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Saddam Hussein Trial

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SADDAM HUSSEIN TRIAL

Summary

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This website is intended to provide the viewer with essential information related to the relevant trials. It will also set out a selection of reference materials that will further explain important aspects of the trials. In making this selection, the Law Library of Congress does not endorse or attest to the authenticity of any such referenced materials or information.

In addition to viewers in general, the following of the development of the trial of Saddam Hussein, which started in October 2005, may be of special interest to legal scholars of international criminal law and the seekers of universal justice.

I. Special Court and Legal Process

A. Introduction

Iraq's historical roots date back almost 8,000 years to Mesopotamia – the "cradle of civilization." Iraq was placed under a United Kingdom mandate by the League of Nations in 1920 and stayed under British authority until it became an independent state in 1932 (PDF, 173KB). The Baathist Party gained power in Iraq in 1968, and Saddam Hussein took over the party and country. He ruled Iraq until he was ousted in 2003. In May 2003, the United Nations Security Council voted to lift non-military sanctions on Iraq and recognized the Coalition Provisional Authority in Resolution 1483 (PDF, 58KB).

The international community has repeatedly accused Saddam Hussein of war crimes, genocide, and atrocities during his reign in Iraq. Some of the allegations include using poison gas against Iranians during the Iran-Iraq war in the 1980s, dropping chemical weapons on Halabja, which killed up to 5,000 people, and committing crimes against humanity and possibly genocide against the Marsh Arabs and Shi'a Arabs in southern Iraq, as well as against Iraqi Kurds in northern Iraq. Throughout the 1990s Saddam Hussein repeatedly violated sixteen United Nations Security Council resolutions, which are described on the White House's website.

Saddam Hussein's regime was toppled in early 2003. Eight months later on December 13, 2003, the United States military captured Saddam Hussein. Since then it is believed that he has been held near the Baghdad airport. The prosecution of Saddam Hussein is being carried out in the Green Zone in Baghdad in a well-protected courtroom. The trial began in October 2005.

B. Background

The trial of Saddam Hussein, former president of Iraq, is an important landmark in the development of international criminal law. The confluence of international and national legal principles that may stand in conflict at times makes the trial a notable experiment in international jurisprudence. It is probably the first time a member state of the United Nations has chosen, without the participation or involvement of the United Nations, to bring one of its former leaders before a national court to try him for crimes recognized under international law. The transitional government constituted during the American-led occupation of Iraq has incorporated, through a legislative act (PDF, 2.22MB), genocide, war crimes, and crimes against humanity into the Iraqi national legal system. It also established a special national court vested with the mandate of investigating, prosecuting, and trying Saddam Hussein and other members of his regime for these international crimes and for certain other national crimes.

C. Historical Context

After World War I, as more fully explained in the Library of Congress Country Study series, Iraq ceased to be a part of the Ottoman Empire and came under a British Mandate. While under the British Mandate, it established a constitutional monarchy pursuant to its 1924 Constitution. In 1932, the British Mandate ended, Iraq gained independence, and it was admitted to the League of Nations.

On July 14, 1958, a military coup overthrew the monarchy and declared Iraq a republic. The ensuing power struggle between various factions internal and external to the military ended with the Baath party seizing power on July 17, 1968, and General Ahmed Hassan al- Bakr becoming president and Chairman of the Revolutionary Command Council. During this period, a junior Baath party operative, Saddam Hussein, emerged as a powerful political official. In July 1979, al-Bakr resigned and Saddam Hussein became the new president and Chairman of the Revolutionary Command Council. Saddam Hussein remained in power until the collapse of his regime in March and April 2003, when a coalition led by the United States occupied Iraq.

On May 22, 2003, the UN Security Council adopted Resolution 1483. This resolution recognizes in accordance with applicable international law, the authority, responsibilities, and obligations of the United States and the United Kingdom as occupying powers under a unified command. It also calls upon the states of the United Nations to support actions that facilitate the prosecution of the members of Saddam Hussein's former regime who are responsible for crimes and atrocities against the people of Iraq.

On December 13, 2003, American forces in Iraq captured Saddam Hussein and accorded him the status of prisoner of war.

Legal custody of Saddam Hussein passed to the Iraqi interim government on June 30, 2004, but physical custody remained in American military hands. On July 1, 2004, Saddam Hussein was arraigned before an Iraqi judge on seven preliminary charges.

On July 17, 2005, formal charges were filed against Saddam Hussein and other co-defendants in connection with government atrocities committed in the al-Dujail region against the people of al-Dujail.

These charges are the subject of the present trial, which began on October 19, 2005, and is continuing before the criminal chamber of the Supreme Iraqi Criminal Tribunal.

D. Tribunal

1. Establishment

The Supreme Iraqi Criminal Tribunal (Tribunal or SICT) is a special court established outside the normal Iraqi judicial system for the specific purpose of bringing Saddam Hussein and members of his former regime to justice. Under Order Number 48 of December 10, 2003 (PDF, 383KB), enacted by the Iraqi Governing Council and issued by the Coalition Provisional Authority (CPA), an Iraqi Special Tribunal (IST) was first established by a statute. The CPA is the official authority set up by the United States and its allies to govern Iraq during its occupation. On June 28, 2004, the CPA transferred power to an Iraqi interim government.

Due to legal questions about the establishment of the IST and its legitimacy as an entity created under the authority of an occupying power, the Iraqi interim government issued Law Number 10 on October 9, 2005 (PDF, 2.21MB). This law abolished the 2003 statute and established the SICT.

While the official seat of the Tribunal is the city of Baghdad, hearings, upon a decision of the Council of Ministers based on a recommendation made by the President of the Tribunal, may be held in any of the Iraqi governorates.

2. Organization

Pursuant to Iraqi Law Number 10 of 2005 (PDF, 2.21MB), the Tribunal has three main functions: adjudication, investigation, and prosecution. Each of these functions is carried out by a separate body of judges or prosecutors and supported by the administrative personnel of the Tribunal.

The adjudication of cases meriting indictment is conducted by a trial chamber consisting of five Adjudicative Judges who elect from among themselves a Chief Judge to supervise their work.

In addition to the trial chambers, the Tribunal also includes a Cassation Chamber that reviews judgments and decisions rendered by the Adjudicative and Investigative Judges.

The Cassation Chamber consists of nine judges who elect from among themselves a President, who is also the President of the Tribunal. In addition to other responsibilities, the President of the Tribunal nominates the judges of the trial chambers and their alternates.

The Council of Ministers may, when necessary, and upon the recommendation of the President of the Tribunal, appoint non-Iraqi judges who have experience in the trying of crimes covered by the law of the Tribunal. This will occur when a state is a party to the proceedings. Such an appointment is to be made with the assistance of the international community including the United Nations.

The investigation of crimes that fall under the jurisdiction of the Tribunal is undertaken by the Investigative Judges who elect from among themselves Chief and Deputy Chief Investigative Judges. The Chief Investigative Judge assigns the cases separately to each of the other Investigative Judges.

The Investigative Judge has the authority to collect evidence from whatever sources is deemed appropriate and can establish direct communication with those who may be relevant to the investigation. The Investigative Judge, as a distinct entity of the Tribunal, conducts the investigation independently and does not submit to or answer to any orders or demands made by any governmental authority.

Decisions of the Investigative Judge may be appealed before the Cassation Chamber within fifteen days from the date of service of process, whether the service is actual or by operation of law.

The Chief Investigative Judge may, after consultation with the President of the Tribunal, appoint non-Iraqi experts to provide judicial assistance to the Investigative Judges regarding the cases covered by Iraqi Law Number 10 of 2005 (PDF, 2.21MB).

The prosecution of those accused of committing crimes within the jurisdiction of the Tribunal is conducted by public prosecutors who elect from among themselves Chief and Deputy-Chief Prosecutors. Similarly to the role of the Investigative Judge, each public prosecutor acts independently as a distinct entity of the Tribunal and does not submit to or answer to any orders or demands made by any governmental authority.

The Chief Prosecutor assigns to a public prosecutor a case to be investigated and tried in court. The public prosecutor discharges his duties in accordance with the authority given to him by Iraqi law.

Similarly to the Chief Investigative Judge, the Chief Prosecutor may, after consultation with the President of the Tribunal, appoint non- Iraqi experts to provide assistance concerning investigation and indictment to public prosecutors regarding the cases covered by Iraqi Law Number 10 of 2005 (PDF, 2.21MB).

3. Jurisdiction

In accordance with article 1 of Iraqi Law Number 10 of 2005 (PDF, 2.21MB), the subject matter jurisdiction of the Tribunal is limited to certain types of crimes that were committed between July 17, 1968, the date the Baath party seized power, and May 1, 2003, the date on which the United States declared the end of major combat operations.

Those crimes are: genocide, crimes against humanity, war crimes, and certain violations of Iraqi Law Number 7 of 1958 (PDF, 141KB) and the Iraqi Criminal Code Number 111 of 1969 (PDF, 429KB).

Law Number 10 of 2005 (PDF, 2.21MB) defined the Tribunal and the crimes of genocide, crimes against humanity, and war crimes in a detailed manner, following the text used in articles 6-8 of the Rome Statute (PDF, 1.01MB) of the International Criminal Court.

It is of interest to mention here that article 24 of Law Number 10 of 2005 provides that the penalties imposed by the Tribunal are those provided for in the Iraqi Penal Code Number 111 of 1969. It further provides that in determining the penalty for any of the crimes of genocide, crimes against humanity, and war crimes that have no assigned penalties under Iraqi law, the Tribunal shall be guided by, among other things, the judicial precedents of international criminal courts (such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia).

E. First Prosecution

On October 19, 2005, the first criminal trial of the Tribunal convened in Baghdad to hear its first case, entitled Case Number 1, known as the al-Dujail case. On the same day, the Tribunal released a statement summarizing the proceedings of the hearing.

1. Facts Alleged

The October 19 statement alleges that hundreds of the al-Dujail residents were detained following the firing of shots at the motorcade of the head of the former regime, the defendant Saddam Hussein. Six hundred and eighty-seven persons (687) were detained. One hundred and eighty-four (184) of the detainees were referred to the Revolutionary Court, which condemned them to death after a brief trial. Another three hundred and ninety-nine persons (399), all of whom were women, children, and elderly men, were detained in the desert Lia camp close to the Saudi borders, where they spent four years before their release. Another forty-six persons (46) died in prison as a result of corporal and psychological torture during investigation.

2. Charges

Statements released by the Tribunal have not listed the detailed charges introduced against each of the defendants in the al-Dujail case. The October 19 statement however, indicates that the presiding judge informed the defendants that they were indicted under articles 12 and 15 of Iraqi Law Number 10 of 2005 (PDF, 2.21MB). The charges are: premeditated murder, false imprisonment, forcible expulsion of residents, destruction of agricultural land, and confiscation of the victims' land and orchards.

Article 12 of Law Number 10 of 2005 defines crimes against humanity, and article 15 defines individual criminal responsibility. These two articles were drafted in close conformity to articles 7 and 21 of the Rome Statute (PDF, 1.01MB) of the International Criminal Court.

3. Defendants

In its press release of February 28, 2005, the Tribunal stated that the investigation in the al-Dujail case had been concluded. It also listed the names of the principal defendants, as follows:

Barazan Ibrahim Hassan al-Takriti, half brother of the former president Saddam Hussein and director of Iraqi intelligence; Taha Yassin Ramadan, deputy prime-minister; Awad al-Bandar al-Saadoun, chief judge of the revolutionary court; and Abdullah Kazem Roueid and his son Muzheir Roueid, influential members of the Baath party.

The October 19 statement of the Tribunal, summarizing the first hearing of the al-Dujail case, also included as defendants in the case: Saddam Hussein, Ali Daih Ali, and Mohammed Azawi Ali.

F. Future Prosecution

According to its press releases, the Tribunal is investigating whether the regime of Saddam Hussein committed one or more of a variety of crimes against the people of Iraq, including torture, assassination, extra-judicial executions, forcible relocation of residents, genocide, use of chemical weapons, and other similar crimes. Based on the statement made by the Tribunal, the Investigative Judges appear to have begun the process of conducting investigations into a number of such crimes.

G. Legal Process

1. Rights of the Accused

Article 19 of Iraqi Law Number 10 of 2005 (PDF, 2.21MB) sets out the rights of the accused. According to the general principles of the Iraqi legal system, the accused is presumed innocent until proven guilty by a court of law. Article 19 stipulates that every accused has the right to have a public trial pursuant to the Iraqi law and procedural rules of the Tribunal. Further, when charges are filed, an indictee is entitled at the very least:

a. to be immediately informed of the substance, details, nature and reasons of the charges.
b. to be given time and assistance sufficient to permit him to prepare a defense including contacting and meeting in private with a lawyer of his choosing.
c. to have a speedy trial.
d. to be informed of the right to financial assistance to hire a lawyer if the defendant is not financially capable of doing so.
e. to call defense and prosecution witnesses with the right to confront them.
f. to have the right to remain silent without consequences of guilt or innocence.

2. Procedural Rules

In investigating, prosecuting, and adjudicating the cases that fall within its jurisdiction, the Tribunal applies the procedural rules of the Iraqi Criminal Procedures Code (PDF, 2.13MB) and the Rules of Procedure and Evidence. The rules were appended

to Iraqi Law Number 10 of 2005 (PDF, 2.21MB). It is interesting to note that the Iraqi legal system does not have a jury system and holds no separate hearings for sentencing.

3. Appellate Process

Pursuant to articles 25 and 26 of Iraqi Law Number 10 of 2005 (PDF, 2.21MB), the relevant persons or the public prosecutor may object to charges filed by the Investigative Judge or the verdict rendered by the trial chamber. The objection should be filed with the Cassation Chamber in the form of an appeal based on one or more of the following grounds:

Violation of law or error in its interpretation; Violation of procedure; or

Material error of fact resulting in a miscarriage of justice.
If the Cassation Chamber rejects a verdict of innocence, it may order a new trial before the trial chamber.

In the event that fresh factual evidence that was not known during trial is discovered after the conclusion of the trial, the defendant or the public prosecutor may petition the Tribunal for a new trial.

4. Enforcement of Verdicts

Article 27 of Iraqi Law Number 10 of 2005 (PDF, 2.21MB) provides that no authority, including the President of the Republic, has the right to grant clemency or reduce the sentence pronounced by the Tribunal. Any such sentences should be carried out within thirty days from the date the appellate process has been exhausted.

II. Featured Articles

A. Capital Punishment

B. The Legality Principle - The *Nullum Crimen* Principle and The Trial of Saddam Hussein

1. Introduction

The purpose of this paper is to inform the public about some of the legal issues involved in the present trial of Saddam Hussein and to encourage discussion among scholars of international criminal law. The goal is to present the facts and the various viewpoints on a particular legal issue in a non-partisan manner. The issue under discussion is whether the Supreme Iraqi Criminal Tribunal may convict the defendants without violating the *nullum crimen* principle. The issue arises beginning with the uncontested facts in the case.

2. Uncontested Facts

Saddam Hussein is on trial for charges of having committed, early in the 1980s, acts constituting crimes against humanity, following a failed attempt on his life in the al-Dujail region of Iraq. At the time when the alleged acts took place the customary international offense of crimes against humanity was not a part of the criminal offenses prescribed by the Penal Code or any other Iraqi criminal law. Crimes against humanity were introduced into Iraqi law in December 2003, when the American led occupation authority in Iraq issued, through a legislative order, a statute establishing an Iraqi special tribunal. The purpose of the tribunal was to prosecute those who had engaged in certain types of crimes during the reign of Saddam Hussein. The statute included an article defining crimes against humanity over which the newly established tribunal had jurisdiction.

In October 2005, Iraq issued Law Number 10 (PDF, 2.21MB) abolishing the 2003 statute but containing similar provisions establishing "The Supreme Iraqi Criminal Tribunal (SICT) المحكمة الجنائية العراقية العليا". Section two of article 1 of Law Number 10 gave the SICT subject matter jurisdiction limited to prosecuting certain criminal offenses that may have occurred between July 17, 1968 and May 1, 2003. Among these offenses are crimes against humanity as defined in article 12 of that law. Article 40 stipulates that the law shall come into effect on the date of its publication in the official gazette. The law was published in the official gazette on October 18, 2005.[1] In the present case the trial chamber of the SICT is being asked to convict Saddam Hussein and his co-defendants for crimes committed, according to the prosecution, about two decades before article 12 of Law Number 10 came into effect.

These facts raise an important legal question. May the SICT convict the defendants without violating the legal principle known in Latin as, *nullum crimen sine lege, nulla poena sine lege*?

3. The *Nullum Crimen* Principle

The *Nullum Crimen* principle or *ex post facto* rule means that no crime or punishment can be established unless created by a law that has been in existence prior to the commission of the crime. In other words, a statute criminalizing an act or creating a new offense or imposing a harsher punishment for an existing crime cannot be applied retroactively to acts committed prior to its enactment. The principle goes back to the time of the early Roman law and remains today firmly embedded in various legal systems of the world. The principle applies equally in domestic as well as in international law.

Article 15 of the International Covenant on Civil and Political Rights stipulates as follows:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

[1] Alwaqai Aliraqiya [Official Gazette], The Supreme Iraqi Criminal Tribunal Law, Oct. 18, 2005, No. 10.

> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.[2]

Similarly, and in addition to article 11.2 of the Universal Declaration of Human Rights, article 7[3] of the European Convention on the Protection of Human Rights and Fundamental Freedoms[4] provides the following:

Article 7 – No punishment without law

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations

Many countries have also adopted the principle as an integral part of their constitutions. The United States, for example, prohibits both the federal government and the various states from enacting laws with retroactive application. Article I.9 of the U.S. Constitution stipulates that no ex post facto laws shall be passed by Congress and article I.10 provides that no state shall enact any such laws.[5]

From its inception, the modern Iraqi legal system has subscribed to the *nullum crimen* principle. Several legislative enactments have continuously affirmed that no one can be convicted for acts that did not constitute offenses at the time of their commission.

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[2] United Nations, International Covenant on Civil and Political Rights, Art. 15, Mar. 23, 1976, 999 U.N.T.S. 171.

[3] Universal Declaration of Human Rights, G.A.Res. 217 A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810, Art. 11.2, (Dec. 10, 1948).

[4] Council of Europe, European Convention on the Protection of Human Rights and Fundamental Freedoms, art.7, as amended by Protocol No. 11, Nov. 1998, 213 U.N.T.S. 222.

[5] U.S. Const. art.1, §§ 9 & 10.

As an example, the recent Iraqi Constitution approved by a referendum held on October 15, 2005, stipulates the following:

Article (19)

> Second - There shall be no crime and no punishment without a stipulation [by law]; there shall be no punishment except for an act the law considers a crime at the time of its commission; and no punishment shall be imposed that is more severe than the punishment in effect at the time of the commission of the crime.[6]

Similar provisions were included in the Law of Administration for the State of Iraq for the Transitional Period (known by the acronym TAL), the Iraqi constitution of 1970, and the constitution of 1964. More specifically, Iraqi Penal Code Number 111 of 1969 stipulates as follows:

Article 1

> There shall be no punishment for an act or omission except on the basis of a law so stipulating at the time of its occurrence. And no penalties or precautionary measures shall be imposed without being prescribed by law.

Article 2

> (1) The law applicable to crimes is the law in force at the time of their commission ...
>
> (2) However, if a law or laws issued after the commission of the crime but before the judgment rendered in it has become final, the law most favorable to the accused shall apply.
>
> (3) And if after the judgment has become final a law were issued decriminalizing the act or omission for which the accused was convicted, the execution of the judgment shall cease and its criminal consequences shall expire ... .[7]

As a result of these enactments, crimes and penalties in Iraq have to be prescribed or enacted by legislative instruments. They cannot be established by analogy, precedent or other novel means. The *nullum crimen* principle prevents the application of criminal laws retroactively to the detriment of the accused, even though the accused necessarily benefits from a new law more in his favor. The principle is expressed sometimes in terms of prohibition against enacting *ex post facto* laws or in terms of the non-retroactivity rule.

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[6] Constitution of Iraq, art. 19, 1005.

[7] Iraqi Penal Code No. 111, arts. 1 & 2, 1969.

Despite the clarity of this principle, there is disagreement on how it may be applied by a domestic court to customary international crimes when such crimes are committed prior to their inclusion into the national domestic law. Should a domestic law apply retroactively to acts constituting crimes against humanity under customary international law, but committed prior to the enactment of the domestic law, as is the case in the present trial?

A quick survey of a sample of court decisions in various countries that faced the same question indicates that there are two legal views or opinions on this issue. One view regards the retroactive application of domestic law to international crimes, including crimes against humanity, not violative of the *nullum crimen* principle or *ex post facto* rule; another view regards the matter differently.

4. Court Decisions Supporting Retroactive Application of Domestic Law to International Criminal Offenses

In support of the view that a statute incorporating into domestic law offenses recognized under customary international criminal law does not violate the *nullum crimen* principle or the *ex post facto* rule when applied retroactively, two court decisions will be discussed: one rendered by the Supreme Court of Canada and one by the *Audencia Nacional* of Spain.

a. Canada

In 1987 the Canadian Parliament amended certain sections of the penal code giving Canadian courts jurisdiction over crimes against humanity and war crimes committed outside Canadian territories. Pursuant to these amendments, criminal charges were brought in Canada against Imre Finta, a naturalized citizen, accusing him of having committed crimes against humanity in his native Hungry about fifty years prior to the effective date of the amendments.

Even though Finta was acquitted by a jury trial, his case was appealed and reached the Supreme Court of Canada. One of the legal issues brought before the High Court was whether or not the amended sections of the penal code violated the constitutional rule of non- retroactivity. In its decision rendered on March 24, 1994, the Canadian Supreme Court ruled that the amended sections of the penal code created two new offenses in Canada, crimes against humanity and war crimes, and tacitly acknowledged that the amended sections would have retroactive application.[8] The Court, however, did not find the amended sections unconstitutional on the basis of their retroactivity. In its reasoning the Court cited and adopted the opinion expressed by Professor Hans Kelsen to the effect that the retroactive application of a criminal law to actions, illegal but not criminal at the time of their commission, constitutes an exception to the *ex post facto* rule.[9] The summary holding of the court on this legal question was stated on page 5 of the judgment as follows:

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[8] Regina v. Finta, [1994] 1 S.C.R. 70. (Supreme Court of Canada).

[9] Hans Kelsen, Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? 1 Int'l L.Q. 153 (1947).

The impugned sections do not violate sections 7 and 11(g) of the *Charter* [*Canadian Charter of Rights and Freedoms*] because of any allegedly retrospective character. The rules created by the*Charter of the International Military Tribunal* and applied by the Nuremberg Trial represented a "new law". The rule against retroactive legislation is a principle of justice. A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, however, is an exception to the rule against ex post facto laws. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility. Since the internationally illegal acts for which individual criminal responsibility has been established were also morally the most objectionable and the persons who committed them were certainly aware of their immoral character, the retroactivity of the law applied to them cannot be considered as incompatible with justice. Justice required the punishment of those committing such acts in spite of the fact that under positive law they were not punishable at the time they were performed. It was appropriate that the acts were made punishable with retroactive force.[10]

The detailed ruling from pages 69 to 73 of the judgment quoted Professor Kelsen as follows:
A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed seems also to be an exception to the rule against ex post facto laws.[11]

b. Spain

Adolfo Scilingo was a military officer in Argentina. He was arrested in Spain in 1997 allegedly for having committed international criminal offenses in his native country. On November 15, 2004, the Spanish Supreme Court, *Tribunal Supremo*, ruled that the Spanish special court, the *Audiencia Nacional,* had jurisdiction over the alleged charges.[12]

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[10] Id. at 8.

[11] Id. at 9 American Society for International Law, Audiencia Nacional of Spain: Sentence for Crimes Against Humanity in the Case of Adolfo Scilingo (Apr. 19, 2005), available at http://www.asil.org/ilib/2005/04/ilib050426.htm#j3.

[12] Id. at 11.

On April 19, 2005, the *Audiencia National* convicted Scilingo for having committed crimes against humanity in Argentina and sentenced him to 640 year in prison. In reaching its decision the Spanish court relied on the newly enacted article 607 bis of the Spanish Penal Code, which made crimes against humanity a part of the Spanish legal system. Article 607 bis was enacted in November 2003 and took effect as of October 2004, long after the events for which Scilingo was convicted.[13]

The Scilingo court being aware of the adoption by the Spanish legal system of the *nullum crimen* principle in articles 25 of the Spanish constitution and article 2 of the Spanish Penal Code justified its ruling by arguing that the application of article 607 bis of the Penal Code to actions committed before its enactment does not violate the retroactivity rule. Its reasoning was that article 607bis incorporates into the domestic Spanish law a crime that already existed into international criminal law and that the nature of the crime is such that it represents a *jus cogens* meaning a fundamental norm of international law that no country could ignore.[14]

5. Court Decisions Denying the Retroactive Application of Domestic Law to Crimes Recognized by Customary International Law

Decisions rendered by the House of Lords in the United Kingdom and *la Cour de Cassation* in France do not subscribe to the idea that domestic laws incorporating international criminal offenses apply to acts committed prior to the enactment of these laws.

a. United Kingdom

In 1998 while Senator Pinochet of Chile was present in the United Kingdom, Spain issued an arrest warrant and requested his extradition to face charges in Spain. The charges included allegations that Pinochet committed and conspired to commit torture over a period of time prior to September 28, 1988. The case reached the House of Lords, the Highest Court in the United Kingdom, which issued a judgment on March 24, 1999 relevant to the question discussed here. Lord Justice Browne-Wilkinson referred to the issue presented by Senator Pinochet's counsel on page five of the opinion:

Certain of the charges, in particular those relating to torture and conspiracy to torture, were not "extradition crimes" because *at the time the acts were done* the acts were not criminal under the law of the United Kingdom.[15]

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[13] Sentencia por crimenes contra la humanidad en el caso Adolfo Scilingo (Apr. 19, 2005), available at http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html.

[14] Id. at 11.

[15] See the opinion delivered by Lord Browne-Wilkinson, Regina v. Bartle, et al. (ex rel Pinochet), [1999] 2 WLR 825, 840, available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm

Under the terms of the Extradition Act of 1989, which replaced the pre-existing common law rules, one of the requirements for a crime to be "an extradition crime" is for the conduct to constitute a crime under the law both of the United Kingdom and of the requesting state. This is known as the double criminality requirement.

The United Kingdom is signatory to the 1984 International Convention Against Torture (PDF) and subscribes to the proposition that torture is one of the most important international crimes. As Lord Justice Browne-Wilkinson (PDF) states in the opinion:

Since the Nazi atrocities and the Nuremberg trials, international law has recognized a number of offences as being international crimes ... The most important of such international crimes for present purposes is torture.

In compliance with its obligations under the Convention, the United Kingdom, through section 134 of the Criminal Justice Act of 1988, incorporated into its domestic law the international crime of torture and permitted United Kingdom courts to exercise jurisdiction over the new crime irrespective of whether it was committed inside or outside United Kingdom territories. Because the conduct for which Spain sought extradition constituted, if true, the international crime of torture incorporated into Spanish domestic law, the High Court had to determine whether it also constituted a crime under the law of the United Kingdom.

The High Court first ruled that the double criminality requirement necessitates that the conduct be criminal in the United Kingdom at the time the conduct took place, not the date of the extradition request. Because section 134 of the Criminal Justice Act of 1988, which incorporated the international crime of torture into United Kingdom law, did not take effect until September 29, 1988, the High Court ruled that alleged conduct of Senator Pinochet committed prior to the effective date of section 134, does not constitute a crime under United Kingdom law and therefore cannot serve as a basis for extradition. Even though the High Court considered the alleged conduct of Senator Pinochet to be a criminal offense under international law, it concluded that section 134 of the Criminal Justice Act of 1988 did not apply retroactively to such conduct.

b. France

In France the High Court, *la Cour de Cassation*, ruled in at least two relevant cases. In both cases the issue of the applicability of the international offense of crimes against humanity arose.

In the first case a complaint was filed on April 3, 1991 with the investigative judge, *le juge d'istruction*, against George Boudarel accusing him of having committed the offense of crimes against humanity in North Vietnam between October 1952 and August 1954. The investigative judge decided that the acts as alleged if true, would constitute the offense of crimes against humanity proscribed by article 6(c) of the Charter of the International Military Tribunal of Nuremberg annexed to the London Agreement of August 8, 1945 (PDF). Second, the judge decided that the French Amnesty Law of June 18, 1966 did not apply to

the offense as alleged because of the supremacy of the international norms over domestic law. The investigative judge then allowed the complaint to proceed.

On appeal *la chambre d'accusation*, while agreeing with the investigative judge on the description and effect of the charges as international crimes that are not, pursuant to the law of December 26, 1964, subject to the statute of limitations, it reversed the ruling on the basis that the alleged crimes of which Boudarel stood accused are still covered by the amnesty law, which is applicable to the offense of crimes against humanity.

On further appeal the High Court, the *Cour de Cassation*, affirmed the appellate court's holding but rejected its legal reasoning. The High Court ruled that the provisions of the law of December 26, 1964, and of the Charter of the International Military Tribunal of Nuremberg, annexed to the London Agreement of August 8, 1945, are limited to the actions committed on behalf of the European countries of the Axis (during the War); and, therefore, that the actions committed subsequent to the Second World War cannot be described as crimes against humanity; and concluded that the charges should be dismissed.

The High Court's decision, delivered on April 1, 1993, reads as follows in the original French:

Qu'en effet, les dispositions de la loi du 26 décembre 1964, et du statut du Tribunal militaire international de Nuremberg, annexé à l'accord de Londres du 8 août 1945, ne concernent que les faits commis pour le compte des pays européens de l'Axe ; que, par ailleurs, la Charte du Tribunal militaire international de Tokyo, qui n'a été ni ratifiée, ni publiée en France et qui n'est pas entrée dans les prévisions de la loi du 26 décembre 1964, ou de la résolution des Nations Unies du 13 février 1946, ne vise, en son article 5, que les exactions commises par les criminels de guerre japonais ou leurs complices ; qu'ainsi, les faits dénoncés par les parties civiles, postérieurs à la seconde guerre mondiale, n'étaient pas susceptibles de recevoir la qualification de crimes contre l'humanité au sens des textes précités ; ...

D'où il suit que l'action publique a été à bon droit déclarée éteinte et que, le refus d'informer étant justifié, le moyen ne saurait être accueilli.

It should be noted that at the time the High Court rendered its decision in this case, there was no domestic law incorporating the offense of crimes against humanity into French criminal law.

In the second case a complaint alleging commission of crimes against humanity was filed subsequent to March 1, 1994, the effective date of articles 211-1 and 211-2 of the French Penal Code, which introduced the offense of crimes against humanity into French domestic law. When the case reached the High Court there were three legal issues to be resolved:

1. whether the crimes against humanity, allegedly committed in Algeria between 1955 and 1957, were covered by the Charter of the International Military Tribunal of Nuremberg and the French law of December 26, 1964 by abolishing statutes of limitation from crimes covered by the Charter;

2. whether the legality principle prevents the retroactive application of articles 211-1 and 211-2 of the Penal Code to cover the alleged crimes; and
3. whether customary international law can supply a basis for criminalizing alleged acts committed prior to the effective date of articles 211-1 and 211-2 of the French Penal Code?[16]

The holding of the High Court on the first issue was similar to its decision in the *Boudarel* case. On the second issue the High Court held that the legality principle regarding crimes and punishments, as well as the non-retroactivity of harsher criminal laws, prevented the retroactive application of articles 211-1 and 211-3 of the Penal Code to acts committed before the date on which these articles came into force. On the third issue the High Court held that customary international law cannot be used to supply a remedy in the in the absence of a law proscribing the offense of crimes against humanity.

The holding of the High Court, *la Cour de Cassation*, reads as follows in the original French language:

Que, par ailleurs, les principes de légalité des délits et des peines et de non rétroactivité de la loi pénale plus sévère, énoncés par les articles 8 de la Déclaration des droits de l'homme et du citoyen, 7-1 de la Convention européenne des droits de l'homme, 15-1 du Pacte international relatif aux droits civils et politiques, 111-3 et 112-1 du Code pénal, font obstacle à ce que les articles 211-1 à 212-3 de ce Code réprimant les crimes contre l'humanité s'appliquent aux faits commis avant la date de leur entrée en vigueur, le 1er mars 1994;

Qu'enfin, la coutume internationale ne saurait pallier l'absence de texte incriminant, sous la qualification de crimes contre l'humanité, les faits dénoncés par la partie civile; ... .[17]

6. Concluding Remarks

As in all the cases discussed above, it is important to note that the trial chamber of the Supreme Iraqi Criminal Tribunal concerning the present case against Saddam Hussein is a domestic, not an international venue. There are, however, a number of differences worth mentioning between the Saddam Hussein case and the other cases. Unlike the cases discussed above,

[16] Cour de Cassation, pourvoi No: 92-82273, 1 avril 1993.

[17] Cour de Cassation, pourvoi No: 02-80719, 17 juin 2003.

1. the Iraqi tribunal has been established outside the normal structure of the judicial system of Iraq;
2. the Iraqi tribunal is a temporary, not a permanent entity. Its existence is limited in time by the finite number of crimes that may be brought before it. These crimes must have occurred between July 17, 1968, and May 1, 2003. Article 6 of Law Number 10 of 2005 recognizes the limited lifetime of the tribunal by providing that its judges and prosecutors shall, at the conclusion of its business, be transferred to the Iraqi Supreme Judicial Council; and
3. acts constituting crimes against humanity under customary international law that may have occurred since May 1, 2003, or that may occur in the future are not crimes under present Iraqi law. Article 12 of Law Number 10 of 2005 defines crimes against humanity only for the limited purpose of application to a specific period of time in the past.

C. Comments On The Indictment of Saddam Hussein Mid-Trial

On Monday, May 15, 2006, seven months into the trial of Saddam Hussein and his co-defendants before the criminal chamber of the Supreme Iraqi Criminal Tribunal, the presiding judge of the panel of five judges issued what has been labeled by media observers as formal charges or indictments. Mainstream media outlets have indicated that the Iraqi legal system, unlike the system in the United States, provides for formal charges against the accused to be filed after the prosecution presents its evidence, not at the outset of the trial.

Such perceptions raise interesting questions that need to be discussed. First, does the Iraqi law allow for a trial to begin without an indictment informing the defendant of the crimes with which he is charged? Second, what role does the trial court play with respect to such an indictment under Iraqi law?

The answer to the first question is in the negative. Iraqi law, like other criminal legal systems, requires that the accused be informed of the charges brought against him by the investigative judge who decides whether the accused should be tried. As to the second question, the trial court decides at the conclusion of the prosecution's case whether the evidence supports an indictment necessitating the resumption of trial.

1. Iraqi Law Requires an Indictment Prior to the Beginning of Trial

In accordance with international law, the right of the accused to be informed promptly of any charges against him is guaranteed. Article 9, paragraph 2 of the International Covenant on Civil and Political Rights, ratified by Iraq on January 25, 1971, stipulates that:

> anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.[1]

This right is also guaranteed under Iraqi law. Article 19, paragraph 4.1 of Law Number 10 of 2005, which established the tribunal before which Saddam Hussein and his co-defendant are being tried, provides that whenever a defendant is charged pursuant to that law he shall be entitled to a fair trial with certain minimum guarantees, including:

> to be informed promptly and in detail of the content, nature, and the reasons for the charges directed against him.[2]

This means, at least, that the defendant should be formally apprised of the charges at the beginning of the trial. In fact, the trial cannot start and the court cannot assert jurisdiction over the case before a formal indictment is issued against the accused by an investigative judge. Under Iraqi law, it is the investigative judge, not the prosecutor, who conducts pre-trial investigation, gathers the evidence including reception of testimony of witnesses, and decides whether the accused should be referred to trial.

Article 18 of Law Number 10 describes the process of referring the case to trial before the criminal chamber of the special tribunal.[3] If the investigative judge determines that there is enough evidence to support a finding that the accused has committed a crime within the jurisdiction of the special tribunal, he issues an indictment called "*Qarar ihalat*" (referral decision) in which he summarizes the facts and the crime attributed to the accused, and the specific section of the law under which the accused shall be held responsible.

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[1] International Covenant on Civil and Political Rights, art. 9, para. 4, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 3d. Sess., Supp. No. 16, U.N. Doc. A/6316, 999 U.N.T.S. 171 (Mar. 23, 1976).

[2] The Supreme Iraqi Criminal Tribunal Law Number 10 of 2005 (PDF, 2.21MB), art. 19, para. 4.1, published in the Iraqi official gazette (Alwaqai Aliraqiya), issue number 4006, October 18, 2005.

[3] Id. art. 18.

Pursuant to paragraph 1 of article 20 of Law Number 10, the accused against whom an indictment has been issued immediately shall be informed of the charges and be transferred to the custody of the court.[4] Paragraph 3 of the same article requires the court not only to read the referral decision to the defendant but also to satisfy itself that the defendant understands fully the charge or charges directed against him, and, then to ask him to enter a guilty or non-guilty plea.[5]

It is not clear whether the trial court in the present case against Saddam Hussein has released the original indictment issued by the investigative judge.

2. Role of the Court Relating to Indictment

Iraqi law, unlike criminal procedural rules in other civil law countries, has adopted a special feature under which the presiding judge of the criminal court with jurisdiction over felonies and certain other crimes has to certify the indictment halfway through trial.

The trial starts by asking the defendant for his name, his father and grandfather's names, his age, his title, his occupation and his place of residence. Then it will proceed by reading the referral or indictment decision of the investigative judge, receiving the testimony of the complainant, if any, as well as the testimony of each of the prosecution witnesses separately, and next reading the investigative reports and any other relevant documents. Then, according to Article 167 of the Criminal Procedures Code, the court receives the statement of the defendant and the requests of the complainant and the prosecutor.[6]

At this stage of the trial the court has, in accordance with article 181 of the Criminal Procedures Code,[7] either to:

- dismiss the case if the evidence is insufficient to support a conviction; or
- adopt the indictment if the evidence as presented may support a conviction of the defendant for a crime that is within the jurisdiction of the court. If the facts as presented constitute a crime different from the one prescribed in the original indictment, the court may modify the indictment within certain limitations.

In the second situation, the court shall read to the defendant the indictment as adopted by the court, explain it to him and ask him if he admits committing the crime or not. The trial shall then resume and proceed to its final conclusion.

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[4] Id. art. 20, para. 1.

[5] Id. art. 20, para. 3.

[6] Iraqi Criminal Procedure Code Law Number 23 of 1971 (PDF, 2.93MB), art. 167, published in the Iraqi official gazette (Alwaqai Aliraqiya) issue number 2004 dated May 31, 1971.

[7] Id. art. 181.

3. Concluding Remarks

As we indicated, it is not clear whether the trial court has ever released the original indictment of Saddam Hussein and his co-defendants in the present al-Dujail prosecution (it would be of interest to those who are following the trial to have access to the original indictment issued by the investigative judge and to compare it with the May 15, 2006, decision of the trial court). Nor is it clear at this point whether the court adopted the indictment as presented or has made any substantive modifications to it.

D. A Translation of the Appellate Decision Affirming the Death Sentence Against Saddam Hussein

The following is a translation of the section containing the reasoning of the appellate decision issued on December 12, 2006, by the Cassation Chamber of the Iraqi High Tribunal affirming the death sentence of the trial court against Saddam Hussein in the al-Dujail case. This translation is not official and is meant to provide English readers with general insights into the holding of the appellate decision.

The translation seeks to remain faithful, stylistically, and grammatically, to the original Arabic text. In order to capture the reasoning of the Court as originally expressed in Arabic, the translation is a literal English representation of the decision. The reader will notice that the translation is awkward in style, but this is a fair approximation of the style of the original text. It should be emphasized at the outset also that the substance of the original decision as written in Arabic is difficult to follow. For example, it is not clear what the Court meant by the "legitimacy" principle in paragraph 11 or by "part two of the international criminal law" in paragraph 16.

The punctuation as well as the organization and numbering of paragraphs are not a part of the original. They were added to help the English reader better understand the unique expression used by the court. Careful readers will notice that the name "The Iraqi Supreme Criminal Tribunal" used on this website to identify the judicial institution that prosecuted the al-Dujail case differs from the name that appears on the letterhead of the appellate decision, namely the "Iraqi High Tribunal." While the names are different, they both refer to the same special tribunal created to prosecute Saddam Hussein and of which the trial court and the Cassation Chamber are integral parts. The reason for the difference is due to choices made by different translations.

As far as the procedural blueprint of the text goes, the appellate decision summarizes the prior proceedings, concludes that the appeal was timely filed and then affirms the verdict against Saddam Hussein. In so doing the appellate decision adopts the following reasoning starting on page 6 of the original text:

1. It has been found that,

2. the evidence relied upon by the trial court to issue its guilty verdict against Saddam Hussein al-Majid in his capacity as having had been at the time of the incident and from July 8, 1982 to January 16, 1989, President of the Republic, Supreme Commander of the Military forces and Chairman of the Revolutionary Command Council, and had the legislative and executive powers in his hand;

3. in addition to the video and audio recordings that show the accused addressing the residents of al-Dujail, stating that those who fired at him are 2 or 3 and no more than 10;

4. and the contents of his statements during the preliminary and judicial investigation, and the orders he issued to those in charge of the security agencies reporting directly to him;

5. in addition to the hundreds of official documents in the file the convicted acknowledged they are authentic;

6. in addition to his issuing an order to compensate the owners of the orchards that had been destroyed;

7. therefore the convicted is responsible for the systematic and widespread attack against the civilian population of the town of al- Dujail that occurred with his knowledge;

8. thus, the intent to commit intentional murder as a crime against humanity is realized; the physical element consisting of the criminal behavior (the act of killing), the criminal result consisting of the death of the victims from among the inhabitants of al-Dujail, and the causal connection between that behavior have all been realized;

9. and whereas the law defines crimes against humanity as any of the acts specified in article (12) of Law No. 10 of 2005 when committed as a part of a systematic or widespread attack, with the knowledge of the attack, against any group of the civilian population; therefore most of these crimes could occur as a result of a state action or policy carried out by actors who possess official authority or otherwise; but it is clear that if such crimes were committed or directed against civilian inhabitants they should be the result of a state policy carried out by actors who have official authority, or the result of the policy of actors who do not have official authority;

10. and whereas the convicted Saddam Hussein had official authority as he held the position of former President of the Republic, and he directed his crimes against the civilian inhabitants of al-Dujail population for the purpose of killing them; therefore he had the intent to kill and thus he is responsible for these crimes as crimes against humanity, and the objections invoked by his attorneys are rejected.

11. The convicted cannot hide behind the legitimacy because the basic purpose of the principle of legitimacy is to identify the one who is responsible for the act, and the one who commits the crime of abusing his authority cannot claim that he is not aware of his act.

12. The Order Number (48) of December 10, 2003, issued by the Administrator of the Coalition Provisional Authority which granted the Governing Council the authority to establish a special Iraqi tribunal with jurisdiction to try Iraqis or persons residing in Iraq accused of committing genocide, crimes against humanity and war crimes, or of violating specific Iraqi laws, was issued in conformity with UN Security Council resolutions Number (1843, 1500, 1511) of 2003; the government derived its authority to enact such a law from the UN Security Council resolutions that gave the successor government the authority to enact the laws and regulations relating to the situation of

the Iraqi people; thus the establishment of the tribunal and the issuing of its statute was done legally, and its legitimacy was not adversely affected by the manner by which the law was drafted, and the tribunal was established and became, under the law, independent of all other Iraqi tribunals and independent of any Iraqi government agencies.

13. On March 8, 2004, the Iraqi Constitution was issued and among other things, it established a road map for the creation of an Iraqi tribunal, and it confirmed the creation of the law of the special Iraqi tribunal on June 28, 2004; and after the end of the occupation of Iraq and the formation of a full sovereign Iraqi government and its receiving the authority to govern in accordance with the provisions of the Constitution and the Security Council resolutions and its remaining in power until May 3, 2005; and during its time in office it financed, supported and allowed the tribunal to function, and indeed the judges of the tribunal were appointed and a separate budget was allocated to allow it to function; and on May 3, 2005, the interim Iraqi government elected by more than 60% of the Iraqi people replaced the interim government; and the powers of the government were described in the Constitution; and it was recognized as a government with full sovereignty and it continued to finance the tribunal until a permanent Iraqi government assumed power on May 20, 2006, and a new law for the Tribunal was issued as Law number (10) of 2005 and the Tribunal was named the Iraqi High Tribunal.

14. The law was issued by a government elected by 78% of the Iraqi people and in a national referendum and it is therefore a legitimate tribunal and any objections to this effect are rejected.

15. As to the objection based on the immunity of officials we say the immunity is the practical immunity which comes for the purpose of the position; it is not possible for any person to claim that he committed crimes and that his actions are outside the reach of the law; the immunity is limited to the time in the position and does not continue thereafter, and it is tied in its existence and non- existence to the position, and it is not given to the benefit of a person who clings to the position, but it is given for the benefit of society.

16. The immunity does not violate part two of the international criminal law and the constitution; no state has the right to give its officials immunity from prosecution for crimes against humanity and genocide, and if immunity constitutes a means to avoid prosecution this principle has disappeared after World War II and immunity has no more effect. The establishment of criminal courts is nothing but a sign of the end of the immunity principle and since the law of the tribunal permits the trying of any person accused of committing a crime irrespective of his official position even if the person were president or member of the government or its council because his position does not protect him from punishment or constitute a mitigating circumstance, and whereas the law of the tribunal contains penalty provisions, therefore the claim of immunity of head of state or that the act was committed by the accused in his official capacity does not constitute an acceptable defense or a reason to reduce the sentence, and therefore the immunity does not prevent the tribunal from using its jurisdiction to try those persons for the crimes they committed and over which it has jurisdiction, and therefore the immunity must be a cause to increase the sentence and not to reduce it, because whoever enjoys immunity normally has the power to influence a great number of

people which increases the seriousness of the losses and damages resulting from the crimes.

17. The head of state is responsible internationally for the crimes he commits against the international community because it is not logical or just to punish the subordinates who carry out illegal orders issued by the president and his assistants and spare the president who ordered and planned the commission of these crimes and he is therefore considered a gang chief and not a head of state who respects the law and therefore the supreme president is to be considered responsible for the crimes committed by his subordinates not only on the basis of his knowledge of those crimes but for his negligence in not obtaining such knowledge; and the non-action is considered equal to a positive action in light of article (13/1) of the Third Geneva Convention of 1949 which provides that any illegal action or abstention on the part of the authority which causes death or exposes the safety of prisoners of war to danger is prohibited and constitutes a serious violation of this convention.

18. The responsibility of leaders and presidents for crimes committed by those who are under their command is a responsibility for acts committed by subordinates under his command and authority provided the said leader knew that his forces are committing or about to commit any of these crimes; thus it considered the high government position occupied by the accused itself as an aggravating circumstance because he is supposed to know what is happening and because he exploited his position by the commission of the crimes.

19. Besides, the failure of a leader or a person to take all reasonable and necessary precautions within his authority to prevent the commission of those crimes exposes him to legal accountability. Furthermore the overlooking of crimes is considered as a sign to his subordinates to continue the commission of his crimes without fear of punishment; the principle dictates an obligation on the leader to prevent his subordinates from committing international crimes, and his responsibility is proven irrespective of the intent to admit whenever he fails willfully or negligently to prevent their commission.

20. The act of the subordinate should be considered unlawful because it neglects the interests under his protection and confers on them illegitimacy, and does not comply with what the domestic criminal law stipulates; a subordinate is a human being who possesses the faculties of awareness and understanding and is not a tool that executes without thinking the orders he receives; rather he has the obligation of examining the orders and abstaining from carrying them out unless they are in compliance with the rules of the law; the subordinate is one of the persons of law who has equal standing as his superior and is required to discharge all the duties that the law imposes on him; his responsibility to uphold these duties is direct and therefore the immunity defense is also rejected.

21. As to the defense of non-retroactive application of criminal law we say that criminal legislation normally does not apply retroactively in the field of criminal law, and this is called the principle of non-applicability of the criminal law to the past and means that the effects of criminal law does not reach into the past but apply to the facts that took place after its enactment; this principle has been adopted by the Iraqi Criminal Code Number (111) of 1969 and was referred to in article (2/F1) but article (1/Second)

of the law of the Tribunal made the law applicable to the crimes committed between 7/17/1968, and 5/1/2003, as provided for in Law Number (1) of 2003 and Law Number (10) of 2005; the said two laws did not violate this principle because these crimes are provided for in articles (11, 12, 13, and 14) and have also been provided for since the 1950s of the past century and were included in international treaties; the crime of genocide was stipulated in the international treaties of 1948, ratified by Iraq on 1/20/1959, therefore the ratification of the treaties is considered as a part of the Iraqi law and Iraq is obligated by their provisions which were stipulated in paragraphs one and two of the law of the tribunal and they are therefore in effect and Iraq is obligated to comply with them by virtue of its explicit ratification of them;

22. As to article (12) of the law of the tribunal concerning crimes against humanity, despite the fact that their original source is international customary law since there is no international treaty that regulates their provisions and provides explicitly for them, the international customary law and the international practice are settled on considering these crimes as international crimes, and because Iraq is a part of the international community, it is also committed to them pursuant to the United Nations Charter;

23. As to article (13) concerning war crimes which represent the serious violations of the Geneva Conventions of 1949, Iraq ratified them on 2/12/1956, and Iraq is therefore bound by them, and they are considered a part of its laws, therefore those committing these crimes shall be accountable; furthermore Iraq ratified the international treaties concerning civil and political rights approved by the General Assembly of the United Nations on December 16, 1966, to which Iraq acceded by Law Number (193) of 1970, and which became effective on March 23 1976; therefore, and pursuant to the principles of justice, no criminal can avoid punishment on the basis of this principle because the legal principles were given for the welfare of society and not the welfare of the criminal.

24. The legal rule is not eternal but can expire and be replaced by another rule; therefore, the provisions of criminality can not have retroactive effects; and the criteria of the non-retroactivity of the law goes back to the time before the Roman system in accordance with the same criteria which determine the scope of the legitimacy principle on the basis that the non-retroactivity is considered a logical result of the legitimacy principle; therefore the principle of criminality can not have a retroactive effect.

25. Based on the foregoing if a provision in an international treaty or agreement criminalizes a specific act, the application of this provision to acts committed prior to its enactment does not mean that the provision has been applied retroactively, because this provision was preceded by an international custom that makes the act illegitimate, and the provision did not do anything other than record the substance of the prior custom under which the act was committed; therefore the principle of the legality of crimes and punishment is compatible with the principles of justice because it is among the principles adopted in all the legal systems including international criminal law; therefore the defense based on the non-retroactivity of the law is also rejected.

26. As to the defense based on the principle of applying the lesser penalty, this court is of the view that when the law is amended in the period between the commission of the criminal act attributed to the accused and the time the verdict is issued against him the

lesser of the penalties shall apply to the accused, and the only restriction on the court against the application of the death penalty is the Coalition Provisional Authority's order Number (7/F3) issued during the period of the occupation of Iraq by the Coalition Provisional Authority, and the purpose of this principle as provided for in article (2) of the Iraqi Criminal Code Number (111) of 1969, is to give the accused the opportunity [to benefit] from the value judgment of the society, and since Order Number (7/F3) of the Coalition Provisional Authority was not the product of the Iraqi Legislative authority and did not reflect the standards of the public opinion but reflected the necessity that the coalition used in light of the power granted to it in accordance with the occupation law in its capacity as the provisional caretaker of the actual situation in Iraq, and did not have any sovereignty over the occupied region, and therefore the coalition authority was as a separate authority, and in accordance with established international laws the Iraqi High Tribunal is not bound to apply the [coalition's] decisions or its law, and the Coalition Provisional Authority's order which suspended the death penalty was simply and at best a temporary action imposed by a temporary authority and can not be considered as a law issued prior to the verdict and by which the death penalty is eliminated as an option of judicial decisions, and pursuant to international law the death penalty is a legitimate penalty that also exists in the Iraqi present law and is among the penalties allowed for felonies and was in force prior to the formation of the government in 1919, and chapter 5, part one provided for the death penalty. And the Iraqi Law continued to apply the death penalty without any changes as with respect to the present case.

27. In addition the Iraqi people has the legal and moral right to establish an entity to try the leading personalities in the former regime, and if the Iraqi High Tribunal is to accomplish the objectives for which it was established its decisions shall be compatible with the international standards of justice and in accordance with international law; as to the death penalty, it is a legitimate penalty existing in Iraqi law and conforms to the accepted international law if applied in accordance with the International Convention for Civil and Political Rights and to which Iraq has been a party since January 25, 1971, and there is a universal consensus that war crimes, genocide and crimes against humanity are among the most serious violations of the law, and because of their seriousness these crimes go far beyond the simplest of the requirements of the International Convention for Civil and Political Rights which says that the death penalty shall not be used as a penalty except for crimes that are considered very dangerous according to law; therefore in a domestic trial for commission of these crimes the sentence of death is considered a legitimate penalty allowed under both domestic and international law, and therefore this defense is also rejected.

28. As to the other defenses the accused were given what is sufficient to conduct a just trial against him, he was informed promptly of the nature of the crimes filed against him, he was given enough time to prepare his defense and received legal assistance from those whom he personally chose, and was given the opportunity to defend himself with the help of his lawyer consultants, and was given the opportunity to examine the prosecution and defense witnesses, and he used his right to defend himself fully, and was not forced to say anything he did not want to say; therefore the objections he raised to this effect are also rejected.

III. Related Resources

A. Laws, Treaties and Resolutions

B. Additional Readings

C. Web Resources

D. Sources Cited

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