

# KUALA LUMPUR WAR CRIMES TRIBUNAL

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS  
(INCLUDING NOTES OF PROCEEDINGS)

Case No. 1 – CP – 2011

KUALA LUMPUR WAR CRIMES COMMISSION

v.

GEORGE W. BUSH & ANTHONY L. BLAIR

JUDGMENT OF 22 NOVEMBER 2011

Kuala Lumpur Foundation To

**CRIMINALISE WAR**

WAR IS ABOUT KILLING, MASSIVE KILLING





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PUSTAKA PERDANA



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*Kuala Lumpur War Crimes Commission*  
*v. George W. Bush & Anthony L. Blair*

**JUDGMENT**



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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.

## 1. PARTICULARS OF CHARGE

The Particulars of the Charge state as follows:

1. On 19 March 2003 the United States of America (USA) and the United Kingdom (UK) launched a war against Iraq without the sanction of the United Nations and without just cause whatsoever. 10
2. The accused George W Bush (Bush) was at the relevant time the President of the USA and the accused Anthony Blair (Blair) was the Prime Minister of the UK. 15
3. Bush acted on purported advice that the US could launch a pre-emptive war without the approval of the United Nations, notwithstanding the fact that Iraq had not threatened war against the US or attacked the US; 20
4. Bush had contemplated waging war against Iraq as early as 15 September 2001 and had at some time confided in Blair of this intention. During 2002, Bush and Blair, without the sanction of the United Nations Security Council directed air strikes against Iraq in order to degrade Iraq's air defences, in preparation to invade Iraq in 2003. 25
5. A memorandum of a UK cabinet meeting known as the 'Downing Street Memo' dated July 23 2002 summarised a meeting between Blair and his cabinet with British intelligence officials. It records that 'Military action was seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. But the intelligence and the facts were being fixed around the policy'. Blair supported this line of action. 30

1           6.    On 8 November 2002 the United Nations Security  
Resolution 1441 (SCR1441) was adopted. This resolution  
was jointly sponsored by the USA and the UK. The  
summary of the SCR1441 is as follows:

5           a.    That Iraq was and is in breach of its obligations  
to cooperate with UN inspectors and the IAEA,  
and to complete certain actions as required by  
10           previous resolutions, among them SCR 687.

          b.    Gave Iraq a final opportunity to comply with its  
obligation to disarm.

15           c.    Declared that if Iraq failed to comply then:

          i.    This would be a further breach of its  
obligations.

20           ii.   A report will be made to the Security  
Council by the UNMOVIC and the IAEA  
for assessment.

25           iii.   The Security Council would convene  
immediately to consider

- the situation and
- the need for full compliance with all  
the resolutions in order to secure  
30           peace and security.

35           d.    Noted that the Council had repeatedly warned  
Iraq *“that it would face serious consequences as a  
result of its continued violation of its obligations”*.

40           The SCR 1441 clearly did not authorise the use  
of military action to compel compliance with the  
resolution. A straight reading of the resolution  
made it abundantly patent that the Security  
Council would convene to decide on the next  
course of action, if any, upon receiving the  
requisite report.

7. This was further emphasised by the statements made by the ambassadors of both the US and UK after the passing of the SCR1441 that there was no automatic right of unilateral military action in the event Iraq failed to comply with SCR1441; and that any further action will have to be decided by the Security Council. 1  
5
8. The US and the UK leaders, namely Bush and Blair, subsequently, and aware that the Security Council would not support their resolution to go to war, changed their stance and declared that they reserved the right to take military action against Iraq if the Security Council did not take action. 10  
15
9. Under the UN Charter there is no right for implied authorisation to take unilateral decisions to use force against a sovereign country, except in self-defence in circumscribed circumstances (which has no application to the facts here). 20
10. Iraq had, in any event, complied with SCR1441 by re-admitting weapons inspectors.
11. Blair had in testimony to the Chilcot Inquiry on 14 January 2011 admitted that the then Attorney General, Peter Goldsmith, advised that a further Security Resolution (after SCCR 1441) was obligatory under international law to authorise the use of military force; and his Cabinet Office had reached the same conclusion in its earlier paper. 25  
30
12. On 24 February 2003 the US, UK and Spain did table a second draft resolution that Iraq had failed to take the final opportunity afforded to it in SCR 1441. The other permanent members of the Security Council did not agree with this assessment to authorise the use of force. 35
13. In any event it is now a well established fact which is in the public domain that Iraq did not possess any weapons of mass destruction. Indeed it was made clear by the Chief UN Inspector Scott Ritter that by 1998 Iraq's

chemical structures were completely dismantled and that the nuclear weapons were completely eliminated. The physical structures were also dismantled. This means that, in any event as of that date, the alleged threat posed for weapons of mass destruction was nil. This information was wilfully ignored by Bush and Blair and demonstrates that Bush and Blair knowingly contrived to use an utterly false basis to invade Iraq several years later – in 2003.

14. There is also evidence that the sites named by the US that were sealed since the late 1990s by the UN Inspectors were found to be still sealed after the war was launched against Iraq. This was also confirmed by Scott Ritter the chief UN Inspector.
15. The allegations made that Saddam kicked out inspectors in 1998 is also not true.
16. On 24 September 2004 the then UN Secretary General, Kofi Annan, also weighed in to state that the war against Iraq was illegal.
17. Bush and Blair have over the years since the war admitted that they knew or believed the intelligence reports on WMD to be unreliable; and yet they proceeded unilaterally to wage war based on a false and contrived basis.
18. More than 1.4 million Iraqis have been killed and continue to die as a direct and indirect result of the illegal war waged by Bush and Blair against Iraq.
19. By these acts and omissions, George W Bush and Anthony L Blair committed Crimes Against Peace by wilfully waging war against the sovereign nation of Iraq without any just cause and in breach of international law, international conventions and the United Nations Charter.

## ADDITIONAL FACTS:

- 1
20. Reference is made to the following meetings, directions, authorizations, representations and documents, namely:
- 5
- a. On 21 November 2001, Bush secretly ordered the preparation of formal war plans for the invasion of Iraq;
- 10
- b. In response to Bush's order, Donald Rumsfeld, the Secretary of Defence of the USA, on or about 27 November 2001, directed General Tommy R. Franks ("*General Franks*"), the head of Central Command to prepare immediately plans for the invasion of Iraq. This plan was planned and formulated with the knowledge and consent of General Richard B. Myers, who was at the material time, the Chairman, Joint Chiefs of Staff ("*Myers*");
- 15
- 20
- c. On 29 January 2002, Bush in his State of the Union Address labelled Iraq, Iran and North Korea as an "*Axis of Evil*";
- 25
- d. On 17 March 2002, in Washington DC, Paul D. Wolfowitz ("*Wolfowitz*"), Deputy Secretary of Defence of the US, was advised by the British Ambassador, Sir Christopher Meyer to "*wrong-foot*" President Saddam Hussein by seeking a UN resolution for the readmission of weapons inspectors. The premise was that, in the event of President Saddam Hussein's refusal, the same shall be cited as a justification for war.
- 30
- 35
- e. The memorandum, dated 23 July 2002 from Mr. Matthew Rycroft to Mr. David Manning (more commonly referred to as the "*Downing Street memo*") which made reference to the meeting between the British Prime Minister, Blair and his senior officials at 10, Downing Street on 23 July, 2002.

- f. At the said meeting, Sir Richard Dearlove, known as “C”, head of the British Secret Intelligence Service (MI6) (“Dearlove”) informed Blair that there was a perceptible shift in attitude in the United States – *“military action was now seen as inevitable. Bush wanted to remove Saddam through military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were fixed around the policy”*.
- g. Upon learning from George J. Tenet (“Tenet”), the Director of the Central Intelligence Agency (CIA) and others that Iraq and President Saddam Hussein had no involvement with either the attacks of September 11, 2001 or Al Qaeda, Donald Rumsfeld, the US Secretary of Defence, directed Douglas J. Feith (“Feith”) to secretly create the Counter Terrorism Group (CTEG) to *“establish links”* between Iraq and Al Qaeda by reviewing raw intelligence which was previously discarded as being unreliable.
- h. In order to swing public opinion in favour of war against Iraq, Bush established the *“White House Iraq Group”* (WHIG) chaired by Karl Rove (“Rove”). The main objective of WHIG was to secure Republican majority in both Houses of Congress in the November 2002 congressional elections, thereby ensuring republican support for Bush’s war plans against Iraq.
- i. WHIG’s strategy was formulated to mislead and deceive both the Congress and the US public by suppressing material facts and making statements knowing the same to be without basis and or a reckless indifference to their truth, specifically:
- i. suppressing the ulterior objectives for invading Iraq;

- |       |   |    |
|-------|---|----|
| ii.   | suppressing the ulterior objectives of seeking an UN resolution for the deployment of weapons inspectors;   | 1  |
| iii.  | stating that there was a link between Iraq and the September 11 attacks;  | 5  |
| iv.   | stating that President Saddam Hussein had established links with Osama Bin Laden and the Al Qaeda terrorist organization;   | 10 |
| v.    | stating Saddam Hussein's intent to attack the United States and the United Kingdom;   | 15 |
| vi.   | stating that Iraq was in possession of nuclear weapons;   | 20 |
| vii.  | stating that Iraq was manufacturing biological and chemical weapons; and  | 25 |
| viii. | stating that Iraq and Saddam Hussein were a threat to world peace.  | 25 |
| j.    | As a result of the propaganda campaign conducted by the aforesaid organisation, the US Congress resolved on 11 October 2002 to "Authorise Use of Force Against Iraq". The said resolution provides: | 30 |
|       | <i>"The President is authorised to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to –</i>   | 35 |
| i     | <i>defend the national security of the United States against the continuing threat posed by Iraq; and</i>   |    |
| ii    | <i>enforce all relevant United Nations Security Council resolutions regarding Iraq."</i>  |    |

- 1           21.   Sometime in September 2002, the UK Cabinet Office  
Joint Intelligence Committee headed by one Scarlett and  
assisted by one Campbell prepared a dossier on Iraq,  
5           *“Iraq – Its Infrastructure of Concealment, Deception and  
Intimidation”* which was used as a justification for war  
against Iraq. However, several portions of the said  
dossier were not based on actual intelligence sources  
10           but plagiarised from an article in the journal *“Middle  
East Review of International Affairs”* and written by a post  
graduate student, Ibrahim al-Marashi.
- 15           22.   On 8 November 2002, the UN Security Council approved  
Resolution 1441, a US-British sponsored resolution  
requiring Iraq to reinstate weapons inspectors after a  
four year absence. President Saddam Hussein complied  
with the said UN Security Council’s resolution and  
20           weapon inspectors were re-admitted into Iraq.
- 25           23.   Reference is made to the following statements, meetings,  
directions, authorizations, representations and  
documents, namely:
- 30           a.    On 12 September, 2002, Bush addressed the UN  
General Assembly and stated *inter-alia* that, *“The  
history, the logic and the facts lead to one conclusion.  
Saddam Hussein’s regime is a grave and gathering  
danger. To suggest otherwise is to hope against the  
evidence. To assume this regime’s good faith is to bet  
35           the lives of millions and the peace of the world in a  
reckless gamble. And this is a risk we must not take...  
Saddam Hussein ... continues to develop weapons of  
mass destruction. The first time we may be completely  
certain he has nuclear weapons is when, God forbids,  
he uses one...”*
- 40           Bush made this statement knowing it to be false  
and or misleading and inconsistent with the facts  
particularised above;
- 45           b.    Rumsfeld’s testimony to Congress on 19  
September 2002, *“No terrorist state poses a greater*

*or more immediate threat to the security of our people and the stability of the world than the regime of Saddam Hussein”.* 1

Rumsfeld made this statement knowing the same to be false and or misleading and made for the purpose of inciting war against Iraq. 5

- c. In his State of Union Address on 28 January 2003, Bush stated, 10

“U.S. intelligence indicates that Saddam Hussein had upwards of 30,000 munitions capable of delivering chemical agents. Inspectors recently turned up 16 of them, despite Iraq’s recent declaration denying their existence. Saddam Hussein has not accounted for the remaining 29,984 of these prohibited munitions. He has given no evidence that he has destroyed them. 15 20

From three Iraqi defectors we know that Iraq, in the late 1990s, had several mobile biological weapons labs. These are designed to produce germ warfare agents and can be moved from place to place to evade inspectors. Saddam Hussein has not disclosed these facilities. He has given no evidence that he has destroyed them. 25

The International Atomic Energy Agency confirmed in the 1990s that Saddam Hussein had an advanced nuclear weapons development program, had a design for a nuclear weapon and was working on five different methods of enriching uranium for a bomb. 30 35

The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa”.

The statement was made knowing the same to be false and or misleading and served as a

1 camouflage for the real reasons for waging war  
against Iraq as particularized in the foregoing  
paragraphs.

- 5 d. In his address to the UN Security Council on 5  
February 2003, Colin Powell stated, *“We know  
that Saddam Hussein is determined to keep his  
10 weapons of mass destruction; he’s determined to make  
more. Given Saddam Hussein’s history of aggression,  
given what we know of his grandiose plans, given what  
we know of his terrorist associations and given his  
determination to exact revenge on those who oppose  
15 him, should we take the risk that he will not some day  
use these weapons at a time and the place and in the  
manner of his choosing at a time when the world is in  
a much weaker position to respond?”*

20 The United States will not and cannot run that  
risk to the American people. Leaving Saddam  
Hussein in possession of weapons of mass  
destruction for a few more months or years is  
not an option, not in a post-September 11 world”.

25 The statement was made knowing the same to  
be false and or misleading and served as a  
camouflage for the real reasons for waging war  
against Iraq as particularized in the foregoing  
paragraphs.

- 30 e. Blair’s statement on 29 January 2003 on TV  
linking Saddam with Al-Qaeda.
- 35 f. Bush, Blair and Spanish Premier Jose Maria  
Aznar gathered in the Azores and collectively  
set a deadline for end of Monday, 17 March, 2003  
for the UN Security Council to support the  
United States/United Kingdom resolution  
40 demanding Iraq’s immediate disarmament. Bush  
declared that it was *“a moment of truth for the  
world”*.

- g. On 17 March 2003, the United Kingdom Ambassador to the UN declared that the diplomatic process on Iraq has ended and announces the withdrawal of the abovementioned draft resolution. Weapons Inspectors were ordered to be evacuated from Iraq. 1  
5
- h. On 17 March, 2003, Goldsmith issued a written parliamentary statement that the war on Iraq would be legal on the grounds of existing UN resolutions, knowing the same to be false and or misleading when he had in late July 2002 advised Blair in a hand written letter, that such a war was unlawful and a breach of international law. Goldsmith had then pointed out: 10  
15
- i. War could not be justified purely on grounds of “*regime change*”; 20
- ii. Although UN rules permitted ‘military intervention’ on the basis of ‘*self-defence*’, they did not apply in this case because Britain was not under threat from Iraq; 25
- iii. While UN allowed ‘*humanitarian intervoention*’ in certain circumstances, that too was not relevant to Iraq; and 30
- iv. It would be very hard to rely on earlier UN resolutions in the Nineties approving the use of force against Saddam. 35

The parliamentary statement of 17 March 2003, was therefore issued to solicit support for a war against Iraq and to mislead the British public that the war was legal. 35

- i. On 18 March, 2003, Blair stated, “*We are asked to accept Saddam decided to destroy those weapons. I say that such a claim is palpably absurd*”.

1 The statement was made by Blair to mislead and  
deceive the public that Saddam Hussein at the  
material time was still in possession of nuclear  
5 weapons and was made to incite support for the  
invasion of Iraq which Blair knew would be  
launched in just a few days later.

- 10 j. On the eve of the invasion of Iraq, Bush in his  
address to the nation on 19 March, 2003 stated,  
*“The people of the United States and our friends and  
allies will not live at the mercy of an outlaw regime  
15 that threatens the peace with weapons of mass  
murder”.*

20 This statement was made by Bush knowing the  
same to be false and or misleading and as a  
further justification for waging war against Iraq.  
At the material time, Iraq and Saddam had not  
made any threats against the United States or any  
other countries with weapons of mass murder  
as alleged.

- 25 k. One of the grounds cited in support of Bush’s  
allegations that Iraq had reconstituted nuclear  
weapons was a purported intelligence report that  
Iraq had purchased uranium from Niger. In  
making and or relying on this fraudulent claim,  
30 the above-named accused suppressed from the  
public the declaration by El Baradei, the Director-  
General of the International Atomic Energy  
Agency (IAEA) that, *“Iraq has provided a  
comprehensive explanation of its relation with Niger.  
35 The IAEA was able to review correspondence from  
the government of Niger and compare full format  
contents and signature of that correspondence with  
those of the alleged procurement related  
documentation. Based on thorough analysis the IAEA  
40 has concluded, with concurrence of outside experts,  
that these documents which formed the basis for the  
reports of recent uranium transactions between Iraq  
and Niger are, in fact, not authentic”.*

24. On 20 March, 2003 the invasion of Iraq was ordered by Bush and Blair, in violation of international law. The invasion was dubbed “*Operation Iraqi freedom*”. 1
25. However, no weapons of mass destruction were found in Iraq after the illegal invasion of Iraq. 5

The Prosecution also filed another charge against accused Bush and several others for war crimes and crimes against humanity<sup>1</sup>. This other charge will be the subject of separate proceedings before this Tribunal. 10

## 2. REASONS FOR BRINGING UP THE CHARGE 15

In his submission, the learned Chief Prosecutor asserts the following three reasons for bringing up the charge against the two accused: 15

- a. *“To signal that no country, however great it considers itself to be, can arrogate to itself the right to commit a crime against peace, in this case, attack another country in violation of international law.” 20*
- b. *To signal that there is culpability for such a crime by person(s) – no matter how high their office. This includes heads of state who knowingly order, authorize or acquiesce in the commission of such a crime. 25*

*The law cannot stop with the punishment of petty crimes; or lay the blame for more heinous crimes on petty minions or underlings. It must reach those who sit in the highest echelons of power and make deliberate and concerted (mis)use of it to inflict evil and suffering upon men, women and children of distant lands. 30*

- c. *Finally, to preserve the integrity of international law as it has evolved and is now evolving. We can do this by consigning to the dustbin of history the crude and naked arrogance and cruelty of power as demonstrated by the acts of these two accused – leaders supposedly of the free and civilized world. 35*

<sup>1</sup> KL War Crimes Tribunal Case No 2-CTH-2011.

1            *What these two men represent and did, the Prosecution will*  
*patiently and temperately seek to disclose; how they*  
*manipulated and deceived their own population, their elected*  
5            *representatives, and ultimately defied the rest of the world in*  
*furtherance of their evil and criminal design and objectives.”*

### 3.     **AMICI CURIAE**

10    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 Rules of Procedure and Evidence of the  
15    Kuala Lumpur War Crimes Tribunal (hereinafter referred to as “*the*  
*Commission Charter*”), Mr. Jason Kay Kit Leon, together with Mr.  
Soo Kok Weng, Ms. Pan Shan Ping, Mr. Mohd Zharif Shafiq B. Badrul  
Hisam, Mr. Auzan Syaidi B. Abdul Lateh and Mr. Muhammad  
Khairil B. Khalid were appointed Amici Curiae by the Tribunal to  
20    assist the Tribunal by presenting an unbiased assessment of the  
charge and evidence against the accused.

Amicus Curiae Mr. Jason Kay Kit Leon entered a plea of not guilty  
on behalf of both the accused.

### 4.     **SERVICE OF CHARGE**

Article 6 of the Rules of Procedure and Evidence of the Tribunal  
provides as follows:

- 30            (a)    *The Registrar of the Tribunal shall cause to be served on the*  
*accused a copy of the Charge or Charges before the*  
*commencement of any proceedings of the Tribunal.*
- 35            (b)    *If the Charge involves a current head of state/government or*  
*a former head of state/government, service of a copy thereof*  
*to the relevant Embassy or High Commission shall suffice*  
*and the accused is deemed to have been served.*
- 40            (c)    *In all other cases, such as military commanders (serving or*  
*retired) and government officials, service of the charge shall*  
*be deemed effected if sent to the last known office of the accused.*

No mode of service is prescribed under the above rules. 1

An attempt was made to effect personal service on accused Anthony L. Blair whilst he was on a speaking engagement in Kuala Lumpur a few months earlier, but because of the tight security surrounding him, it proved unsuccessful. 5

On Monday 19 September 2011 at 10:14 pm, the Registrar of the Tribunal effected service upon the two accused by way of e-mail, the addresses whereof he had obtained from "*Decision Points*"<sup>2</sup> and "*Tony Blair – A Journey*"<sup>3</sup>, the respective biographies of accused George W Bush and Anthony L. Blair. 10

In addition thereto, and pursuant to the provision of Article 6(b) of the Rules of Procedure and Evidence of the Tribunal, on Friday 4 November 2011 at 3.00pm, the Registrar sent by courier service a copy of the Charge to both the Embassy of the United States of America and the British High Commission in Kuala Lumpur. 15

The Prosecution contends that service of the charge is good. According to the Chief Prosecutor, since the mode of service is not prescribed, the key is that it arrives or ought to arrive as per mode of service utilised. 20

The *Amicus Curiae* submits that modes of communication have progressed with the times, especially in the last ten to fifteen years. He explains that e-mail is now a very normal mode of communication which has superseded the fax (facsimile) mode of sending messages. Documents received by fax have already gained recognition by our courts. The purpose of delivery is merely to ensure that the correct copy of a document is delivered to the intended recipient. Non-delivery of an e-mail is indicated by a bounce-back from the recipient of the email. No such indication is recorded in the affidavit of the Registrar and the *Amicus Curiae* consequently accepts that service on both the accused by way of e-mail is good. The *Amicus Curiae* also accepts that service effected just about two months before the Hearing date was done within a reasonable time frame. 25  
30  
35

<sup>2</sup> Bush, George W., *Decision Points*, Random House, 2010.

<sup>3</sup> Blair, Tony, *A Journey: My Political Life*, Decker Edge, 2010.

1 Both counsel however were unable to produce any case law on  
service of documents by e-mail. The Tribunal nevertheless accepts  
the proposition of the *Amicus Curiae* that the law needs to move  
with the times and consequently holds that *bona fide* e-mail  
5 communications are valid and sufficient in law.

## 5. RECUSAL OF JUDGE NILOUFER

10 At the commencement of the proceedings, the *Amicus Curiae* applied  
for the recusal of Judge Niloufer on the ground of apparent bias  
based on the following grounds:

- 15 • Judge Niloufer Bhagwat had on the 10 of March 2004  
sat on the Bench of the International Criminal Tribunal  
for Afghanistan in Tokyo in the case cited as “*The People  
vs George Walker Bush, President of the United States of  
America*”<sup>4</sup>, and wrote the Judgment of the Tribunal which  
found Accused George Bush guilty for, *inter alia*, waging  
20 war of aggression against Afghanistan and the Afghan  
people;
- Judge Niloufer was a Prosecutor in the World Tribunal  
on Iraq<sup>5</sup> in the year 2005;
- 25 • Judge Niloufer had specifically named the President of  
the United States during the deliberations of the Kuala  
Lumpur War Crimes Tribunal when it sat to consider  
the following Application for Advisory Opinion:

30 Whether a Head of State and/or Government can unilaterally  
exempt itself from complying with any provisions of any  
International Treaties/Conventions (such as the Geneva  
Conventions) dealing with international humanitarian law,  
and in particular as set out in Article 7 paragraph (1)(a)-(d) of  
35 the Charter of the Kuala Lumpur War Crimes Commission,  
duly ratified by the State without first abrogating the relevant  
treaty/convention.

4 [www.supremelaw.org/cc/gwbush/icta.judgment.htm](http://www.supremelaw.org/cc/gwbush/icta.judgment.htm).

5 <http://www.deepdishtv.org/ProgramDetail/Default.aspx?id=3505>.

The Opinion sought was general in essence and made no reference to any particular head of State. Nonetheless, in finding that the interpretation of treaty obligations cannot be usurped by a Head of State, the learned Judge concluded as follows:

*The President of the United States declared in 2007, that “micro nukes” of less than 20 kilotons, three times as powerful as the Hiroshima and Nagasaki bombs were to be classified in the arsenal of the United States of America as ‘conventional ordnance’. Such acts by a Head of State/government and the indiscriminate increase of stockpiles of nuclear weapons by the powerful club of nuclear weapon States can hardly be considered in conformity with the 1968 Treaty on the Non-Proliferation of Nuclear Weapons and other treaty obligations.*

Strenuous efforts were made by the Prosecution to oppose the application of the Amicus Curiae. However, Judge Niloufer, on her own volition, recused herself.

## 6. RECUSAL OF JUDGE ZAKARIA YATIM

During a short recess of the First Day’s Hearing, Judge Zakaria Yatim recused himself on account of ill-health.

## 7. QUORUM OF THE TRIBUNAL

Article 6 of the Charter of the Kuala Lumpur War Crimes Commission stipulates as follows:

*A quorum of five Judges shall suffice to constitute the Tribunal in the event that the President is indisposed or unable to discharge his duties, the judges shall elect from among themselves an Acting President.*

The Tribunal had a full bench of 7 Judges. However, with the recusal of Judge Prof Niloufer Bhagwat and Judge Dato’ Dr Zakaria Yatim, the Tribunal proceeded to hear the case with a quorum of 5 Judges.

## 8. PRELIMINARY OBJECTION ON JURISDICTION OF TRIBUNAL

*Amicus Curiae* raises a preliminary objection that the Tribunal has no jurisdiction to hear the case. Relying on a thesis purportedly developed by Professor David Luban of the Georgetown University in his article - *A Theory of Crimes Against Humanity*<sup>6</sup>, *Amicus Curiae* says that the Tribunal can only assume jurisdiction if so mandated by the United Nations or the Security Council and quotes the following passage from Luban<sup>7</sup> in support thereof. The relevant passage from Prof Luban's article reads:

*Only tribunals respecting the requirements of natural justice should be authorized to try those accused of crimes against humanity, and in practice these tribunals must be established by states or international organizations established by states. But the authority of these tribunals derives from the vigilante jurisdiction and the requirements of natural justice, not from the political authority of the states that sponsor them.. [Emphasis added]*

In rebuttal, the Chief Prosecutor submits that the Tribunal "is a peoples' tribunal, a tribunal of conscience ... These two accused now strut the world as elder statesmen demanding high speaking fees. Condoning crimes against peace, remaining silent when we know such crimes have been committed – are in themselves crimes. Hence this prosecution – by the people and for the people. To announce loudly and clearly that we will not be complicit and remain silent when evil blots the international rule of law; and the perpetrators – these two accused - stalk the world."<sup>8</sup>

In support thereof, the Chief Prosecutor takes a leaf from Justice Jackson's Opening Statement for the Prosecution at the International Military Tribunal at Nuremberg in November 1945:

What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust<sup>9</sup>.

<sup>6</sup> 29 Yale J. Int'l L. 85-167 (2004)

<sup>7</sup> *ibid.* at p. 142.

<sup>8</sup> Prosecution Written Submission dated 19 November 2011, para 1.3 at p.5

<sup>9</sup> *op. cit.* at p.6

In further support of the Tribunal's right to jurisdiction, the Prosecution alludes to the concept of Universal jurisdiction and the moral authority of the Tribunal to boost such jurisdiction:

Some crimes are so serious that any court anywhere is empowered by international law to try them and mete out the requisite punishment, irrespective of its place of commission or the nationality of the offender or its victims. This contrasts with jurisdiction for ordinary crimes which require some such link. The "universal jurisdiction" arises wherever an offender is found and it arises because he is alleged to have offended in a particularly outrageous way against international law. Such jurisdiction arises because they are crimes against humanity simpliciter under any domestic law. The link is found in the simple fact that we are all human beings. The offence might otherwise go unpunished. Universal jurisdiction sends the signal to prospective international criminals that there is no safe haven for any person accused of these crimes. It is our submission that waging an illegal war – with its inevitable killing of men, women and children – is a crime against peace. This crime attracts universal jurisdiction.

The Nuremberg Charter made this clear. It established jurisdiction to punish crimes against peace, that is, waging a war of aggression, in violation of international treaties. Article 8 of the Commission Charter is word for word the same as Article 6(a) of the Nuremberg Charter.<sup>10</sup>

A peoples' tribunal has, without doubt, moral force. Given universal jurisdiction, states need to be strengthened in their resolve that there exists a sufficient body of international jurists that have concluded, after due deliberation, that an international crime has been committed. This is the added

<sup>10</sup> **Article 6(a) of the Nuremberg Charter reads:** CRIMES AGAINST PEACE: namely, 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; **Article 8 of the Commission Charter reads:** CRIME AGAINST PEACE: refers to planning, preparation, initiation, or waging of wars 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.

1 value of a considered verdict pronounced by the eminent  
judges of this Tribunal. Indeed Chapter VI Article 31 of the  
Charter states that while the verdict of this Tribunal of  
conscience is merely declaratory, the Tribunal may  
5 recommend to the Commission to submit its finding to the  
ICC or any other international organization for further action<sup>11</sup>.  
The Prosecution wishes to give advance intimation of our  
intention to request the Tribunal to do so if the charge against  
10 the accused persons is established and there is a finding of  
guilt. We will also in that eventuality be requesting the  
Tribunal to circulate its findings to the international  
community for them collectively or for states individually to  
initiate prosecution. Thus may the outcome of this Tribunal  
15 serve the ends of justice.

*The war against Iraq has engaged, and continues to engage, the  
world community: through the print media and through intellectual  
and other public discourses. It will be correct to say that no person  
20 has been left untouched by this continuing aggression – now in its  
eighth year. It is to be expected then that views of all suasions colour  
an assessment of this war. It is no easy task to remain truly neutral  
in these circumstances. Yet, as Nuremberg which tried Hitler's  
henchmen in the midst of strongly held views, this Tribunal must  
25 adhere scrupulously to the rules of fair play and justice - lest we be  
poisoned by the same corrupting and insidious illegal ways employed  
by these two accused. These proceedings and the verdict of the  
Tribunal will be discredited if we falter, in even minor matters, in  
being fair and temperate.*

30 The Tribunal acknowledges the role of both the Prosecution and  
the Amicus Curiae for their illuminating assistance on the issue of  
jurisdiction.

35 We have perused at some length Professor Luban's *A Theory of  
Crimes Against Humanity*, a passage from which the Amicus Curiae  
has placed great reliance in challenging the jurisdiction of this  
Tribunal. With respects, we find the impugned quoted passage out  
of context. In our view, we find the learned Professor's concluding  
40 remarks, excerpted below, provide, the true thesis of his article,

<sup>11</sup> Commission Charter, Chapter 6, Article 31.

and that tribunals such as ours, do indeed possess the requisite jurisdiction:

*... crimes against humanity are crimes against humanness as well as crimes against humankind... Anyone who violates them becomes an enemy and legitimate target of all humankind... This gives rise to what I have labelled the "vigilante jurisdiction"... vigilante jurisdiction must always be delegated to tribunals, provided that these conform to the standards of natural justice. The point of the argument is that tribunals trying crimes against humanity are not vindicating state interests, but rather human interests; their obligation is simply to ensure that this vindication satisfies natural justice.*<sup>12</sup> [Emphasis added]

Consequently, on the following grounds, the Tribunal unanimously rules that it has jurisdiction:

- a) We are a legally constituted body, because we are an organ of the Kuala Lumpur Foundation to Criminalise War which is a lawful entity under the Trustees Incorporation Act.
- b) In the context of international law, the concept of 'law' incorporates principles of natural justice and good conscience. This Tribunal is a tribunal of conscience inspired by the highest ideals of natural law and justice.
- c) Our Charter is largely inspired by the Rome Statute.
- d) We are guided by earlier precedents of tribunals of conscience in many other countries including Tokyo and Turkey.
- e) Our inability to enforce a judgement does not affect our validity. All legal systems know of sanctionless duties and unenforceable rights.
- f) Are we usurping the functions of the United Nations? We agree with the Counsel for the Prosecution that we are complementing the United Nations because of its inability to act in relation to the atrocities that are the subject of these proceedings.

<sup>12</sup> 29 Yale J. Int'l L. *op.cit.* at p.160

- g) Crimes against peace are the subject of the universal jurisdiction and this Tribunal in Kuala Lumpur is within its powers to adjudicate on crimes against peace. Further, our Charter allows us to conduct our proceedings in other countries that are the subject of the ICC
- h) Finally, the Tribunal notes with regret the analogy drawn by the Learned Amicus Curiae with vigilante groups. This Tribunal is not a motley collection of vigilantes but a Tribunal of Conscience guided and inspired by the highest principles of international law and justice.

## 9. TRIAL IN ABSENTIA

It was at Nuremberg that trial *in absentia* i.e. the holding of a trial without the presence of the accused, first made its appearance. Article 12 of the Charter of the International Military Tribunal at Nuremberg provides that the “Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.”<sup>13</sup>

In similar vein, Article 15 (Chapter V) of the Rules of Procedure and Evidence of the Kuala Lumpur War Crimes Tribunal stipulates that:

If the Tribunal is satisfied that the accused is for any reason unwilling to appear in person or unwilling to appoint counsel to represent him before the Tribunal, the Tribunal shall appoint one or more amici curiae from the Defence Division of the Legal Team of the Commission to assist the Tribunal by presenting an unbiased assessment of the charge and evidence against accused.

Both accused, though duly served with the Charge, were absent. Has the Tribunal the authority to proceed with trial *in absentia* against them?

<sup>14</sup> Pursuant to this Article, Martin Bormann, a high-ranking Nazi leader who had escaped capture, was tried *in absentia* and subsequently sentenced to death.



*Scenes from the Kuala Lumpur War Crimes Tribunal  
Hearing from 19 - 22 November 2011*

[www.criminalisewar.org](http://www.criminalisewar.org)