CHIEF PROSECUTOR OF THE KUALA LUMPUR WAR CRIMES COMMISSION v. GEORGE W BUSH & ANTHONY L. BLAIR

CRIMINAL PROCEEDING NO. 1-CP-2011

Kuala Lumpur War Crimes Tribunal, Kuala Lumpur, Malaysia

Corum: Judge Abdul Kadar Sulaiman, Judge Salleh Buang, Judge Tunku Sofiah Jewa, Judge Alfred L. Webre, Judge Shad Saleem Faruqi.

Prosecution: Prof Gurdial Singh Nijar, Prof Francis A. Boyle, Avtaran Singh, Usha Kulasegaran, Gan Pei Fern.

Amici Curiae: Jason Kay Kit Leong, Sook Kok Weng, Pan Shan Ping, Mohd Zharif Shafiq, Zyzan Syaidi, Muhammad Khirul.

Registrar: Musa Ismail.

22 November 2011.

UNANIMOUS VIEWS AND FINDINGS

The two accused, George W Bush and Anthony L. Blair, at the material times the Heads of Government of the United States of America and the United Kingdom respectively, have been charged by the Chief Prosecutor of the Kuala Lumpur War Crimes Commission with having committed CRIMES AGAINST PEACE, in that they have planned, prepared and invaded the sovereign state of Iraq on 19 March 2003 in violation of the United Nations Charter and international law. The Particulars of the Charge state, inter alia, that on 19 March 2003, the two accused launched a war against Iraq without the sanction of the United Nations and without just cause whatsoever.

The two accused were not present at the proceedings though duly served. Nor were any attorneys or counsel present in their behalf. Pursuant to Article 15 of the Charter of the Kuala Lumpur War Crimes Commission & the Rulesof Procedure and Evidence of the Kuala Lumpur War Crimes Tribunal (hereinafter referred to as "the Charter"), an Amicus Curiae was appointed by the Tribunal to assist the Tribunal by presenting an unbiased assessment of the charge and evidence against the accused.

The Amicus Curiae entered a plea of not guilty on behalf of both the accused.

1. Recusal of Judges

At the commencement of the proceedings, the Tribunal had a full bench of 7 Judges. However, Judge Prof Niloufer Bhagwat and Judge Dato' Dr Zakaria Yatim later recused themselves, and the Tribunal proceeded to hear the case with a quorum of 5 Judges.

2. Preliminary Objection on Jurisdiction

Amicus Curiae Jason Kay Kit Leong raised a preliminary objection that the Tribunal has no jurisdiction to hear the case. After listening to arguments by the Chief Prosecutor and the Amicus Curiae, the Tribunal ruled that it has jurisdiction and the proceedings then continued.

Under Article 7 of Part I of the Charter, the Tribunal shall have jurisdiction not only in respect of crimes against peace, but also in respect of crimes against humanity, crime of genocide and war crimes.

3. Facts

It is the undisputed facts of the case that the first accused had contemplated invading Iraq as far back as 15 September 2001 and had confided in the second accused of this intention. In 2002, the two accused, without the sanction of the United Nations Security Council, had directed air strikes against Iraq in order to degrade Iraq's air defences, in preparation for its invasion in 2003. A memorandum of the UK cabinet dated July 23, 2002 (known as the "Downing Street Memo") had recorded a meeting between the second accused and his intelligence officials.

On November 8, 2002, the United Nations Security Council passed Resolution 1441. The text of this Resolution clearly does not authorise the use of military action to compel its compliance. Both the accused would have been fully aware of the limitations of this Resolution.

The second accused had admitted whilst giving his testimony at the Chilcot Inquiry on 14 January 2011 that his Attorney General, Peter Goldsmith, had advised that a second Security Council Resolution is necessary under international law to authorise the use of military force against Iraq.

It is also an established fact that Iraq did not possess any weapons of mass destruction (WMD). The two accused had over the years since the Iraq war admitted that they knew or believed the intelligence reports on Iraq's WMD to be unreliable. Yet both accused proceeded to wage war on Iraq based on a false and contrived basis.

More than 1.4 million Iraqis have been killed (and continue to die) as a direct and indirect consequence of the war waged by both accused against Iraq.

4. THE INTERNATIONAL LAW OF WAR –

4.1 General Prohibition Against Force

The Charter of the United Nations contains a general prohibition against force as a means of resolving disputes. The Charter insists that war can only be a last resort and that the decision to unleash the horrors of war on innocent populations can only be taken according to the duly established law itself. The Security Council and the General Assembly have consistently affirmed this principle.

4.2 Where in Exceptional Circumstances Force is Allowed

Under the Charter as well as customary international law, there are some exceptions that make the use of force lawful.

First, legitimate self-defense under Article 51 of the Charter.

Second, specific Security Council authorization of force as a last resort to maintain peace and security under Chapter VII of the Charter.

Third, the Defence assertion that in customary international law there is a principle of pre-emptive or anticipatory self-defense when a threat of attack is imminent.

Fourth, the Defence assertion that there is a principle of humanitarian intervention or a Right to Protect".

5. WAS THERE A PRIMA FACIE CASE?

At the close of the case for the prosecution, we listened to submissions by both sides. The Tribunal came to the unanimous conclusion that a prima facie case exists. Defence was, therefore, called.

6. THE CASE FOR THE DEFENCE

6.1. Nicaragua case –

The amicus curiae Jason Kay Kit Leon states that the prosecution has submitted two contradicting points on humanitarian catastrophe. The defence states, "The rule of natural justice requires the accused to know the charges against him clearly, to understand the nature of the charges against him, so that he has a chance to defend himself.''

Yet, the defence in objecting to the prosecution's submission of the Nicaragua case has made a moot point. Both of prosecution counsels' interpretations of the Nicaragua case would prohibit Bush and Blair's orders to wage aggressive war and invade Iraq.

The Nicaragua case, by the interpretation of prosecution lead counsel Gurdial Singh Nijar, prohibits the invasion of Iraq by Bush and Blair because that invasion was not in furtherance of "preventing an overwhelming humanitarian catastrophe for which Saddam could be held responsible." No such catastrophe had been established in Iraq through well documented evidence. There were many other means – including a second Resolution at the United Nations – available to prevent the use of force. The measures taken by Bush and Blair's aggressive war against Iraq were disproportionate.

The Nicaragua case, by the interpretation of prosecution co-counsel Prof. Frances Boyle, places an absolute bar upon any intervention by force for humanitarian reasons.

6.2. Responsibility to Protect

Similarly defence argues that responsibility to protect is a doctrine that justifies an intervention by force on humanitarian grounds, and that the doctrine of responsibility to protect provides a legal rationale for the aggressive war by Bush and Blair against Iraq. Defense cites the 1999 NATO intervention in Serbia as precedent. Yet as prosecution co-counsel Frances Boyle noted, U.S. President Bill Clinton had no authority from the U.S. Congress to invade Serbia and the UN resolutions cited by the defence were after the fact of the illegal invasion by way of an attempt by the UN to control a U.S. President. The 1999 invasion of Serbia was illegal under the Nicaragua case as was the 2003 invasion of Iraq by the two accused.

6.3. Use of U.S. government documents and statements of the accused

In arguing that the situation in Iraq justified Humanitarian intervention, the defence has submitted official documents predominately from one agency of the U.S. government, the U.S. Agency for International Development. These documents are biased presentations and unreliable, as they are prepared subsequent to the invasion for purposes of justifying the invasion of Iraq. Moreover, as the prosecution demonstrated, the director of USAID himself admitted his agency was filled with U.S. under-cover intelligence agents and propagandists.

6.4. 9/11 & the invasion of Iraq

The defence has interjected the events of September 11, 2001 into these proceedings in a number of ways.

A. 9/11 & the invasion of Iraq –The defence has introduced no evidence that establishes a planning or operational connection between Saddam Hussein and 9/11 event. The prosecution established that Bush may have used 9/11 as a pretext for the invasion of Iraq.
9/11 & the Project for A New American Century – The prosecution introduced evidence demonstrating that key principals in the cabinet of the first accused Bush were planning an invasion of Iraq as early as February, 1998 under the umbrella of the Project for a New American Century which at the same time was preparing public opinion for ‘’a new Pearl Harbor’’, an event that materialized on 9/11.

B. 9/11 ‘’Grotian moment’’ – The defence cites authority contending that ‘’September 11 attacks on the United States demonstrate a change in the nature of the threats confronting the international community, thereby paving the way for rapid development of new rules of customary international law’’ that would presumably authorize the invasion of Iraq.

Yet it is still unsettled, what the events of September 11, 2001 are all about.

6.5 Saddam Hussein & acts of 1988-1991

The defence introduced evidence of Saddam Hussein's ethnic cleansing and chemical weapons use against the Kurds and the Anfal campaign in 1988, as well as the killing of Shiites and Marsh Arabs in 1991. Yet the defence failed to explain why U.S. President Ronald Reagan and George HW Bush (Senior) through agent Donald H. Rumsfeld sold Iraq chemical weapons and permitted their use and why President George HW Bush (Senior) incited the Marsh Arabs to revolt in 1991 only to abandon them knowing they would face Iraqi government reprisals.

6.6. United States Joint Forces Command

The defence introduced a document prepared by the Joint Center for Operation Analyses under official contract with the U.S. Department of Defense as justification for relationships between Saddam Hussein and international terrorism. The prosecution established the bias of this document as that produced by the invading party after the invasion.

6.7. Anticipatory self-defence

The defence raised the doctrine of anticipatory self-defence under Article 51 of the UN Charter as a justification for the invasion of Iraq by the two accused Bush and Blair. The prosecution noted that the clause ''if an armed attack occurs'' in Article 51 precludes its application to the case of Iraq. The prosecution also noted that the 1981 attack by Israel on Iraq, cited by counsel for the defence as a justification for the invasion of Iraq by the accused, was condemned by the UN Security Counsel and had been ordered by Israeli Prime Minister Begin to improve his standing in the election polls in Israel in 1981.

6.8. Memoirs of the accused Bush and Blair

Both the defence and the prosecution introduced relevant segments of the Memoirs of the accused Bush and Blair as evidence in this case.

7. TRIBUNAL'S FINDINGS ON FACTS AND LAW

7.1 Right of Self-Defense Under the UN Charter

Article 51 of the UN Charter permits member states to defend their sovereignty and to exercise the "inherent right of individual or collective self-defense if an armed attack occurs". However, the unilateral use of retaliatory force is subject to a number of limitations.

First, the right persists only till "the Security Council has taken measures necessary to maintain peace and security". Once the Council formally determines that there exists a threat to international peace and security, individual states may no longer exercise the right of self-defense without the Council's express prior approval.

Sometime after the Allied invasion, the Security Council deliberated on the Iraq war. It did not expressly validate the invasion. Yet we all know that the military occupation of Iraq by the Allies continues till today.

Second, Article 51 applies only in the event of an *actual* armed attack. Iraq had not attacked the USA or the UK. In fact, since 1991, it had not attacked any country whatsoever.

Despite Defence submissions, there is no credible evidence that Iraq had any connections with September 11, 2001 or with Al-Qaeda. Nor is there any evidence of Iraqi preparation to invade or attack or threaten any nation.

If by some stretch of imagination, there was such a threat, it was not imminent and it was entirely avoidable. The argument about self-defense is, therefore, not credible.

Third, the International Court of Justice has affirmed in the *Nuclear Weapons Case* that lawful defense must be both "proportional to the armed attack and necessary to respond to it". [*Nicaragua*, ICJ Reports (1986) at 14, 94 and 103; *Legality of the Threat Or Use of Nuclear Weapons*, ICJ Reports (1996) at para. 41].

As there was no armed attack from Iraq, there was, therefore, no justification for the US or UK to invoke the Article 51 doctrine of self-defense to attack, invade and conquer Iraq. The justification, if any, must lie in the Defence Counsel's disputed doctrine of anticipatory or preemptive self-defense under customary international law which we shall deal with below.

7.2 Security Council Authorization

Except for the narrow exception of unilateral self-defense under Article 51, the Security Council of the United Nations is the only authority empowered by Chapter VII, Articles 39 to 42 to use force by air, sea or land against a nation that is guilty of a "threat to the peace, breach of the peace, or act of aggression". This exceptional power is subject to a number of limitations.

First, military action is permitted for maintaining or restoring international peace and security. *However, on the basis of the Nicaragua decision, regime change is not a valid international law objective.* We are of the firm view that the exceptional powers of Chapter VII cannot be employed to declare war and resort to military action against a sovereign nation solely for the purpose of "regime change" or the removal of a dictatorial or unelected leader, no matter how unlikable he may be.

Second, military action under Article 42 must be resorted to as a matter of last resort. The Council must first attempt peaceful measures like sanctions under Article 41 of the Charter. Article 41 authorises "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".

Force can be authorized only after the Council determines that peaceful measures "would be inadequate or have proved to be inadequate" (Article 42). The Council has an obligation to exhaust all peaceful avenues before authorizing war (Article 39).

Except for the USA and the UK, the other permanent members of the Security Council were of the view that UN inspections were working and that Iraq was complying with the order to disarm. On the orders of the UN inspectors the Saddam regime had destroyed some proscribed weapons. Hans Blix, chief United Nations weapons inspector requested four months to complete his job and the majority of the members of the Council seemed agreeable to granting this time. But the US and the UK were not supportive of any extension of time. They lobbied hard to obtain a new Council Resolution to authorize immediate military operations against Iraq. The US forged documents to accuse Iraq of trying to purchase raw materials for WMD on the international market. The UK, on its part, lacking any substantial evidence against Iraq, plagiarized from a student thesis and tried to pass off an out-of-date student essay as an authoritative intelligence report!

US and UK attempts to force a new resolution ultimately failed France, Germany, Russia and China wished to give to the inspectors the time they requested to complete their inspections.

Having failed to push a resolution through the Security Council, the US and the UK changed their tune and argued that no new resolution was needed to authorize military strikes as earlier resolutions were sufficient to allow any Council member to unilaterally use force in the event that Iraq was in material breach of its obligations.

This is the "revival argument" put forward by the Defence. Examination of some of the UNSC resolutions on Iraq between 2 August 1990 and 8 November 2002 will show that the US-UK argument of unilateral authority to invade Iraq suffers from several fatal flaws.

7.3 Pre-emptive or Anticipatory Self-defense in Customary International Law

The UN Charter nowhere permits the declaration of war on a perceived threat of imminent attack. Some scholars argue that the Charter intended to abolish the pre-Charter customary right of pre-emptive self-defense. Despite this doubt it does appear that under customary international law the doctrine of pre-emptive self-defense does exist. "According to the seminal *Caroline case* the legitimate exercise of this right requires "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation".

The idea that the security of US & UK was threatened by Iraq's alleged possession of weapons of mass destruction (WMD) was preposterous and is even more so today. Despite years of extremely intrusive intelligence gathering from the air and more than 550 inspections on the ground by UN inspectors in the last four months before the invasion, no credible evidence of WMD had surfaced. Some US documents alleging Iraq's attempt to purchase proscribed weapons turned out to be crude forgeries. The UN Inspectors found no such weapons nor any long-range delivery system.

In these circumstances, the assertion by the Defence of a right to engage in unilateral and "pre-emptive attacks" on Iraq was a blatant violation of international law. Their argument sought to give to powerful states the right to use military force against other states that are seen as hostile or that make moves to acquire weapons of mass destruction whether nuclear, biological or chemical.

It is our view that the doctrine of pre-emptive strikes "is a doctrine without limits, without accountability to the UN or international law, without any dependence on a collective judgment of responsible governments and, what is worse, without any convincing demonstration of practical necessity". It repudiates the core idea of the UN Charter that prohibits the use of force except for self-defense or pursuant to a decision of the Security Council.

7.4 Humanitarian Intervention or the Right to Protect Victims of Human Rights Abuses

The Defence gave convincing evidence of serious human rights violations by Saddam Hussain. However, they adroitly avoided admitting that both the US and UK were complicit in most of these offence.

In the light of Saddam's brutal record, the Defence argued that the international community has the right and the duty to use military force for humanitarian purposes and for redressing gross abuses of human rights. As there was credible evidence that the unelected Saddam regime was guilty of serious human rights breaches, it was argued that military force could be used to bring about a regime change in Iraq.

We acknowledge that international law is not static. Eloquent arguments by the Defence of "Grotiun moments" in international law are taken note of. However, growth and change have to be within the four corners of the UN Charter and not outside it.

The danger of the `humanitarian intervention' argument is that it enables member states to circumvent well-established principles and procedures of the UN Charter on use of legitimate force. Decision-making on issues of peace and war is unlawfully transferred from multilateral UN mechanisms to individual states. Relying on this argument member states may transgress legal limits on use of this exceptional power and not be accountable to anyone. There is no safeguard to prevent states from manipulating this argument to serve narrow political or strategic interests.

It must also be remembered that the UN is already empowered, under Chapter VII, to respond with force if necessary to uphold the UN's fundamental purposes, which, in Article 1 include "encouraging respect for human rights and fundamental freedoms".

We hold that when a country takes it upon itself to displace by force of arms a government or administration that it disapproves of, this is naked aggression and an international crime. Despite some scholarly dispute which we recognize,we hold that the principle of humanitarian intervention has dubious basis. International vigilantism has no legal validity. Even if it did, it

should be applied subject to the preconditions outlined by the Prosecution. None of the conditions were satisfied in this tragic situation.

7.5 Possession of WMD

An attack on Iraq because of its alleged possession of weapons of mass destruction (WMD) had no legitimacy in international law. First of all, claims regarding Iraq's pursuit or actual possession of weapons of mass destruction (WMD) were always highly suspect.

Secondly, enforcement of UN resolutions against Iraq's alleged possession of WMD should have been undertaken in accordance with international law and not in blatant disregard of it.

Thirdly**,** the US lacked clean hands on the issue of Iraq's possession of WMD because along with Britain and 150 or so Western companies (listed in Iraq's Report to the UN Inspectors), the US facilitated Iraq's acquisition and use of WMD in the 1980s

7.6 Was there pre-planning and preparation to mount the military operation?

The Prosecution has given us convincing evidence that the drums of war were being beaten long before the invasion. Facts were fixed to support the policy.

Regrettably the Defence rebuttal was based on highly dubious US Government or US Military evidence that is not credible. US laws or Congressional Resolutions are also not acceptable as the US, with all its might has no right to change international law.

Further many statements in the books authored by the two accused implicate them in the diabolical plan. The memoirs of the two accused do not provide justification for the war of aggression against Iraq.

8. VERDICT

"The essence of legality is the principled, predictable, and consistent application of a single standard for the strong and the weak alike. Selective manipulation of international law by powerful states undermines its legitimacy."

The 2003 invasion of Iraq was an unlawful act of aggression and an international crime. It "cannot be justified under any reasonable interpretation of international law". It violates "the outer limits of laws regulating the use of force". It amounts to mass murder. Unlawful use of force in Iraq "threatens to return us to a world in which the law of the jungle prevails over the rule of law, with potentially disastrous consequences for the human rights not only of the Iraqis but of people throughout the region and the world".

The future of the UN and of the international law of war is also at stake. The unauthorized military action in Iraq undermines the system of collective security embedded in the UN Charter in order to protect humanity from a recurrence of the carnage of World War II.

The two accused took the law into their own hands. They acted with deceit and with falsehood. They acted in flagrant violation of international law of war and peace. In the absence of any convincing evidence, defence assertions lack credibility. They appear to be fig leaves for hiding naked economic and political ambitions.

We therefore find that the charge against the two accused is proved beyond reasonable doubt. The two accused are, therefore, found guilty as charged and the two accused are accordingly convicted on the charge.

9. ORDERS

1. The Tribunal in accordance with Article 31 of our Charter, recommends to the Commission to file reports with the International Criminal Court against the two accused.

2. The Tribunal in accordance with Article 32 recommends to the Commission that the name of the two convicted criminals be included in the Commission's Register of War Criminals and publicized accordingly.

10. RECOMMENDATIONS

First, the Commission must invoke the Nuremberg law to report Bush, Blair and their accomplices for crimes against peace, war crimes and crimes against humanity under Part VI of the Charter of the Nuremberg Tribunal.

Second, the Commission must file reports of genocide and crimes against humanity with the International Criminal Court (ICC).

Third, the General Assembly of the United Nations must be approached to pass a resolution to end the American occupation of Iraq.

Fourth, the findings of this Tribunal must be communicated to all countries that have acceded to the Rome Statute and are possessed of universal jurisdiction.

Fifth, the UN Security Council must reassert itself and ensure that true sovereignty is transferred to the Iraqi people as soon as possible with the assistance of a UN Peacekeeping Force. The autonomy of the newly installed Iraqi government must be ensured.

President- Judge Abdul Kadar Sulaiman

Judge Salleh Buang,

Judge Tunku Sofiah Jewa,

Judge Alfred L. Webre

Judge Shad Saleem Faruqi

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Dated: Twenty second day of November 2011 at Kuala Lumpur, Malaysia.