

Bush and Blair accused of War Crimes:

Kuala Lumpur Tribunal: Criminalize War

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Regardless of size or power, no country or national leader is exempt from international humanitarian law.

ON Saturday Oct 31, the Kuala Lumpur War Crimes Tribunal (KLWCT) heard the opening arguments from the Kuala Lumpur War Crimes Commission (KLWCC) about war crimes in Iraq and Afghanistan.

The Commission submitted on many grave issues of international law of war and of humanitarian law, arising out of the invasion of Afghanistan in 2001 and the conquest of Iraq in 2003 by the United States and its allies.

There are well documented allegations that the invading armies used banned weapons of mass destruction, bombed civilian areas and committed mass murders. There were kidnappings, torture, racial and religious profiling and many other acts of savagery and lawlessness that satisfy the legal definitions of war crimes, genocide and crimes against humanity.

Furthermore, in a show of invincibility and impunity, then US President George W. Bush, by a White House Memorandum of Feb 7, 2002 exempted his nation from the binding provisions of the much-venerated Geneva Conventions, excluding (suspected) al-Qaeda and Taliban detainees from the Conventions' protection.

The carnage in Afghanistan and Iraq continues but the Western world largely remains silent. International institutions like the UN Security Council, the World Court and the International Criminal Court (ICC) look the other way.

It is in this context that in 2005, the KL-based Perdana Global Peace Forum hosted a number of international consultations bringing together legal luminaries from around the world. This resulted in the launching of the Kuala Lumpur Declaration to Criminalise War.

A War Crimes Commission was appointed to investigate allegations of brutality and to gather evidence. A War Crimes Court was set up.

The Commission took two-and-a-half years to trace and interview victims, gather evidence and research the law. Last Saturday, when the Commission submitted its case to the seven-judge Tribunal, two preliminary issues came up for adjudication.

First, does the Tribunal have jurisdiction to hear the cases? Second, can a head of state or government unilaterally exempt itself from any international treaty or convention (such as

the Geneva Conventions) duly ratified by the state without first abrogating the relevant treaty or convention?

On both issues the Tribunal gave unanimous opinions. The Tribunal held that it has jurisdiction to adjudicate on war crimes in Iraq because of the Charter of the Kuala Lumpur War Crimes Tribunal. Its proceedings were also inspired by previous precedents of People's Tribunals, e.g. the Sir Bertrand Russell Tribunal in relation to US War Crimes in Vietnam, the Tokyo Tribunal on Afghanistan and the Turkish Tribunal in relation to Iraq.

The KL proceedings are inspired by the noble principle that wherever there is a right there must be a remedy. The families of the 650,000 innocents slaughtered in Iraq in the last five years, the thousands more who had been tortured and the millions more who have been displaced have no remedy in national or international courts.

Their country is still under brutal occupation and it is inconceivable that any Iraqi court will prosecute members of the occupation force for war crimes. US courts have no jurisdiction in Iraq and some US judges have even feigned helplessness in relation to torture and unlawful detentions in US-controlled concentration camps in Guantanamo Bay.

The ICC has been approached with 240 complaints. Its chief prosecutor, a European, has most amazingly ruled that the complaints do not have "sufficient gravity" to merit prosecution!

The Rome Statute that created the ICC has a number of flaws that prevent the horrendous war crimes, the genocide, the crimes against humanity and the crime of aggression from being prosecuted.

First, the United States did not ratify the Rome Statute. As such, US politicians and generals are largely exempt from the jurisdiction of the ICC.

British and Australian citizens belong to a ratifying state, and as such are subject to the ICC's jurisdiction but are being shielded by the ICC prosecutor because in his opinion their crimes of complicity lack sufficient gravity!

Second, for a crime to be prosecuted before the ICC, it must be committed on the territories of a member state of the ICC. Iraq and Afghanistan are not parties to the ICC Treaty and the bestialities committed there are, therefore, exempt from the ICC's jurisdiction.

Third, the UN Security Council has the power to refer a non-signatory to the ICC (as it did for Darfur). But due to its geopolitical, racial and religious bias, the UNSC will not refer US, British, Polish, Italian or Australian citizens to the ICC.

Fourth, the ICC can investigate a case only if national courts fail or are unable to investigate a case. In the United States and Britain, only low-level soldiers have been prosecuted. The fact that the orders came right from the top is being ignored by the international legal system.

The Tribunal was also unanimous in holding that over the last 50 years, international humanitarian law has developed to the point that no head of state or nation can unilaterally renounce it.

If there is a treaty, it is binding. Even if a nation is not a signatory to a treaty or claims to revoke it, it is still bound by a higher customary international law that is universal and that cannot be disowned.

National sovereignty is no more the absolutist concept it was in the Middle Ages. Today, sovereignty is a shield against foreign aggression.

It cannot be used as a sword against one's own people or the people of other nations. No nation can legislate to legalise wars, conquer territories, enslave populations or commit genocide, torture or crimes against humanity.

In the case of former president Bush there was an additional factor: in the United States, treaties are part of the law of the land.

The US president has no authority to abrogate the law of his country. Therefore, Bush's memorandum exempting the United States from the binding rules of the Geneva Convention had no force in law.

The Tribunal held that in relation to crimes against humanitarian law, the status of a head of state does not constitute a defence. Nor is it a defence to submit that one was acting under the orders of a superior; this is the law since the Nuremberg Trials.

The lifting of immunity and the principle of individual criminal responsibility are now embodied in a plethora of international laws and decisions. These include the UN General Assembly Resolution 95(1) of Dec 11, 1946; Article 13 of the Draft Code of Crimes Against the Peace and Security of Mankind (1991); UN Document No. S/25704 (1993); and Article 27 of the Rome Statute. The Tribunal has just begun its work. The road ahead is long and painful.

What is important is that there is a Malaysian initiative to remind the world that some rules of civilised behaviour bind all nations of the world, big and small. No nation of the world, no matter how powerful, can exempt its officials from the long arm of international humanitarian law.

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