

**Accountability for Human Rights Violations in the War on Terror:**

**Is Former U.S. President George W. Bush Immune?**

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**Abstract**

*In the War on Terror conducted by the United States after the 9/11/01 terrorist attacks, former U.S. President George W. Bush played a major role in violating international humanitarian and human rights law. Under the Bush administration, the U.S. denied prisoners due process, tried them in military tribunals, and subjected them to torture. Should Bush be held accountable for the human rights violations he committed? Accountability of leaders under international law has progressed in recent decades from immunity to individual accountability. This paper analyzes Bush's responsibility and whether he should be indicted for human rights violations committed while in office.*

The Bush administration received much criticism for its policies in the War on Terror. Vocal critics included not only members of the political opposition, but also academic and legal scholars. While much criticism focused on the abuse of presidential power and the violation of the U.S. Constitution, there was also outrage over disregard for international law. This paper focuses on violations of international law under the Bush administration. It excludes the question of accountability under domestic law. Since the U.S. tortured prisoners from various countries, human rights violations in the War on Terror are of global concern. The issue matters because the U.S. is a powerful nation, and the

way it handles international law abuses after 9/11 will determine the significance of international law in the future.

This paper's research question specifically targets former U.S. President George W. Bush. There is no doubt that other high-ranking (as well as low-ranking) officials deserve to have their accountability questioned for crimes committed in the War on Terror. However, this article focuses on Bush in his role as head of state when post-9/11 human rights violations occurred. What human rights violations did Bush commit or help to commit between 2001 and 2008? Should he be held accountable for human rights and humanitarian law violations that occurred during his presidency?

### **Charges against Bush**

Bush is guilty of violations of international humanitarian law and international human rights law. By labeling detainees in the War on Terror "enemy combatants" – an expression that does not appear in international law – the Bush administration denied human rights protection under international law to its prisoners kept in Afghanistan (Bagram prison), Iraq (Abu Ghraib prison), Cuba (Guantanamo prison), and other (in part secret) detention facilities all over the world. Since detainees were not considered lawful combatants, or prisoners of war (POWs), the U.S. denied them due process, tried them in military tribunals, and subjected them to torture (Ball, 2007).

Although the Bush government stated that the terrorist attack of September 11, 2001 was an act of war, it denied that the 1949 Geneva Conventions applied to conflicts with Al Qaeda and the Taliban. The Bush administration did not distinguish between lawful and unlawful combatants, although this distinction is a basic principle of *jus in bello* (acceptable wartime conduct). Instead, it labeled all prisoners "enemy combatants" (Ball, 2007). According to Article 5 of the Third Geneva Convention, a state must determine the status of a captured person in a competent tribunal and treat the person as

POW until his or her status is determined (International Committee of the Red Cross, 1949). The Bush administration, however, did not hold any hearing on the status of its detainees (Ball, 2007).

Furthermore, Bush established military commissions to try alleged terrorists, or “enemy combatants,” by signing a military order on November 13, 2001. In the 2006 U.S. Supreme Court decision *Hamdan v. Rumsfeld*, the court found that these military tribunals violated the Geneva Conventions, i.e. international humanitarian law (Ball, 2007).

Due to their status as “enemy combatants,” detainees in Abu Ghraib, Guantanamo, and other prisons were denied due process and subjected to interrogation methods that amounted to torture. Detainees had no possibility to counter their charges in a fair trial, which violates Articles 10 and 11 of the Universal Declaration of Human Rights (United Nations General Assembly, 1948). In 1994, the United States ratified the 1984 Convention Against Torture (CAT) and incorporated CAT into domestic law (Sikkink, 2011). According to CAT, torture constitutes the intentional infliction of severe mental or physical pain or suffering to obtain information or punish a person. With the 2002 Bybee memo, the Bush administration extended the definition of torture to all interrogation techniques that do not lead to organ failure or death, and thus violated CAT (Ball, 2007). Moreover, Bush personally signed statements authorizing the Central Intelligence Agency (CIA) to fly prisoners to secret prisons around the world where detainees were subjected to torture (Rothschild, 2005). Article 3 of CAT says that “no State Party shall expel, return...or extradite a person to another State where there is substantial grounds for believing that he would be in danger of being subjected to torture” (United Nations General Assembly, 1984; Ball, 2007, p. 75). Bush thus violated international human rights law, which has been formally accepted by the United States since 1994.

## **Should Bush Be Prosecuted Under International Law?**

Official memos and statements created by the Bush administration between 2001 and 2008 were outcomes of the prevalent fear of being held accountable in the future. The possibility for prosecution under international law led officials in the Bush administration to demand clear authorizations and “advance pardon,” a request from CIA officials for human rights violations (Sikkink, 2011). Previously, there were attempts to hold foreign heads of state such as Augusto Pinochet and Slobodan Milošević accountable for violations committed while in office. The question of accountability for Bush as head of state is thus legitimate and important to ask.

Some scholars argue that Bush’s actions were warranted in the War on Terror, and that heads of state should be immune from charges. Stephen Knott (2012) defends Bush's actions and claims that torturous interrogation methods helped kill Osama Bin Laden, thus justifying “extraordinary measures” taken in the war on terror (p. 161). It can be argued that a president must be able to act without fear of being prosecuted at a later point in time. In order to counter a major threat against the nation, it was necessary for the Bush administration to trade human rights for national security. Bush then lived up to his duty as commander in chief to protect U.S. citizens. Critics like Jack Goldsmith and Stephen D. Krasner, who both worked under the Bush administration, claim that prosecutions of high-ranking officials lead to negative consequences for democracy and human rights. In order to prevent prosecutions, a president might hold on to his or her power with force, which then would result in a decline in human rights standards (Sikkink, 2011). When confronted with the question of the Bush administration's accountability, U.S. President Barack Obama opposed filing charges and argued that he wanted to look forward instead of backward. Thus, the Obama administration granted impunity in August 2012 for those enacting the Bush administration's policies during the War on Terror (Greenwald,

2012). More than four years since Bush left office, it might be too late for courts to file charges against him (Sikkink, 2011).

Although it is possible to make arguments in favor of impunity, these reasons should not be accepted by the international community and are not a justification for violating international law. Alfred McCoy (2006) warns that history will repeat itself if Bush is not held accountable for violations he committed or helped to commit. McCoy claims that human rights violations occur periodically in the U.S. and will reoccur if violators are not held accountable (McCoy, 2006, 2009). The U.S. has promoted human rights in the past and prosecuted foreign nationals for human rights violations, as in the case *Filártiga v. Peña-Irala*. It would be hypocritical for the U.S. not to prosecute the wrong-doings of its own government. If prosecutions do not happen, the U.S. will lose soft power and its legitimacy to promote human rights in other parts of the world (Sikkink, 2011). Also, Bush should be prosecuted to avoid a double-standard for prosecutions of leaders from powerful and less powerful nations. For instance, mainly African criminal leaders have been prosecuted at the International Criminal Court (ICC), rather than criminal leaders from Western countries (Boyle, 2012). Contrary to the claim made by Goldsmith and Krasner, Kathryn Sikkink (2011) shows that prosecutions correlate with improvements in human rights. Since 1994, countries without human rights prosecutions experienced more repression from their government than countries with human rights prosecutions. The United States is a stable democracy and has much experience with judicial proceedings. A prosecution of Bush would not threaten democracy or human rights in America. It would rather strengthen democracy, human rights, and the rule of international law by putting the credibility of the nation before the reputation of a head of state.

The Obama administration's unwillingness to prosecute international law violations committed by the Bush administration opens the door for prosecutions in foreign and international courts. Other countries or international bodies like the ICC need to take the responsibility for filing a suit against Bush.

The difficult part will be convincing foreign governments to take this step; political will is missing, but there is hard evidence that human rights violations were committed by Bush. In his memoir, *Decision Points*, Bush (2010) admits that he personally authorized water-boarding, which is generally regarded as torture. A 2004 Red Cross report on torture in Abu Ghraib, written communications by the Defense Department on the deaths of detainees, and the “torture” memos prove that the Bush administration undermined international law (Sikkink, 2011). Hence, Bush should be held accountable because a prosecution for human rights violations will (1) help prevent future violations, (2) improve the credibility of the U.S. in the world, (3) promote democracy and human rights, (4) strengthen international law, and (5) show that international law is also binding for powerful nations. Since the U.S. is not willing to try Bush and there is hard evidence for violations, foreign or international courts should initiate trials against Bush.<sup>1</sup>

### **Conclusion: Bush Should be Prosecuted Under Universal Jurisdiction**

Italy, France, Germany, Spain, Switzerland, and Canada have attempted to hold members of the Bush administration accountable for human rights violations. Francis A. Boyle, professor at the University of Illinois, sued Bush and other high-ranking members at the ICC.<sup>2</sup> A case against Bush in Malaysia found Bush guilty of war crimes in absentia, but cannot do anything but publish its finding (Falk, 2011). Although attempts to try Bush will not bring him in front of a judge any time soon, Bush might reconsider traveling to Malaysia. Each case against Bush puts pressure on him and limits his mobility. This way, the international community can close in on Bush, and may encourage the U.S. to press charges against him for violations of international law. Nevertheless, it also remains to be seen

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1 Since the United States did not declare provisions against universal jurisdiction under CAT, foreign countries can prosecute the U.S. in their courts for torture (Sikkink, 2011).

2 Although the U.S. does not accept the jurisdiction of the ICC, the court can nevertheless consider the case because it has the authority to prosecute war crimes (Boyle, 2012).

whether Bush should additionally be prosecuted under domestic law for a violation of the U.S. Constitution, and who else should be held accountable for human rights violations committed in the War on Terror.

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