Taming the waves of international criminal justice: the paradox of serving (in)justice through (un)just means and the Saddam Hussein's case[1]

by Victor Tsilonis*

Abstract: International justice is often misleadingly viewed as an autonomous, impartial and independent system left to its own devices. This view has been boldly advanced despite the unequivocal inexistence of an international democratic system which is traditionally considered in legal theory as a *sine qua non* prerequisite for justice at least at a state level. Currently, international criminal justice is purportedly still conferred more by international criminal tribunals/special courts and lessby the International Criminal Court (ICC), whose role is still undermined and its performance not yet sufficiently tested. The paper attempts to examine the cunningly overlooked role of international politics in the international justice system through one of the most recent paradigms of international criminal justice performance, namely the case of Saddam Hussein.

"The real significance is that this man has been given a *proper trial, due process was followed*. It was an *appeal that's been dismissed* and he has been dealt with *in accordance with the law of Iraq*…That's *the mark* of a country that's trying against fearful odds to embrace democracy and it's a country that deserves sympathy and support - *not to be abandoned*." **John Howard, Australian Prime Minister, following Saddam Hussein's execution**

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[1] An earlier draft of this paper was presented at the School of Law of the University of Nottingham on 24 February 2007 at the 7th International Student Human Rights Conference of the University of Nottingham on "International Criminal Accountability".

International justice is often misleadingly viewed as an autonomous, impartial and independent system left to its own devices. This view has been boldly advanced despite the unequivocal inexistence of an international democratic system which is traditionally considered in legal theory as a *sine qua non* prerequisite for justice at least at a state level.[2] Currently, international criminal justice is purportedly still conferred more by international criminal tribunals/special courts and lessby the International Criminal Court (ICC), whose role is still undermined and its performance not yet sufficiently tested.

The paper will attempt to examine the cunningly overlooked role of international politics in the international justice system through one of the most recent paradigms of international criminal justice performance, namely the case of Saddam Hussein.[3]

On the other hand, mainly due to the pompous fall of human rights and US-led shift of international politics since 11th September 2001, the analysis of the political factor in international criminal justice has become a well-known devil in the service of common sense rather than a radical approach of international law. In the same vein, while few international law scholars currently deny the applicability of politics to the international criminal law,[4] few also attempt to analyse it in depth. Yet there is still an overwhelming tendency either to teach petrified legal principles in the abstract or treat politics as a mystical backstage of social life called 'political reality', constantly infringing on international actions, hampering any good intentions and violating long-standing legal principles, while remaining largely

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[2] For a general discussion see H. Köchler (ed.), GLOBALITY VERSUS DEMOCRACY? THE CHANGING NATURE OF INTERNATIONAL RELATIONS IN THE ERA OF GLOBALISATION, (Vienna: International Progress Organisation), (2000); also H. Köchler GLOBAL JUSTICE OR GLOBAL REVENGE? INTERNATIONAL JUSTICE AT CROSSROADS, (Heidelberg: Springer), (2004), especially pp. 19-24 and 75 where he calls for the separation of powers in international level and consequently considers ICC as a 'new qualititative stage' of progress towards this direction.

[3] The ICC eventually commenced its work in 2007 when it indicted Germain Katanga and Thomas Lubanga Dyilo. Consequently the cases against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen in Uganda and Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") in Sudan opened. See ICC official webpage: http://www.icc-cpi.int/cases.html. However it seems that the case against Thomas Lubanga Dyilo might turn out as a failure of titanic proportions since the Office of the Prosecutor failed to disclose to the accused potentially exculpatory materials covered by agreements entered into pursuant to Article 54(3)(e) of the Rome Statute. See Official Document No ICC-01704-01/06 on 13 June 2008, electronically available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401-ENG.pdf. According to the ICC records 106 states have ratified the Rome Statute thus far. It is noteworthy that the last state which ratified the Rome Statute was Madagascar on 14 March 2008, while Japan proceeded to the ratification stage quite lately on 17 July 2007. See http://www.icc-cpi.int/statesparties.html (last visit on 12 June 2008).

[4] See Oscar Schachter's comment that "one must go beyond doctrine and case law into a consideration of the values to seek to promote and the political considerations that influence its development." O. Schachter, 'Comments', in 'Special Feature: The State of International Legal Education in the United States', (1988) 29 *Harvard Journal of International Law*, at 273.

unexamined.[5] Hence, politics appear like a prompter who has ended up dictating line by line the whole script to the theatre's forgetful actors playing on stage.

It does not suffice merely to notice that international law is created by states, that states are political beings with their own political and economic interests, and that therefore international law is inevitably political. The more intriguing question remains: what or whose politics is it or should it become? This question tends to remain unanswered.

Moreover, one may question what do all these really mean for those stubbornly interested in international law apart from the fact that international law is a powerful tool of global governance? One answer is that we should not allow ourselves to give in to the imperatives of the current preordained reality or be converted from 'potential global citizens to Hobbesian cynics',[6] but should persist in seeking old or new utopias which will make our world better.

Although more people now than ever before agree with the truism that law is politics by other means, we should focus on articulating an actual politics that might animate international criminal justice in a novel way. What sort of politics might this be? They can be best illustrated by reference to a series of questions we rarely ask and perspectives we rarely examine. We should engage almost instantly with the law's 'political shadow'.[7] What exactly is this creature called 'international community'? How are its interests articulated normatively? Do all states constitute the 'international community' or only the most powerful or 'visible' or 'famous' ones?[8] Whose values dominate the international law system and why? What can we learn of the practice of the Saddam Hussein's state, the Milosevic's era, the Indonesian experience of colonialism, the Greek dictatorship period, the USA global governance? How does this system essentially affect me and my fellow English, Greek, German, Polish or European nationals? These are some of the too often unasked and consequently unanswered questions of international law.

Hence, it is particularly important that we embrace an alternative politics in such a crisis period of the international law system. It is during precisely such times that the scholar as moral agent must resist funding and objectively inform the practices of the lawyer as

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[5] G. Simpson, 'On the Magic Mountain: Teaching Public International Law', (1999) 10(1) *European Journal of International Law,* 70-92, at 84.
[6] *Ibid.*, at 85.
[7] *Ibid.*
[8] If one can accept that this is a meaningful term, since this term is practically utilised in order to depict the views and decisions taken by the most powerful states in the world, i.e., the member-states of the Security Council or G8.

professional. We should not surrender neither to any *Realpolitik* demands nor to the well-served theories of globalization which have been widely accepted as merely depicting a new inescapable political reality.[9]

But it's now time we turned –after this relatively brief introduction on the relation between politics and international criminal justice, which aimed at placing international criminal justice under the prism of politics- our attention to the case of Saddam Hussein in Iraq. In order to transfer ourselves there from the political arena we will utilise a classic theoretical approach albeit through a non-classical course. In too many treatises and essays, the jurists of international criminal law commence their writings under titles such "from Nuremberg to The Hague", "from Versailles to The Hague", "from Versailles to Rwanda", "from Tokyo to Baghdad" etc., because they set as landmarks certain events of international criminal justice.

Nonetheless, I have selected a less shiny course to move to Iraq and the Saddam Hussein's case. Thus, we will be transferred to Iraq from Guantanamo with one of the CIA secret airplanes[10,11] along with the lucky 379 ex-Guantanamo prisoners who have been liberated thus far, since I consider that this is the best alternative course available.[12]

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[9] I. Clark, GLOBALISATION AND FRAGMENTATION: INTERNATIONAL RELATIONS IN THE TWENTIETH CENTURY, (Oxford: Oxford University Press), (1997) and also the minutes of 'Symposium: The Changing Structure of International Law Revisited', printed in three consecutive issues of European Journal of International Law: (1997) 8(3) *European Journal of International Law*, pp. *399-448,* (1997); 8(4) *EJIL*, pp. *545-595*; (1998) 9(1) EJIL, pp. 2-31

[10] Following concerns that European states and their airspace were used by the CIA for the transportation and illegal detention of terrorist suspects, the European Parliament set up a Temporary Committee on the alleged use of European countries by the CIA for illegal activities (TDIP) on 18th January 2006 to look closer into CIA's aforementioned activities as well as any member-state's involvement. See *Texts Adopted*, P6_TA(2006)0012. See also the statement of Giovanni Claudio Fava, an Italian Socialist MEP and rapporteur for the CIA enquiry committee, *MEPs Demand Clarification on Secret CIA Detention Centres,* EUROPEAN PARLIAMENT OFFICIAL WEBSITE,http://www.europarl.europa.eu/news/public/story_page/017-10609-257-09-37-902-20060913STO10607-2006-14-09-2006/default_en.htm, last visit on 16 February 2007.

[11] On 6th September 2006 President Bush admitted for the first time that the CIA has been holding "a small number of suspected terrorist leaders and operatives" in secret prisons and announced that 14 detainees, including the alleged mastermind of the 9/11 attacks, Khalid Sheikh Mohammed, were transferred to Guantanamo Bay. President Bush stated also that the secret CIA detention programme will continue to exist, even with no-one officially in custody now, because it "will continue to be crucial to getting life-saving information", but categorically denied any torture allegations. It must be noted that while the United States have eventually allowed the International Committee of the Red Cross to gain access to Guantanamo Bay, have not done the same to any secret CIA prisons. *Questions & Answers: Bush and CIA Secret Prisons*, BBC NEWS, 6 September 2006, http://news.bbc.co.uk/2/hi/americas/5321986.stm, last visit on 17 February 2007. As far as what does the secrecy mean one can recollect D. Chandler's words: "Like the Nazi extermination camps and the Argentine torture facilities, S-21 was a secret facility, and the need for secrecy influenced much of what happened inside its walls. The prison existence was known only to those who worked or were imprisoned there and to a handful of high ranking cadres, known as the Part Center…Interrogators, clerks, photographers, guards and cooks at the prison were forbidden to mingle with workers elsewhere, and the compound soon earned an eerie reputation. A factory worker in a nearby compound, interviewed in 1989, referred to S-21 as "the place

According to the European Parliament's final report[13] on illegal CIA activities in Europe, which was adopted on 14th February 2007, it has been estimated that over one thousand two hundred forty five (1245) CIA-operated flights used European airspace from 2001 to 2005 for transferring illegally terrorist suspects,[14] while additionally the Parliament expressed its deep concern because "in some cases, temporary secret facilities in European countries may have been located at US military bases".[15] Last but not least, the European Parliament deplored European states[16], officials of the highest rank[17] and institutions[18] for their evident lack of cooperation and concealment of relevant information.

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where people went in but never came out." D. Chandler, VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON, (Berkeley: University of California Press), (1999) p. 7.

[12] From the 775 tortured prisoners who have been at the camp since 11 January 2002, almost half of them, namely 379 prisoners, have been up to now released, while only 75 from the remaining are likely to face military tribunals pursuant to the Military Commissions Act 2006. For the rest, there is the fruitful prospect of indefinite detention without trial. From a countless sea of articles see P. Reynolds, *"Guantanamo-Black Hole or Vital Tool?",* BBC NEWS, 21 February 2007, http://news.bbc.co.uk/1/hi/world/americas/6241123.stm, (last visit on 22 February 2007).

[13] It must be noted that European Parliament is an organ which does not have true political power but can merely make recommendations.

[14] An unspecified number of military flights for the same purpose should be added to the above number. See European Parliament, FINAL REPORT ON THE ALLEGED USE OF EUROPEAN COUNTRIES BY THE CIA FOR THE TRANSPORTATION AND ILLEGAL DETENTION OF PRISONERS, A6-9999/2007, PE 382.246v02-00, para. 42.

[15] *Ibid.,* para. 151 but see also paras. 154, 163, 174, 178 and 216.

[16] The United Kingdom being notably one of them. See *ibid*, para. 67 where it is stated that the European Parliament "[d]eplores the manner in which the UK Government, as represented by its Minister for Europe, cooperated with the Temporary Committee; is extremely surprised at the letter of the Minister sent to Parliament's President". See also para. 50, about Italy where the European Parliament "[c]ondemns the extraordinary rendition by the CIA of the Egyptian cleric Abu Omar, who had been granted asylum in Italy and who was abducted in Milan on 17 February 2003, transferred from Milan to the NATO military base of Aviano by car, and then flown, via the NATO military base of Ramstein in Germany, to Egypt, where he has been held *incommunicado* and tortured ever since". The European Parliament is considerably milder to other states such as Greece, where serious concerns are simply expressed "about the 64 stopovers made by CIA-operated aircrafts at Greek airports" and only "the stopovers in Greece of aircrafts which have been shown to have been used by the CIA, on other occasions" for the extraordinary rendition of suspects are deplored. It is quite surprising though that no referral is made to the alleged 28 Pakistan abductions that took place in July 2005 in Greece. Arguably, one could contend that this was out of scope of the European Parliament's Report since officially MI6 and not CIA cooperated with the Greek Secret Services for the abductions. See biggest Greek news portal In.gr about the Prosecutor of the State supporting Pakistanis' claims and his pre-trial findings http://www.in.gr/news/article.asp?lngEntityID=705252; see also *Greece to Probe Abduction Claims,* BBC NEWS, 13 December 2005, http://news.bbc.co.uk/1/hi/world/europe/4526502.stm, and *Call for MI6 'abduction' Inquiry*, BBC NEWS, 29 December 2005, http://news.bbc.co.uk/1/hi/uk_politics/4566252.stm, (last visit on 17 February 2007).

[17] Including the former and current Secretaries-General of NATO, Lord Robertson and Jaap de Hoop Scheffer, *ibid,* para. 34, the Director of the European Police Office (Europol), Max-Peter Ratzel, *ibid.,* para. 29, and the Secretary-General (and High Representative for the Common Foreign and Security Policy) of the Council of the European Union, Javier Solana, about whom is stressed that he omitted in the statements made to the Temporary Committee to reveal crucial information regarding the Council's discussions and knowledge of the methods used by the United States in its campaign against terrorism, *ibid.,* para. 27.

[18] See for example *ibid.,* paras. 7, 13 and especially 25.

Questions arising while examining

the Saddam Hussein case:

Why did the first and second Iraq invasions take place?

Why was he tried for the lowest of gravity offence comparable to the others allegedly committed by him and about which there were no ample evidence?

Why was he executed before being tried for other grave crimes such as the Kurdish genocide, known as the 'Anfal Campaign'?

Where there any fears that the so-called respectable 'international community' might be found indirectly or directly involved in any bigger Saddam-related case?

Why did the trial take such an awful turn? (at least three defence lawyers killed, the presiding judge was forcefully replaced, two other judges resigned etc.)

Why did the death penalty was enacted once again shortly before his trial but contemporaneously all the death-row inmates were given pardon?

How hypocritical and damaging for justice is it to constantly proclaim that we seek justice?

The Case of Saddam Hussein or

One of the last Waves of International Criminal Justice

The United Nations Security Council Resolution 1483, passed in May 2003, provided the first official international recognition of the status of the United States and the United Kingdom as occupying powers in Iraq[19] and provided an *ex post facto* legitimacy for the invasion. As the insurgency escalated, L. Paul Bremer III, a career diplomat in the US Department of State and an expert on terrorism, was appointed on May 2003 chief administrator of the Coalition Provisional Authority (CPA) in Iraq. Bremer's duty was officially to unravel the 'Gordian Knot' of the demolished Iraq and steer it towards a new promising and democratic future.[20] In addition to rebuilding wonderfully Iraq's economy and society, Bremer had also to deal with an alleged demand for justice from various ethnic and

[19] Security Council Resolution (S.C. Res.) 1483, U.N. Doc. S/RES/1483, on 22 May 2003).

[20] E. Stover *et al,* 'Bremer's "Gordian Knot": Transitional Justice and US Occupation in Iraq', 27.3 (2005) *Human Rights Quarterly* 830-857, at 831.

religious groups after thirty-five years of iron-hand rule and large-scale human rights violations.[21]

The very first democratic measure Bremer took during his "struggle to build a future of hope"[22] in order to bolster unity amongst Iraqi people was the introduction of a de-Ba'athification program on 16 May 2003, which aimed at removing all Ba'ath Party members from their positions of authority and indeterminately banning them from any employment in the public sector.[23] The obvious inference that, unless an equilibrium could be found between bringing those responsible for past crimes to justice and achieving unity and solidarity amongst the various ethnic and religious groups, Iraq would face the danger of further bloodshed and be mutated into a terminally crippled state remained comfortably unnoticed, probably because it fell outside the purported aims of the Coalition Provisional Authority. The grand plan named 'Success in Failing' had only just begun and did not certainly include the stabilisation of Iraq.[24]

A few months later, another decree issued on 10 December 2003 created the Iraqi Special Tribunal for Crimes Against Humanity (IST) responsible to try exclusively Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes and other violations of strictly stipulated Iraqi laws committed recently, i.e., from 17 July 1968 to 1 May 2003.[25] By pure coincidence Saddam Hussein was announced to have been captured a few days after the decree's issuance.[26] According to Article 14 of the relevant statute the strictly stipulated Iraqi laws which fell within the prosecutorial ambit of the Iraqi Special Tribunal were: "a) For those outside the Judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, *inter alia*, of the Iraqi

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[21] *Ibid.,* at 832.

[22] L. Paul Bremer III & M. McConnell, MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE, (New York: Simon & Schuster), (2006) is actually the imaginative title of the book he wrote after returning from Iraq in June 2004.

[23] See Coalition Provision Authority Order No. 1, *De-Ba'thification of Iraqi Society,* CPA/ORD/16 May 2003/01; see also Coalition Provision Authority Order No. 13 (Revised), *The Central Criminal Court of Iraq,* CPA/ORD/18 June 2003/13 both of them available at www.cpa.gov/government/governingcouncil.html. (last visit 10 February 2007). Even McArthur might have envied Bremer for his innovative and decisive actions.

[24] I do not believe either that U.S. has failed to implement its peace plans through war, bombardment and invasion in Iraq or that the US forces had had any success in establishing peace and unity in Iraq thus far. I hold the view instead that peace was never in the US agenda and that US was successful at achieving its aim in creating a havoc in Iraq. The plan of dismantling Iraq has gone pretty fine thus far, although it is dubious whether Iraq will be eventually split into three different states.

25 CPA Order No. 48, *Delegation of Authority Regarding an Iraqi Special Tribunal, available at* www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf. (last visit on 10 February 2007).

[26] M. P. Scharf, Is it International Enough? A Critique of the Iraqi Special Tribunal in the Light of the Goals of International Justice, (2004) 15 (2) *Journal of International Criminal Justice*, pp. 330-337, at 330.

interim constitution of 1970, as amended; b) The wastage of national resources and the squandering of public assets and funds, pursuant to, *inter alia*, Article 2(g) of Law Number 7 of 1958, as amended; and c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended".[27]

It goes almost without saying that this arbitrary inclusion of merely three criminal offences of the existing Iraqi law was clearly intentional and 'photographic' of the so-called Coalition Provisional Authority's intentions to prosecute Saddam Hussein along with the other 38 (the playing cards shown 55 persons in total but presumably the rest died, disappeared or cooperated during/after the invasion) detained high-executive officials of the former regime, who appeared in the US-issued deck of Iraqi fugitive 'playing cards'[28] and had ceased long ago being useful to the American interests.[29]

Nonetheless, due to eloquent concerns that the Iraqi Special Tribunal for Crimes Against Humanity (IST) would continue to be perceived as an American creation, the Iraqi government decided in a quasi-tricky way to enact Law No. 10 (on 10 August 2005), which dissolved the IST and instituted the Iraqi High Tribunal (IHT),[30] by practically copying the mandate of the IST for the newly established and independent from the Coalition Powers Iraqi High Tribunal (IHT).[31]

At this point it seemed clear more than ever before that the coalition states would eventually take out of the official drawers a modified version of the 1990 plan George Bush the first and Margaret Thatcher had made, namely the establishment of an international tribunal with jurisdiction over war crimes and international humanitarian law to try Saddam Hussein and other high officials.[32] At that time the possibility of bringing Saddam Hussein to trial was for some mysterious reasons forgotten after the easy win of the American-led

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[27] *Ibid.*
[28] *Ibid*.
[29] For a rare exception to the general norm of Americans' implicit trust in their political leadership and acceptance of war's inevitability, see W. Hamelson, 'I'm an American Tired of American Lies', THE GUARDIAN**,** G2, 17 October 2002, who does not mince his words: 'I am a father, and no amount of propaganda can convince me that half a million dead children is acceptable "collateral damage". The fact is that Saddam Hussein was our boy. The CIA helped him to power, as they did the Shah of Iran and Noriega and Marcos and the Taliban and countless other brutal tyrants".
[30] Law No. 10 (2005), Law of the Iraqi Higher Criminal Court, 47 Al-Waqai Al-Iraqiya 2-23 (Oct. 2005, Iraq).
[31] That's the conclusion one can easily reach if one compares the Statute of the Iraqi Special Tribunal (arts. 1-38, 47 Al-Waqai Al-Iraqiya 127-148 (Mar. 2004) (Iraq), with Law No. 10 of the Iraqi Higher Criminal Court (arts. 1-40, 47 Al-Waqai Al-Iraqiya 2-22 (Oct. 2005, Iraq). The Iraqi puppet-government's attempt of manipulation reminds me of an old Greek proverb: 'Joe has changed today; he wears his clothes upside down'.
[32] W. A. Schabas, 'United States Hostility to the International Criminal Court',(2004) 15 *European Journal of International Law*, 701-720 at 707.

coalition in the Gulf War and the American officials meetings with Saddam Hussein,[33] despite some European opposition.[34] The period of scholarly discussions on the possibility that Saddam Hussein could be tried by ICTY,[35] ICC[36] or another special international criminal tribunal had now officially ended.[37]

Eminent American scholars like Michael Scharf felt confident to predict that "[a]mong the crimes most likely to be prosecuted are the genocidal Anfal campaign against the Iraqi Kurds, which resulted in the deaths of over 100,000 civilians and the destruction of more than 4,000 villages; the use of chemical weapons against Iranian troops and Kurdish civilians during the Iraq-Iran war; the 'disappearance' and executions of hundreds of thousands of Iraqis; the and the destruction and repression of the Marsh Arabs".[38] However, these predictions were doomed to be refuted by the inexorable reality, simply because the well-intended, respectable authors did not take into account neither the US interests nor the good possibility that some of the global powers might have participated unofficially in the Iran-Iraq war by providing requisite funds, weapons and military know-how to the Iraq's kind governor; consequently, they could not be particularly happy if Saddam Hussein was tried for any crimes related to their compassionate activities towards his regime.

A number of unfair criticisms followed the establishment of the impartial Iraqi High Tribunal (IHT). Some scholars became overtly strict and suddenly asserted that the tribunal's statute was suffering from legal schizophrenia, simply because it combined international crimes drawn from the latest advances in international criminal law with

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[33] Sciolino, 'U.S. Figures It Wants Charged With War Crimes', NEW YORK TIMES, 17 December 1992, 'When Saddam Is Brought to Court', THE TIMES, 3 September 1990.

[34] Letter by President-in-Office of the Council, Jacques Poos, to the Secretary-General of the United Nations, Perez de Cuellar, 16 April 1991, reproduced in International Criminal Tribunal for the formerYugoslavia, *The Path to The Hague* (2001), at 16-17. Schabas also notes that Genscher also proposed the same in a speech delivered at the University of Ottawa when he was awarded an honorary degree on 27 September 1991, *loc. cit.,* at 707, fn. 29.

[35] See Victor Tsilonis interview in the biggest Greek Newspaper ELEYTHEROTYPIA, "I could try Saddam" (abridged version); the full interview was reprinted in ADVOCATE, (University of Nottingham, School of Law magazine) Winter 2005, pp. 44-49 and is also electronically available at http://www.intellectum.org/gb_themata.htm.

[36] M. R. Kropko,'International Court's Canadian President Says Court Can't Try Saddam', CBC NEWS, 7th November 2005, currently available at http://www.globalpolicy.org/intljustice/tribunals/iraq/2005/1108icc.htm, (last visit on 16th June 2008).

[37] It seems that (having taken the US opposition against ICC operation for granted) there were similar control-related fears regarding the establishment of another special international tribunal. Nonetheless, certain Americans journalists endorse that the decision to hold Hussein's trial in Iraq was made partly in order to avoid the failure of Milosevic trial and partly because the U.N. Security Council – allegedly led by France, Russia and China - told the Iraqis organizing the trial that it did not wish to get involved. See A. Applebaum, 'Justice in Iraq: How to Judge the Trial of Saddam Hussein', WASHINGTON POST, 7th November 2006, page A21.

[38] M. P. Scharf, *loc. cit.,* fn. 25, at 330.

jurisdiction to bring charges only cognizable under Iraqi law, and inserted Iraqi judges and prosecutors into proceedings modelled for the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR respectively), which were located safely at The Hague and possessed much more resources.[39]

Another reason of unfair criticism was that it too bluntly appeared to some prejudiced persons as a pseudo-judicial system serving victor's justice. These persons dared to found their arguments on the fact that Iraqi High Tribunal (IHT) was not created by the Security Council like the ad hoc tribunals (ICTY, ICTR), had not otherwise secured UN sanction (like the hybrid tribunal in Sierra Leone), and was evidently not the product of any multilateral interstate treaty (like the International Criminal Court (ICC)). Moreover, the inconsiderate criticisms were launched into its alleged lack of a proper legitimating power, i.e., a power conferred by a fully sovereign, independent government and its people. Its establishment, by special permission of the kind Governor, L. Paul Bremer III, supposedly denied the legitimacy of other localized accountability efforts, such as the establishment of truth commissions and victim compensation schemes[40] or even more innovative attempts such as the Gacaca-style proceedings in Rwanda.[41]

Additionally, unjustified doubts were also raised about the evenness of the Tribunal's playing field as between prosecution and defence. Although its Statute formally extended most of the international guarantees now routinely given to criminal defendants before both national and international tribunals, it was criticized for imposing criminal liability at least for some offences which were legally defined after 17 July 1968 and thus violating the much contested *nullum crimen sine lege* principle.[42] Furthermore, it was aggressively attacked because it omitted some insignificant international guarantees for defendants and their counsel. And, regardless of the letter of the Statute, many heretically questioned the feasibility of fair or impartial trials within a society that was still swept by lethal violence

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[39] J. E. Alvarez, 'Trying Hussein: Between Hubris and Hegemony', (2004) 15(2) *Journal of International Criminal Justice, pp. 319-329,* especially p. 319 where he refers to other scholars as well such as Scharf and Zolo.

[40] M.C. Bassiouni, "Post Conflict Justice in Iraq: Is the Glass Half-Full, Half-Empty, or Is It a Phyrric Achievement?" in M. P. Scharf and G. McNeal (eds.), SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL, (Durham: North Carolina Press), (2006), pp. 245-252.

[41] http://en.wikipedia.org/wiki/Gacaca_court

[42] As far as the Iraqi law crimes are concerned these would probably fall within the ambit of the Statute of Limitations for most national legal orders. In any case, it is not plausible to suggest that some of the crimes now included before the Iraqi Tribunal, such as deportation (characterized as a crime against humanity under its Art. 12(4)) and explicitly defined for the first time in the Rome Statute of the International Criminal Court in 1998, was regarded as such a crime in 1968.

(particularly directed at institutions and persons regarded as cooperating with the 'coalition forces'), had had little experience in handling complex criminal cases, had relative few adequately trained international jurists, and had yet to overcome a corrupting Ba'athist legacy.[43] Last but not least, it was blatantly endorsed that the restriction of trying only Iraqi nationals would mean, of course, that this Tribunal will not provide an account of any possible American or British war crimes during Operation Iraqi Freedom, if one could ever rationally assume that War Crimes can take place during global operations of Freedom *(white phosphorus in Falluja?)*.[44] .

Notwithstanding these unjust remarks, on 19th October 2005, the SICT (renamed as IHT shortly after) began prosecuting Saddam Hussein, who was firstly accused only of the massacre of 148 people at al-Dujail, namely one of the least contested and most important charges Saddam Hussein could ever face.[45] Saddam pleaded not-guilty as two out of his seven co-defendants, Barzan al-Tikriti, Saddam Hussein's half-brother and former head of Iraq's intelligence service and Awad Hamed al-Bandar, former Revolutionary Court chief judge also did.

While other well-respected scholars like Michael Bohlander,[46] started writing on whether the imposition of death sentence to Saddam Hussein was legally permissible, they were soon placed in an uncomfortable situation when they learned –some of them after having sent their paper on the imposition of Saddam Hussein's death to the publisher- that the US-appointed Iraqi Council had amended the law and re-established death penalty in order Saddam Hussein to be executed shortly after his forthcoming at that point conviction. It must be highlighted that strangely enough the amendment annulled all death penalties imposed on convicted felons thus far and substituted them with the sentence of life imprisonment. Certainly we might never find out whether this was part of a secret deal serving some kind of useful purpose, e.g. the crucial information provided by a death-row inmate in order to arrest Saddam Hussein. Once again, it clearly appears that the

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[43] J. E. Alvarez, *loc. cit.*
[44] T. Pfanner, 'Interview with Fergal Keane', (2005) 87 *International Review of the Red Cross* 611-619, at 617.
[45] About the brilliant reasons of this awkward decision see M.P. Scharf, *Does it Make Good Sense to Start with the Dujail Case, Rather than a Greater Atrocity Like the Anfal Campaign* in M.P. Scharf & G. McNeal (eds.), *op. cit.*, pp. 83-84.
[46] M. Bohlander, 'Can the Iraqi Special Tribunal Sentence Saddam to Death?', (2005) 2 *Journal of International Criminal Justice*, pp. 463-468.

'metaphysics' of international criminal justice made their presence known at this point as well for the curious international scholar.[47]

On Tuesday 14 February 2006 the court session started with shouting and defiance from the defendants; Saddam Hussein announced that he and his seven co-accused had been on hunger strike for three days in protest at the court's behaviour towards them. Contemporaneously, Saddam Hussein's half-brother, Barzan Ibrahim al-Tikriti, continued appearing dressed in long underwear for the second consecutive day trying to demonstrate his rejection of the court.

Nonetheless, the aforementioned events seemed to be only the tip of a monstrous judicial iceberg solidly formed by the murder of at least three defence lawyers during the trial[48] (which in turn led the defence counsel to the extraordinary decision not to make any closing arguments), the resignation of two at least judges and the removal of the presiding judge due to political US-led pressures shortly before the Court's decision.[49]

Sending Saddam to gallows did not remove a defiant symbol for Sunni insurgents but actually created a martyr to spur them to greater efforts (and the 'informal' footage of his execution did offer an invaluable assistance to this end). His execution by what is seen by too many as a US-backed Shia puppet regime was truly a grist to the mill of both Sunni Arab nationalists and Islamists elsewhere and set back for good any faltering reformist efforts.

The prior regime left thousands of government opponents executed, more than 300,000 missing and most probably dead, thousands of towns and villages levelled, all dissent voices straggled, and hundreds of thousands internally displaced or luckily living in

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[47] An often-ignored but bothersome issue one meets soon after commencing his/her studies on international criminal justice is the fact that too many elements, functions and operations of international criminal justice, which are interrelated with international politics, are shrouded into secrecy. Hence, no one who has worked as an intern or a permanent staff of an international court or organisation can publish anything based on information from confidential documents without permission and –guess what- the vast majority of the documents one reads during his post in an international organisation, criminal court or tribunal is characterised as confidential, whether it is actually confidential or not. Another characteristic example was the International Committee Red Cross' proud announcement in 2004 that its records will remain now closed for only 40 years, implying that this was a great progress from its previous 'sixty years secrecy' standard. (See J.-F. Pitteloud, 'The International Committee of Red Cross Reduces the Protective Embargo on Access to its Archives', (2004) 86 *International Review of the Red Cross,* pp. 958-962, electronically available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692FY8/ $File/irrc_856_Pitteloup_Eng.pdf (last visit on 16 June 2008). Consequently, one cannot but too often merely speculate about what has happened or inescapably trust academic or other sources without having any guarantee that their offered explanations are always trustworthy or good intended. This problematic phenomenon is what I consider as the 'metaphysics of international criminal justice'.

[48] M. Newton, *The Defence Boycott of the Defence Closing Arguments* in M. P. Scharf and G. McNeal (eds.), *op. cit.*, fn. 40, pp. 149-150.

[49] R. Brown, *The Significance of the Kidnapping/Murder of Defence Counsel* in M. P. Scharf and G. McNeal (eds.), *op. cit.*, fn. 40, pp. 123-125; *contra* M. Scharf, *The Significance of the Kidnapping/Murder of Defence Counsel* in M. P. Scharf and G. McNeal (eds.), *op. cit.*, fn. 40, pp. 121-123.

exile abroad. The fact that Saddam Hussein was never actually brought to trial for any of his infamous crimes such as the Anfal campaign in 1988[50] or the illegal use of chemical weapons against the Iranian army[51] but was actually sentenced to death and consequently executed for one of the most ambivalent and less important crimes that could be attributed to his brutal regime cannot serve justice but feelings of crude retribution and can only further injustice and civil clashes in the long term. Consequently, the death of Saddam will not allow us even the tiny possibility to learn in full the details of his dreadful crimes, such as the Anfal campaign, the crushing the Shia and Kurdish rebellions in 1991, the invasion of Iran and Kuwait, the illegal use of chemical weapons against the Iranian army etc.

All three were sentenced to death by an Iraqi court on 5 November 2006 after a year-long trial. The former president Saddam Hussein was executed 56 days after the death sentence was passed, after Iraq's highest court rejected an appeal on 25 December 2006, while his two co-defendants were executed separately a few days later. Only to make matters worse for the already devastated conferment of justice the ghastly video with the Saddam Hussein's execution was mistakenly released and made swiftly its trip around the globe.Quite predictably this fact provoked jubilant scenes in Shia and Kurdish areas which were matched by equally predictable anger in Saddam's hometown of Tikrit in the Sunni heartlands and in Sunni quarters of Baghdad.

"The principal source of State preferences and constraints is internal rather than external. The strength and intensity of State preferences, determined as an aggregation of individual and group actors' preferences represented in a particular state, will determine the outcome of State interactions".[52] Despite the fact that this inference has been contested by many international scholars and lawyers, in the case of the recent US politics, consequent human rights abuse and turbulence in various forms of the international criminal justice system (Saddam Hussein and 'CIA Airways' cases most recently) this claim appears stronger than ever, especially when one recalls the last US Supreme Court decisions on

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[50] See Human Rights Watch, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS, (New York: Human Rights Watch), (1993).

[51] British army used white phosphorus in Falluja, another war crime accidentally documented years later by an Italian television crew of RAI whose perpetrators will never probably face justice. See A. Buncombe and S. Hughes, *The Fog of War: White Phosphorus, Fallujah and Some Burning Questions,* THE INDEPENDENT, 15 November 2005, electronically available at: http://www.independent.co.uk/news/world/americas/the-fog-of-war-white-phosphorus-fallujah-and-some-burning-questions-515345.html and *US 'Uses* Incendiary *Arms in Iraq'*, BBC NEWS, 8 November 2005,electronically available at http://news.bbc.co.uk/2/hi/middle_east/4417024.stm (last visit on 16 June 2008).

[52] A. M. Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations', (1994) 4 *Transnational Law and Contemporary Problems* 377-396, at 396.

Guantanamo Bay.[53] The same can be noted for United Kingdom where the House of Lords has consistently followed the footsteps of The Privy Council in *Ibrahim v The King*[54] in *A (FC) and others v Secretary of State for the Home Department (2004)*[55] as Canada following the recent decision of the Supreme Court of Canada in the case of Charkaoui *v.* Canada.[56,57]

Nonetheless, despite the above inferences, there are still academics who feel quite astonished when they admit that "such specially created courts will inevitably lack a certain amount of legitimacy because international criminal law has not yet achieved the same recognized validity that national criminal courts possess".[58]

There are four quite obvious interpretations of my paper's title[59] but there is also a fifth more hidden one. Hence, despite the fact one can arguably claim that we live in an era where words have lost their meaning, I have indirectly attempted to present you a paper where the multiplicity of the words' meaning is revealed so that one can more easily decide the kind of meaning one would like to attribute to words like 'international criminal justice', 'international law', 'impartial tribunal', 'international politics', 'just or unjust means', according to one's beliefs, social and political predispositions and convictions.[60]

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[53] *Hamdi v Rumsfeld,* 542 US 507 (2004) 124 S Ct 2633, 2655 (2004).

[54] *Ibrahim v The King,* Privy Council Appeal No 112 of 1913 (6 Mar. 1914), (from the Supreme Court of Hong Kong), para. 18.

[55] *A (FC) and others v Secretary of State for the Home Department (2004); A and others (FC) and others v Secretary of State for the Home Department (Conjoined Appeals)* [2005] UKHL 71 (8 December 2005). It was ruled that abductions and incommunicado detention is 'unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice".

[56] *Charkaoui v. Canada* (Citizenship and Immigration), 2007 SCC 9. The Supreme Court of Canada with an unanimous 9-0 ruling decided that indefinite decisions infringe on the Charter of Rights and Freedom, Canada's Bill of Rights. Nonetheless, the Supreme Court of Canada took also the extravagant step to suspend its decision for a year in order to provide ample time for the executive branch to adapt their practice to the ruling. Because of this suspension it is yet unclear whether those detained will be released or kept detained for another year!

[57] But see also the role of the UN Committee Against Torture and its decision in Agiza v Sweden (2005), CAT/C/34/D/233/2003, 24 May 2005, especially para. 13.8.

[58] A. M. Danner & J. S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', (2005) 93 *Cal. L. Rev.* 75 et sub., 96-97.

[59] Which clearly stem from the reader's decision to exclude or include any or all the words in brackets. Certainly one of the four possible interprations, i.e serving justice through just means arguably contradicts the word paradox and thus should be excluded; alternatively if one could accept that such a paradox exist then this connotes one's acceptance that usually justice is served through unjust means.

[60] Other scholars like Robert Cryer seem to agree with this 'subjective view' when they state that "There are a number of different understandings of the content of 'international criminal law'. There is no single right answer as to what is included in 'international criminal law': the phrase may mean different things to different people". R. Cryer, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL LAW REGIME, (Cambridge: Cambridge University Press) (2005), p. 1.

So it might be truism but still is true that 'law is politics' as one of the leading American textbook in international law acknowledged from its very beginning.[61] And it seems that in our era international justice is international politics (which in turn quite crudely still means US politics) more obviously than before.

Hence, it cogently appears that what used to be -at least during the 20th century- the shadow of law (politics), has once again abandoned its beautiful disguise and become again the Law by overthrowing in its shadow the law. Meanwhile, during this course of events it seems that the national courts -for reasons primarily related to their foundation and tradition- have proved to be more resistant in upholding the rule of law and protecting citizens' rights.

So, which course of action should one take? There are no single answers, definite plans or panaceas to the thorny problem of taming the waves of international criminal justice but one thing is certain: we need to obstruct politics as much as we can from getting in justice's way, we need to bring more law in International Law and demand for the maximum possible degree of transparency from states as well as international organisations (such as the Red Cross) and institutions.

Clearly, the role of the international scholars as well as lawyers is crucial for achieving the above aims; on the one hand through influential articles and books about the role of law in international law and on the other hand through uncompromising legal practice. In short, taming the waves of international justice is a case it rests heavily upon our shoulders to be resolved fairly.

[61] L. Henkin, R. C. Pugh, 0. Schachter and H. Smit, INTERNATIONAL LAW, CASES AND MATERIALS (St. Paul: West Publishing Group), (3rd ed., 1993).