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SYMPOSIUM: "LESSONS FROM THE SADDAM TRIAL"*

THE POISONOUS PRECEDENT: HOW THE IRAQI SPECIAL TRIBUNAL
UNDERMINES INTERNATIONAL LAW

*Paul Wolf**

On October 6, 2006, the Frederick K. Cox International Law Center sponsored a public symposium reflecting on the successes and failures of the Saddam trial. The following transcribed speech is excerpted from the day-long event.†

TRANSCRIPT:

I would like to thank Professors Bassiouni, Sharf, Ellis, Shabas, and Newton who invited me here. It shows the open-mindedness of the chairs of this symposium that they invited someone with an opposing view. And I really mean that. I will do my best. I am Paul Wolf, an attorney in private practice in Washington, D.C. Let me start by saying I am not a member of the president's defense team. The Iraqi lawyers have no idea who I am. I have helped Curtis Doebbler and Ramsey Clark in defending the Iraqi president, and this is the perspective that I can share with you today.

I think there are about twenty speakers today. I am the only one arguing for the defense. I only have twelve minutes, so I will have to be brief. I will start by making a proposal for you to consider. It has three parts. Number one: America apologizes for the war in Iraq. Number two: Saddam Hussein is reinstated as president. Number three: in return, the president agrees to restore order. He is the only person in the world who can do it. The U.S. should get out of there.

Please think about that while I use the balance of my time pointing out the main problem with this trial. And then I hope you'll ask me questions in the sessions that follow. I titled my talk *The*

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† A webcast of the symposium, in its entirety, may be viewed online at http://law.case.edu/centers/cox/content.asp?content_id=90.

Poisonous Precedent because I think that is the main issue. What kind of precedent will this set for the future? If this is the trial of the century, as some of you are saying, what kind of a century will it be? A century of war?

I hope it is clear that Iraq did not have weapons of mass destruction. Iraq did not have a nuclear weapons program. Iraq was not supporting al Qaeda. Iraq was not behind the attacks of September 11. Iraq had been blockaded for twelve years and could not threaten the United States in any way. In 1991, after the Gulf War, the United States and Iraq agreed to a ceasefire. The terms were set forth in UN Resolution 687. Iraq never violated them. This ceasefire was still in force when the U.S. attacked Iraq in March of 2003.

Under Chapter VII of the U.N. Charter, only the Security Council can authorize military attacks to enforce U.N. resolutions. Otherwise, the use of military force is only permitted in self-defense. The Security Council did not authorize the U.S. war in Iraq. If you do not believe me, ask Vladimir Putin. Ask Jacques Chirac. Ask Jiang Zemin, the Chinese prime minister. All of them opposed the American attack. On March 5, 2003, France, Germany, and Russia issued a joint statement vowing to block any U.N. resolution authorizing the use of force. Two weeks later, America began the shock and awe bombing campaign. People claim that the U.N. Security Council authorized the shock and awe, and the deaths of thousands of people. It did not.

Now, you all know that international agreements, like U.N. resolutions and treaties, are interpreted as contracts between states. You look at the objective intent, the meeting of the minds, in this case among the members of the Security Council who signed Resolution 1441. Three permanent members said they never authorized the use of force. Russia, China, and France each have a veto. John Negroponte, the U.S. ambassador to the U.N., said Resolution 1441 contained no "hidden triggers" and no "automaticity" with regard to the use of force. That was John Negroponte who said that. There's the objective intent. Of course, you should also look at the plain language of the resolution itself. It did not authorize the use of force. It made references to "consequences" and "serious consequences" but said nothing about a U.S. attack.

The International Court of Justice has held that preemptive attacks violate customary international law as well as the U.N. Charter. So, to summarize, the use of force by the United States was not authorized by any U.N. resolution, the United States was not under attack, and because pre-emptive wars violate international law, the U.S. attack on Iraq was illegal. In fact, it was a violation of the *jus cogens* principle of international law that one state must not

use force against another. And now we can put this in better perspective because we know that Iraq did not have weapons of mass destruction in the first place.

Then what happens. The United States invades and occupies Iraq, sets up a new government, and puts the old government on trial. Not for weapons of mass destruction. Not for violating the Nuclear Non-Proliferation Treaty. Not for September 11. Not for violating any U.N. Security Council resolution. The president of Iraq was held for two and a half years before he was charged with a crime. And to charge him, the occupying power had to set up a special court with special new laws. So, you see, the basis for this tribunal is not legitimate. It is rooted in an illegal war of aggression. Everything else flows from that.

By the way, the statute for the Iraqi tribunal was written in English and signed by Paul Bremer, who does not even understand Arabic. It was translated into Arabic much later. Doesn't that seem strange? The Statute makes no reference to Islamic law. Iraq is an Islamic country. Religion and law are related there. I do not want to get off track, but there is a funny story, that Ambassador Bremer ceded his legislative authority to the Iraqi Governing Council for just one day, so the statute for this court could be enacted by the Iraqis themselves. Of this whole tragedy that we are dealing with, the horrible disaster that has become of Iraq, this is the one thing I think is funny. The Iraqi Governing Council, installed by the United States government, gets the honor to perform this sovereign act. Then when America was ready, there was an election, and the president's name was not on the ballot. We will never know if Saddam Hussein was a popular president or not, because he could not get on the ballot.

Maybe that sounds strange to you, to let the Iraqi people vote on whether to keep their president. It never occurred to you before. But it could have happened. Instead, we pitted Sunni against Shia, Arab against Kurd, and the government that is in place now would not last one day if the U.S. military left.

I am going to leave it to the other panelists to describe the problems with the Dujail trial. I am glad to comment on that if I am asked, but I do not have a lot of time. I will mention that the defense wrote several lengthy motions challenging the legality of the court, asking for removal of a hostile judge, and others, but they might as well drop them at the judges' feet, like what a process server sometimes has to do with a defendant. The court will not take them. The court will not rule on them. I have English translations of some of these motions with me, and they are also online at international-lawyers.org.

The trial is a circus. I think we can all agree on that. What is the point of having a trial if the outcome is predetermined. If the purpose is the so-called "educative value," and not to determine the facts, then it is an exercise in propaganda. It is like a Soviet show trial. Some people are complaining that the president is making outbursts during the trial. Well, it was not his idea to televise it. If the drama is not to your liking then that is an issue to take up with the U.S. military, who edit and produce the show.

And that brings me to my main point. We have to wonder what is the real purpose of this trial. Maybe what the court is really doing is searching for reasons to justify the war in Iraq. Maybe that is what this is all about. Think about what the Dujail trial was about. In the middle of the Iran-Iraq war, there was an assassination attempt on the president by people associated with the Dawa Party of Iran. Let me emphasize that Iran and Iraq were at war. About 150 people were rounded up, interrogated, and held for two years. Then there was a trial and people were executed for treason. Did anyone get a fair trial? We will never know because the transcript of that trial could not be admitted into evidence in this one. Just think about that. Why wasn't the transcript allowed into evidence? It goes to the central issue. It is the main piece of evidence in the case. It is not a minor detail. And speaking of transcripts, if a transcript of the current proceedings is being made, it is not available to the defense or to the public. If any of you can obtain a copy of the transcript and put it on your website, then there would be something closer to a public trial. Then there would be something for scholarly debate.

So, what is next? Gassing the Kurds. We are back to the Iran-Iraq war. We are looking for war crimes in it. We know that Iran and Iraq both used chemical weapons in this terrible war. Everyone condemns that. But did the use of chemical weapons in the Iran-Iraq war justify the invasion of Iraq by the United States twenty-five years later? Does this prove there were weapons of mass destruction? How is it related? How is it different from dropping phosphorus bombs on Fallujah or cluster bombs on Beirut? Would we still call it genocide if conventional weapons were used? The legal and emotional issues are all mixed up. And this is the big case, the one about weapons of mass destruction.

I will conclude my remarks by saying that this case sets a terrible precedent for the future. It poisons the chalice. A superpower attacks a helpless country, invades it, occupies it, kills thousands of people, and puts the losing government on trial on TV. It should be opposed by anyone who advocates world peace. That is why I hope you consider the proposal I made. Reinstate the president and get out of there. If you want the next century to be a cen-

ture of peace, where the United Nations is effective in preventing war—and that was the original reason for creating the U.N.—then you cannot endorse this war, and you cannot endorse this trial.

Thank you.

