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War Is Illegal

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It's a simple point, but an important one, and one that gets overlooked. Whether or not you think a particular war is moral and good, the fact remains that war is illegal. Actual defense by a country when attacked is legal, but that only occurs once another country has actually attacked, and it must not be used as a loophole to excuse wider war that is not employed in actual defense.

Needless to say, a strong moral argument can be made for preferring the rule of law to the law of rulers. If those in power can do anything they like, most of us will not like what they do. Some laws are so unjust that when they are imposed on ordinary people, they should be violated. But allowing those in charge of a government to engage in massive violence and killing in defiance of the law is to sanction all lesser abuses as well, since no greater abuse is imaginable. It's understandable that proponents of war would rather ignore or "re-interpret" the law than properly change the law through the legislative process, but it is not morally defensible.

For much of U.S. history, it was reasonable for citizens to believe, and often they did believe, that the U.S. Constitution banned aggressive war. Congress declared the 1846-1848 War on Mexico to have been "unnecessarily and unconstitutionally begun by the president of the United States." Congress had issued a declaration of war, but the House believed the president had lied to them. (President Woodrow Wilson would later send troops to war with Mexico without a declaration.) It does not seem to be the lying that Congress viewed as unconstitutional in the 1840s, but rather the launching of an unnecessary or aggressive war.

As Attorney General Lord Peter Goldsmith warned British Prime Minister Tony Blair in March 2003, "Aggression is a crime under customary international law which automatically forms part of domestic law," and therefore, "international aggression is a crime recognized by the common law which can be prosecuted in the U.K. courts." U.S. law evolved from English common law, and the U.S. Supreme Court recognizes precedents and traditions based on it. U.S. law in the 1840s was closer to its roots in English common law than is U.S. law today, and statutory law was less developed in general, so it was natural for Congress to take the position that launching an unnecessary war was unconstitutional without needing to be more specific.

In fact, just prior to giving Congress the exclusive power to declare war, the Constitution gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." At least by implication, this would seem to suggest that the United States was itself expected to abide by the "Law of Nations." In the 1840s, no member of Congress would have dared to suggest that the United States was not itself bound by the "Law of Nations." At that point in history, this meant customary international law, under which the launching of an aggressive war had long been considered

the most serious offense.

Fortunately, now that we have binding multilateral treaties that explicitly prohibit aggressive war, we no longer have to guess at what the U.S. Constitution says about war. Article VI of the Constitution explicitly says this:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [emphasis added]

So, if the United States were to make a treaty that banned war, war would be illegal under the supreme law of the land.

The United States has in fact done this, at least twice, in treaties that remain today part of our highest law: the Kellogg-Briand Pact and the United Nations Charter.

WE BANNED ALL WAR IN 1928

In 1928, the United States Senate, that same institution that on a good day can now get three percent of its members to vote against funding war escalations or continuations, voted 85 to 1 to bind the United States to a treaty by which it is still bound and in which we "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in [our] relations with" other nations. This is the Kellogg-Briand Pact. It condemns and renounces all war. The U.S. Secretary of State, Frank Kellogg, rejected a French proposal to limit the ban to wars of aggression. He wrote to the French ambassador that if the pact, ". . . were accompanied by definitions of the word 'aggressor' and by expressions and qualifications stipulating when nations would be justified in going to war, its effect would be very greatly weakened and its positive value as a guaranty of peace virtually destroyed." The treaty was signed with its ban on all war included, and was agreed to by dozens of nations. Kellogg was awarded the Nobel Peace Prize in 1929, an award already rendered questionable by its previous bestowal upon both Theodore Roosevelt and Woodrow Wilson.

However, when the U.S. Senate ratified the treaty it added two reservations. First, the United States would not be obliged to enforce the treaty by taking action against those who violated it. Excellent. So far so good. If war is banned, it hardly seems a nation could be required to go to war to enforce the ban. But old ways of thinking die hard, and redundancy is much less painful than bloodshed.

The second reservation, however, was that the treaty must not infringe upon America's right of self-defense. So, there, war maintained a foot in the door. The traditional right to defend yourself when attacked was preserved, and a loophole was created that could be and would be unreasonably expanded.

When any nation is attacked, it will defend itself, violently or otherwise. The harm in placing that prerogative in law is, as Kellogg foresaw, a weakening of the idea that war is illegal. An argument could be made for U.S. participation in World War II under this reservation, for example, based on the Japanese attack on Pearl Harbor, no matter how provoked and desired that attack was. War with Germany could be justified by the Japanese attack as well,

through predictable stretching of the loophole. Even so, wars of aggression have been illegal (albeit unpunished) in the United States since 1928.

In addition, in 1945, the United States became a party to the United Nations Charter, which also remains in force today as part of the "supreme law of the land." The United States had been the driving force behind the U.N. Charter's creation. It includes these lines:

> "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

This would appear to be a new Kellogg-Briand Pact with at least an initial attempt at the creation of an enforcement body. And so it is. But the U.N. Charter contains two exceptions to its ban on warfare. The first is self- defense. Here is part of Article 51:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence (sic) if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

So, the U.N. Charter contains the same traditional right and small loophole that the U.S. Senate attached to the Kellogg-Briand Pact. It also adds another. The Charter makes clear that the U.N. Security Council can choose to authorize the use of force. This further weakens the understanding that war is illegal, by making some wars legal. Other wars are then, predictably, justified by claims of legality. The architects of the 2003 attack on Iraq claimed it was authorized by the United Nations, even though the United Nations disagreed.

The U.N. Security Council did authorize the War on Korea, but only because the U.S.S.R. was boycotting the Security Council at the time and China was still represented by the Kuomintang government in Taiwan. The Western powers were preventing the ambassador of the new revolutionary government of China from taking China's seat as a permanent member of the Security Council, and the Russians were boycotting the Council in protest. If the Soviet and Chinese delegates had been present, there is no way that the United Nations would have taken sides in the war that eventually destroyed most of Korea.

It seems reasonable, of course, to make exceptions for wars of self-defense. You can't tell people they're forbidden to fight back when attacked. And what if they were attacked years or decades earlier and have been occupied by a foreign or colonial force against their will, albeit without recent violence? Many consider wars of national liberation to be a legal extension of the right to defense. The people of Iraq or Afghanistan don't lose their right to fight back when enough years go by, do they? But a nation at peace cannot legally dredge up centuries- or millennia-old ethnic grievances as grounds for war. The dozens of nations in which U.S. troops are now based cannot legally bomb Washington. Apartheid and Jim Crow were not grounds for war. Nonviolence is not just more effective in remedying many injustices; it is also the only legal choice. People cannot "defend" themselves with war any

time they wish.

What people can do is fight back when attacked or occupied. Given that possibility, why wouldn't you also make an exception — as in the U.N. Charter — for the defense of other, smaller countries that are unable to defend themselves? After all, the United States liberated itself from England a long time ago, and the only way it can use this rationale as an excuse for war is if it "liberates" other countries by overthrowing their rulers and occupying them. The idea of defending others seems very sensible, but — exactly as Kellogg predicted — loopholes lead to confusion and confusion allows larger and larger exceptions to the rule until a point is reached at which the very idea that the rule exists at all seems ludicrous.

And yet it does exist. The rule is that war is a crime. There are two narrow exceptions in the U.N. Charter, and it is easy enough to show that any particular war does not meet either of the exceptions.

Libya has not attacked the United States.

The United Nations has not authorized bombing Libya.

On August 31, 2010, when President Barack Obama was scheduled to give a speech about the War on Iraq, blogger Juan Cole composed a speech he thought the president might like to, but of course did not, give:

> "Fellow Americans, and Iraqis who are watching this speech, I have come here this evening not to declare a victory or to mourn a defeat on the battlefield, but to apologize from the bottom of my heart for a series of illegal actions and grossly incompetent policies pursued by the government of the United States of America, in defiance of domestic US law, international treaty obligations, and both American and Iraqi public opinion.
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> "The United Nations was established in 1945 in the wake of a series of aggressive wars of conquest and the response to them, in which over 60 million people perished. Its purpose was to forbid such unjustified attacks, and its charter specified that in future wars could only be launched on two grounds. One is clear self-defense, when a country has been attacked. The other is with the authorization of the United Nations Security Council."
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> "It was because the French, British, and Israeli attack on Egypt in 1956 contravened these provisions of the United Nations Charter that President Dwight D. Eisenhower condemned that war and forced the belligerents to withdraw. When Israel looked as though it might try to hang on to its ill-gotten spoils, the Sinai Peninsula, President Eisenhower went on television on February 21, 1957, and addressed the nation. These words have largely been suppressed and forgotten in the United States of today, but they should ring through the decades and centuries:
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> "'If the United Nations once admits that international dispute can be settled by using force, then we will have destroyed the very foundation of the organization, and our best hope of establishing a real world order. That would be a disaster for us all.... [Referring to Israeli demands that certain conditions be met before it relinquished the Sinai, the president said that he] "would be untrue to the standards of the high office to which you have chosen me if I

> were to lend the influence of the United States to the proposition that a nation which invades another should be permitted to exact conditions for withdrawal….'
>
> "'If it [the United Nations Security Council] does nothing, if it accepts the ignoring of its repeated resolutions calling for the withdrawal of the invading forces, then it will have admitted failure. That failure would be a blow to the authority and influence of the United Nations in the world and to the hopes which humanity has placed in the United Nations as the means of achieving peace with justice.'"

Eisenhower was referring to an incident that began when Egypt nationalized the Suez Canal; Israel invaded Egypt in response. Britain and France pretended to step in as outside parties concerned that the Egyptian-Israeli dispute might jeopardize free passage through the canal. In reality, Israel, France, and Britain had planned the invasion of Egypt together, all agreeing that Israel would attack first, with the other two nations joining in later pretending they were trying to stop the fighting. This illustrates the need for a truly impartial international body (something the United Nations has never become but someday could) and the need for a complete ban on war. In the Suez crisis, the rule of law was enforced because the biggest kid on the block was inclined to enforce it. When it came to overthrowing governments in Iran and Guatemala, shifting away from big wars to secret operations much as Obama would do, President Eisenhower held a different view of the value of law enforcement. When it came to the 2003 invasion of Iraq, Obama was not about to concede that the crime of aggression should be punished. The National Security Strategy published by the White House in May 2010 declared:

> "Military force, at times, may be necessary to defend our country and allies or to preserve broader peace and security, including by protecting civilians facing a grave humanitarian crisis…. The United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force."

Try telling your local police that you may soon go on a violent crime spree, but that you will also seek to adhere to standards that govern the use of force.

WE TRIED WAR CRIMINALS IN 1945

Two other important documents, one from 1945 and the other from 1946, treated wars of aggression as crimes. The first was the Charter of the International Military Tribunal at Nuremberg, the institution that tried Nazi war leaders for their crimes. Among the crimes listed in the charter were "crimes against peace," "war crimes," and "crimes against humanity." Crimes "against peace" were defined as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." The next year, the Charter of the International Military Tribunal for the Far East (the trial of Japanese war criminals) used the same definition. These two sets of trials deserve a great deal of criticism, but a great deal of praise as well.

On the one hand, they enforced victors' justice. They left out of the lists of prosecuted crimes certain crimes, such as the bombing of civilians, in which the allies had also engaged. And they failed to prosecute the allies for other crimes that the Germans and

Japanese were prosecuted and hanged for. U.S. General Curtis LeMay, who commanded the firebombing of Tokyo, said “I suppose if I had lost the war, I would have been tried as a war criminal. Fortunately, we were on the winning side.”

The tribunals claimed to start the prosecutions at the very top, but they gave the Emperor of Japan immunity. The United States gave immunity to over 1,000 Nazi scientists, including some who were guilty of the most horrendous crimes, and brought them to the United States to continue their research. General Douglas MacArthur gave Japanese microbiologist and lieutenant general Shiro Ishii and all the members of his bacteriological research units immunity in exchange for germ warfare data derived from human experimentation. The British learned from the German crimes they prosecuted how to later set up concentration camps in Kenya. The French recruited thousands of SS and other German troops into their Foreign Legion, so that about half of the legionnaires fighting France’s brutal colonial war in Indochina were none other than the most hardened remnants of the German Army from World War II, and the torture techniques of the German Gestapo were widely used on French detainees in the Algerian War of Independence. The United States, also working with former Nazis, spread the same techniques throughout Latin America. Having executed a Nazi for opening dikes to flood Dutch farmland, the United States proceeded to bomb dams in Korea and Vietnam for the same purpose.

War veteran and Atlantic Monthly correspondent Edgar L. Jones returned from World War II, and was shocked to discover that civilians back home thought highly of the war. “Cynical as most of us overseas were,” Jones wrote, “I doubt if many of us seriously believed that people at home would start planning for the next war before we could get home and talk without censorship about this one.” Jones objected to the sort of hypocrisy that drove the war crimes trials:

> “Not every American soldier, or even one per cent of our troops, deliberately committed unwarranted atrocities, and the same might be said for the Germans and Japanese. The exigencies of war necessitated many so-called crimes, and the bulk of the rest could be blamed on the mental distortion which war produced. But we publicized every inhuman act of our opponents and censored any recognition of our own moral frailty in moments of desperation.
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> “I have asked fighting men, for instance, why they — or actually, why we — regulated flame-throwers in such a way that enemy soldiers were set afire, to die slowly and painfully, rather than killed outright with a full blast of burning oil. Was it because they hated the enemy so thoroughly? The answer was invariably, ‘No, we don’t hate those poor bastards particularly; we just hate the whole goddam mess and have to take it out on somebody.’ Possibly for the same reason, we mutilated the bodies of enemy dead, cutting off their ears and kicking out their gold teeth for souvenirs, and buried them with their testicles in their mouths, but such flagrant violations of all moral codes reach into still-unexplored realms of battle psychology.”

On the other hand, there is a great deal to praise in the trials of the Nazi and Japanese war criminals. Hypocrisy not withstanding, surely it is preferable that some war crimes be punished than none. Many people intended that the trials establish a norm that would later be enforced equally for all crimes against the peace and crimes of war. The Chief Prosecutor at Nuremberg, U.S. Supreme Court Justice Robert H. Jackson, said in his opening statement:

> "The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. The Charter of this Tribunal evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are, as Lord Chief Justice Coke put it to King James, 'under … the law.' And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment."

The tribunal concluded that aggressive war was "not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole." The tribunal prosecuted the supreme crime of aggression and many of the lesser crimes that followed from it.

The ideal of international justice for war crimes has not yet been achieved, of course. The U.S. House Judiciary Committee included a charge of aggression against President Richard Nixon for ordering the secret bombing and invasion of Cambodia in its draft articles of impeachment. Rather than including those charges in the final version, however, the Committee decided to focus more narrowly on Watergate, wire-tapping, and contempt of Congress.

In the 1980s Nicaragua appealed to the International Court of Justice (ICJ). That court ruled that the United States had organized the militant rebel group, the Contras, and mined Nicaragua's harbors. It found those actions to constitute international aggression. The United States blocked enforcement of the judgment by the United Nations and thereby prevented Nicaragua from obtaining any compensation. The United States then withdrew from the binding jurisdiction of the ICJ, hoping to ensure that never again would U.S. actions be subject to the adjudication of an impartial body that could objectively rule on their legality or criminality.

More recently, the United Nations set up tribunals for Yugoslavia and Rwanda, as well as special courts in Sierra Leone, Lebanon, Cambodia, and East Timor. Since 2002, the International Criminal Court (ICC) has prosecuted war crimes by the leaders of small countries. But the crime of aggression has loomed as the supreme offense for decades without being punished. When Iraq invaded Kuwait, the United States evicted Iraq and punished it severely, but when the United States invaded Iraq, there was no stronger force to step in and undo or punish the crime.

In 2010, despite U.S. opposition, the ICC established its jurisdiction over future crimes of aggression. In what types of cases it will do so, and in particular whether it will ever go after powerful nations that have not joined the ICC, nations that hold veto power at the United Nations, remains to be seen. Numerous war crimes, apart from the overarching crime of aggression, have in recent years been committed by the United States in Iraq, Afghanistan, and elsewhere, but those crimes have not yet been prosecuted by the ICC.

In 2009, an Italian court convicted 23 Americans in absentia, most of them employees of the CIA, for their roles in kidnapping a man in Italy and shipping him to Egypt to be tortured. Under the principle of universal jurisdiction for the most terrible crimes, which is accepted in a growing number of countries around the world, a Spanish court indicted Chilean dictator Augusto Pinochet and 9-11 suspect Osama bin Laden. The same Spanish court then sought

to prosecute members of the George W. Bush administration for war crimes, but Spain is being pressured by the Obama administration to drop the case. In 2010, a judge involved, Baltasar Garzón, was removed from his position for allegedly abusing his power by investigating the executions or disappearances of more than 100,000 civilians at the hands of supporters of Gen. Francisco Franco during the 1936-39 Spanish Civil War and the early years of the Franco dictatorship.

In 2003, a lawyer in Belgium filed a complaint against Gen. Tommy R. Franks, head of U.S. Central Command, alleging war crimes in Iraq. The United States quickly threatened to move NATO headquarters out of Belgium if that nation did not rescind its law permitting trials of foreign crimes. Charges filed against U.S. officials in other European nations have thus far failed to go to trial as well. Civil suits brought in the United States by victims of torture and other war crimes have run up against claims from the Justice Department (under the direction of Presidents Bush and Obama) that any such trials would constitute a threat to national security. In September 2010, the Ninth Circuit Court of Appeals, agreeing with that claim, threw out a case that had been brought against Jeppesen Dataplan Inc., a subsidiary of Boeing, for its role in "renditioning" prisoners to countries where they were tortured.

In 2005 and 2006 while Republicans held a majority in Congress, Democratic Congress members led by John Conyers (Mich.), Barbara Lee (Calif.), and Dennis Kucinich (Ohio) pushed hard for an investigation into the lies that had launched the aggression against Iraq. But from the time the Democrats took the majority in January 2007 up to the present moment, there has been no further mention of the matter, apart from a Senate committee's release of its long-delayed report.

In Britain, in contrast, there have been endless "inquiries" beginning the moment the "weapons of mass destruction" weren't found, continuing to the present, and likely extending into the foreseeable future. These investigations have been limited and in most cases can accurately be characterized as whitewashes. They have not involved criminal prosecution. But at least they have actually taken place. And those who have spoken up a little have been lauded and encouraged to speak up a little more. This climate has produced tell-all books, a treasure trove of leaked and declassified documents, and incriminating oral testimony. It has also seen Britain pull its troops out of Iraq. In contrast, by 2010 in Washington, it was common for elected officials to praise the 2007 "surge" and swear they'd known Iraq would turn out to be a "good war" all along. Similarly, Britain and several other countries have been investigating their roles in U.S. kidnapping, imprisonment, and torture programs, but the United States has not — President Obama having publicly instructed the Attorney General not to prosecute those most responsible, and Congress having performed an inspired imitation of a possum.

WHAT IF THE COPS OF THE WORLD BREAK THE LAW?

Political Science professor Michael Haas published a book in 2009 the title of which reveals its contents: "George W. Bush, War Criminal? The Bush Administration's Liability for 269 War Crimes." (A 2010 book by the same author includes Obama in his charges.) Number one on Haas's 2009 list is the crime of aggression against Afghanistan and Iraq. Haas includes five more crimes related to the illegality of war:

> War Crime #2. Aiding Rebels in a Civil War. (Supporting the Northern Alliance in Afghanistan).

War Crime #3. Threatening Aggressive War.

War Crime #4. Planning and Preparing for a War of Aggression.

War Crime #5. Conspiracy to Wage War.

War Crime #6. Propaganda for War.

The launching of a war can also involve numerous violations of domestic law. Many such crimes relating to Iraq are detailed in "The 35 Articles of Impeachment and the Case for Prosecuting George W. Bush," which was published in 2008 and includes an introduction that I wrote and 35 articles of impeachment that Congressman Dennis Kucinich (D., Ohio) presented to Congress. Bush and Congress did not comply with the War Powers Act, which requires a specific and timely authorization of war from Congress.

Bush did not even comply with the terms of the vague authorization that Congress did issue. Instead he submitted a report full of lies about weapons and ties to 9-11. Bush and his subordinates lied repeatedly to Congress, which is a felony under two different statutes. Thus, not only is war a crime, but war lies are a crime too.

I don't mean to pick on Bush. As Noam Chomsky remarked in about 1990, "If the Nuremberg laws were applied, then every post-war American president would have been hanged." Chomsky pointed out that General Tomoyuki Yamashita was hanged for having been the top commander of Japanese troops who committed atrocities in the Philippines late in the war when he had no contact with them. By that standard, Chomsky said, you'd have to hang every U.S. president.

But, Chomsky argued, you'd have to do the same even if the standards were lower. Truman dropped atomic bombs on civilians. Truman "proceeded to organize a major counter-insurgency campaign in Greece which killed off about one hundred and sixty thousand people, sixty thousand refugees, another sixty thousand or so people tortured, political system dismantled, right-wing regime. American corporations came in and took it over." Eisenhower overthrew the governments of Iran and Guatemala and invaded Lebanon. Kennedy invaded Cuba and Vietnam. Johnson slaughtered civilians in Indochina and invaded the Dominican Republic. Nixon invaded Cambodia and Laos. Ford and Carter supported the Indonesian invasion of East Timor. Reagan funded war crimes in Central America and supported the Israeli invasion of Lebanon. These were the examples Chomsky offered off the top of his head. There are many more.

PRESIDENTS DON'T GET TO DECLARE WAR

Of course, Chomsky blames presidents for wars of aggression because they launched them. Constitutionally, however, the launching of a war is the responsibility of Congress. Applying the standard of Nuremberg, or of the Kellogg-Briand Pact — ratified overwhelmingly by the Senate — to Congress itself would require a lot more rope or, if we outgrow the death penalty, a lot of prison cells.

Until President William McKinley created the first presidential press secretary and courted the press, Congress looked like the center of power in Washington. In 1900 McKinley created something else: the power of presidents to send military forces to fight against foreign governments without congressional approval. McKinley sent 5,000 troops from the Philippines to China to fight against the Boxer Rebellion. And he got away with it, meaning

that future presidents could probably do the same.

Since World War II, presidents have acquired tremendous powers to operate in secrecy and outside the oversight of Congress. Truman added to the presidential toolbox the CIA, the National Security Advisor, the Strategic Air Command, and the nuclear arsenal. Kennedy used new structures called the Special Group Counter-Insurgency, the 303 Committee, and the Country Team to consolidate power in the White House, and the Green Berets to allow the president to direct covert military operations. Presidents began asking Congress to declare a state of national emergency as an end run around the requirement of a declaration of war. President Clinton used NATO as a vehicle for going to war despite congressional opposition.

The trend that moved war powers from Congress to the White House reached a new peak when President George W. Bush asked lawyers in his Justice Department to draft secret memos that would be treated as carrying the force of law, memos that re-interpreted actual laws to mean the opposite of what they had always been understood to say. On October 23, 2002, Assistant Attorney General Jay Bybee signed a 48-page memo to the president's counsel Alberto Gonzales titled Authority of the President Under Domestic and International Law to Use Military Force Against Iraq. This secret law (or call it what you will, a memo masquerading as a law) authorized any president to single-handedly commit what Nuremberg called "the supreme international crime."

Bybee's memo declares that a president has the power to launch wars. Period. Any "authorization to use force" passed by Congress is treated as redundant. According to Bybee's copy of the U.S. Constitution, Congress can "issue formal declarations of war." According to mine, Congress has the power "to declare war," as well as every related substantive power. In fact, there are no incidental formal powers anywhere in my copy of the Constitution.

Bybee dismisses the War Powers Act by citing Nixon's veto of it rather than addressing the law itself, which was passed over Nixon's veto. Bybee cites letters written by Bush. He even cites a Bush signing statement, a statement written to alter a new law. Bybee relies on previous memos produced by his office, the Office of Legal Counsel in the Department of Justice. And he leans most heavily on the argument that President Clinton had already done similar things. For good measure, he cites Truman, Kennedy, Reagan, and Bush Sr., plus an Israeli ambassador's opinion of a U.N. declaration condemning an aggressive attack by Israel. These are all interesting precedents, but they aren't laws.

Bybee claims that in an age of nuclear weapons "anticipatory self-defense" can justify launching a war against any nation that might conceivably acquire nukes, even if there is no reason to think that nation would use them to attack yours:

> "We observe, therefore, that even if the probability that Iraq itself would attack the United States with WMD, or would transfer such a weapon to terrorists for their use against the United States, were relatively low, the exceptionally high degree of harm that would result, combined with a limited window of opportunity and the likelihood that if we do not use force, the threat will increase, could lead the President to conclude that military action is necessary to defend the United States."

Never mind the high degree of harm the "military action" produces, or its clear illegality.

This memo justified a war of aggression and all the crimes and abuses of power abroad and at home that were justified by the war. At the same time that presidents have assumed the power to brush aside the laws of warfare, they have publicly spoken of supporting them. Harold Lasswell pointed out in 1927 that a war could better be marketed to "liberal and middle-class people" if packaged as the vindication of international law. The British stopped arguing for World War I on the basis of national self-interest when they were able to argue against the German invasion of Belgium. The French quickly organized a Committee for the Defense of International Law.

> "The Germans were staggered by this outburst of affection for international law in the world, but soon found it possible to file a brief for the defendant.…The Germans…discovered that they were really fighting for the freedom of the seas and the rights of small nations to trade, as they saw fit, without being subject to the bullying tactics of the British fleet."

The allies said they were fighting for the liberation of Belgium, Alsace, and Lorraine. The Germans countered that they were fighting for the liberation of Ireland, Egypt, and India.

Despite invading Iraq in the absence of U.N. authorization in 2003, Bush claimed to be invading in order to enforce a U.N. resolution. Despite fighting a war almost entirely with U.S. troops, Bush was careful to pretend to be working within a broad international coalition. That rulers are willing to promote the idea of international law while violating it, thereby risking endangering themselves, may suggest the importance they place on winning immediate popular approval for each new war, and their confidence that once a war has begun no one will go back to examine too closely how it happened.

THE ACCUMULATED EVIL OF THE WHOLE

The Hague and Geneva Conventions and other international treaties to which the United States is a party ban the crimes that are always part of any war, regardless of the legality of the war as a whole. Many of these bans have been placed in the U.S. Code of Law, including the crimes found in the Geneva Conventions, in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in the conventions against both chemical and biological weapons. In fact, most of these treaties require signatory countries to pass domestic legislation to make the treaties' provisions part of each country's own legal system. It took until 1996 for the United States to pass the War Crimes Act to give the 1948 Geneva Conventions the force of U.S. Federal Law. But, even where the activities forbidden by treaties have not been made statutory crimes, the treaties themselves remain part of the "Supreme Law of the Land" under the United States Constitution.

Michael Haas identifies and documents 263 war crimes in addition to aggression, that have occurred just in the current War on Iraq, and divides them into the categories of "conduct of the war," "treatment of prisoners," and "the conduct of the postwar occupation." A random sample of the crimes:

> War Crime #7. Failure to Observe the Neutrality of a Hospital.
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> War Crime #12. Bombing of Neutral Countries.
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> War Crime #16. Indiscriminate Attacks Against Civilians.

War Crime #21. Use of Depleted Uranium Weapons.

War Crime #31. Extrajudicial Executions.

War Crime #55. Torture.

War Crime #120. Denial of Right to Counsel.

War Crime #183. Incarceration of Children in the Same Quarters as Adults.

War Crime #223. Failure to Protect Journalists.

War Crime #229. Collective Punishment.

War Crime #240. Confiscation of Private Property.

The list of abuses that accompany wars is long, but it's hard to imagine wars without them. The United States seems to be moving in the direction of unmanned wars conducted by remote-controlled drones, and small- scale targeted assassinations conducted by special forces under the secret command of the president. Such wars may avoid a great many war crimes, but are themselves completely illegal. A United Nations report in June 2010 concluded that the U.S. drone attacks on Pakistan were illegal. The drone attacks continued.

A lawsuit filed in 2010 by the Center for Constitutional Rights (CCR) and the American Civil Liberties Union (ACLU) challenged the practice of targeted killings of Americans. The argument the plaintiffs made focused on the right to due process. The White House had claimed the right to kill Americans outside the United States, but it would of course be doing so without charging those Americans with any crimes, putting them on trial, or providing them with any opportunity to defend themselves against accusations. CCR and the ACLU were retained by Nasser al-Aulaqi to bring a lawsuit in connection with the government's decision to authorize the targeted killing of his son, U.S. citizen Anwar al-Aulaqi. But the Secretary of the Treasury declared Anwar al-Aulaqi a "specially designated global terrorist," which made it a crime for lawyers to provide representation for his benefit without first obtaining a special license, which the government at the time of this writing has not granted.

Also in 2010, Congressman Dennis Kucinich (D., Ohio) introduced a bill to prohibit the targeted killings of U.S. citizens. Since, to my knowledge, Congress had not up to that point passed a single bill not favored by President Obama since he entered the White House, it was unlikely that this one would break that streak. There was just not enough public pressure to force such changes.

One reason, I suspect, for the lack of pressure was a persistent belief in American exceptionalism. If the president does it, to quote Richard Nixon, "that means that it's not illegal." If our nation does it, it must be legal. Since the enemies in our wars are the bad guys, we must be upholding the law, or at least upholding ad hoc might-makes-right justice of some sort. We can easily see the conundrum created if people on both sides of a war assume that their side can do no wrong. We would be better off recognizing that our nation, like other nations, can do things wrong, can in fact do things very, very wrong — even criminal. We would be better off organizing to compel Congress to cease funding wars. We would be better off deterring would-be war makers by holding past and current war makers accountable.

David Swanson *is the author of "War Is A Lie" from which this is excerpted: http://warisalie.org*

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