

# To What Extent are Domestic Penal Laws Retroactive for Crime against Humanity? The Mauritian Perspective

- *The S.I.C.T<sup>ii</sup>: a case<sup>iii</sup> to remember* -

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*“The heart of a criminal case lies in the details of proof”.*

## **Abstract**

To what extent does a domestic court, like the S.I.C.T, have jurisdiction to try over war crimes and crimes against humanity especially to crimes committed ‘prior’ to the coming into force of the very controversial Law Number 10 of 2005 of Iraq where some of its provisions are borrowed from the Rome Statute of the International Criminal Court 1998(articles 6 to 8)? The sentence was death penalty by hanging though there is no international instrument forbidding the death penalty per se and though Iraq was not a State party to the Rome Statute. However, the main issue is to what extent are domestic penal laws retroactive for crime against humanity? In addition, is there a link between domestic law and procedures of an international character? By referring to domestic and international instruments, the stare decisis of the case and other relevant national court decisions, with rather controversial and conflicting views, this article deals with the procedural aspects of Saddam Hussein’s trial and it tries to enlighten international legal aspects linked with some procedures that must be avoided in the future to avoid a mistrial and to assess some procedural values of the indictment<sup>iv</sup> prior to the trial.

**Keywords:** nullum crimen, nulla poena sine lege<sup>v</sup>, retroactivity and non-retroactivity of laws, ultra vires.

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## INTRODUCTION

Though the international offence of crimes against humanity, as part of international customary law, has never been incorporated in Iraqi law, Saddam Hussein<sup>vi</sup> was charged with crimes against humanity committed during 1982-1983 and he was nevertheless convicted. It is only in 2003 that the local Iraqi law (Penal Code) addressed crimes against humanity but Law No. 10/05<sup>vii</sup>, which was never part of any domestic Iraqi law, replaced hastily the 2003 Statute. During the trial, most procedural rules were borrowed from the Iraqi Criminal Procedures Code and the Rules of Procedure and Evidence.

However, some pertinent questions remained unanswered and the procedures still consume the attention of lawyers, scholars, jurists, diplomats and journalists.

Does the legality principle or *nullum crimen* violate the sacrosanct principle of the non-retroactivity of penal laws and to what extent is it valid when procedures related to crime against humanity are in issue? Nonetheless, it appears that the decision of the S.I.C.T, which is based on Law 10 of 2002, has acted retroactively. Relevant sections of the present Iraqi Constitution and the Iraqi Penal Code confirm that the sacrosanct principle has nevertheless been violated in the absence of a universal justice.

Certain principles of domestic<sup>viii</sup> law find their application in international law and most especially to issues pertaining to criminal law and international crime but there are a lot of conflicting views<sup>ix</sup> emanating from scholars, jurists<sup>x</sup> and *stare decisis* from various courts when the principle of retroactivity is in issue.

First, there are a lot of critics regarding the (unfair) trial<sup>xi</sup> of Saddam Hussein by the S.I.C.T, the legitimacy of a domestic court to try cases with issues linked with international crimes, as a revolutionary concept in international penal law<sup>xii</sup>, and the validity of the proceeding. Secondly, there is no Iraqi law, which provides for death sentence<sup>xiii</sup> for the offence of crimes against humanity, the death penalty represents per se inhuman and degrading treatment prohibited by most conventions pertaining to human rights<sup>xiv</sup> with particular reference to the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>xv</sup>.

Indeed, most critics acknowledge the retroactivity of penal law though some domestic courts have maintained that penal laws have a non-retroactive effect depending on the circumstance of the case. Other domestic courts like the famous *Cour de cassation* are not of the same opinion and have made it a live issue because they consider that an accused person may be prosecuted and sentenced even if the law came into force well after the acts were perpetrated (*infra*).

But although the SICT was a domestic court it was, however, vested with powers equivalent to an international criminal court and the *stare decisis* of the court would find support on precedent cases established by the former international criminal tribunals. It was empowered to do so under article 12 of Law No. 10. It is

worthless to precise that Iraqi Law No. 10 of 2005 only establishes a special tribunal to try Saddam Hussein and its legal statutory framework is completely outside the judiciary system of Iraq. And anyway the SICT was vested with jurisdiction to try violators for crimes against humanity. The determination of penalties for a crime against humanity must derive from the penalties applicable to the underlying crime, the Trial Chamber held in the judgment of *Prosecutor v. Erdemovic*<sup>xvi</sup>. This law suddenly repealed the 2003 statute and its articles deal with offences committed during 1982-1983, which, of course, are against the *nullum crimen sine lege* and *nulla poena sine lege* principles.

Unlike Iraqi laws some common law countries may apply penal laws with retroactive effects because they are made statutory and form part of their respective legislations. However, by contrast, there are none in the Iraqi law, and the new Law No. 10 does not provide for such enactments either. It has never been part of any statutory enactment or any permanent Iraqi legislation. Questions therefore arise with regards to its legitimacy.

Has there been a mistrial by the S.I.C.T? According to international legal instruments<sup>xvii</sup>, which have inspired most domestic legislations, an accused person and whoever he is and even if he has perpetrated atrocities, genocide, murder, rape, forced prostitution and torture to prisoners, he must have a fair<sup>xviii</sup> trial before an independent and impartial court. International criminal tribunals have been framed purposely to try crimes of an international character. The procedures reflect that neither the defendants have been able to enjoy their fundamental rights throughout the trial nor has an international criminal tribunal tried them. Unfortunately, there is no jury to assist the SICT in its verdict and there is no separate hearing for sentencing.

This article, therefore, deals with issues pertaining to a trial that has been misdirected since the beginning until the death sentence was pronounced. Eventually, it is too late but jurists always learn from their mistakes, past experience and knowledge and it is a good lesson for the future.

#### -I-

#### SOME PROCEDURAL ASPECTS UNDER INTERNATIONAL LAW

Was there a mis-trial by the Supreme Iraqi Criminal Tribunal or was the decision rendered *ultra-vires*: the national court, set by the interim government and the occupying powers<sup>xix</sup>, is neither an international criminal court to judge perpetrators for crime against humanity nor has it jurisdiction to try cases where the accused committed the offence prior to Law No. 10 of 2005, which does not in any way form part of any Iraqi domestic law, which came in force some fifteen years after? Firstly, both the principle of *nullem crimen* and *nulla poena sine lege*<sup>xx</sup> have been violated (**A**) and there exist sufficient procedural aspects under international law, which demonstrate that the famous trial is tainted with some irregularities (**B**).

**A. The procedure of legality: *nullem crimen*, and the Geneva Conventions.**

The Geneva Conventions include as acts of grave breaches if committed against a person protected by the Convention such as wilful killing, torture or inhuman treatment, including biological experiments, unlawful deportation, depriving a protected person of the right to a fair trial, and hostage-taking.

Article 49 and article 50 of the Geneva Convention I (1949) require States to exercise universal jurisdiction over such crimes, to implement necessary legislations in their domestic or municipal law and to provide penal sanctions but Iraqi law has neither domestic legislations on the subject of crime against humanity nor has it incorporated the Geneva Conventions in its domestic legislation. By contrast; unlike France, Israel, Russia or the United Kingdom; there is neither domestic law punishing war crimes and crimes against humanity nor the Geneva Conventions have been implemented as a statutory<sup>xxi</sup> enactment in Iraqi law. So, where is the truth?

By contrast, if the Geneva Conventions have been codified from international customary law, the Constitution of Iraq declares, in its Preamble, as the highest law of the country and ideally crimes against humanity must either be tried by an international criminal court or it is left to the Iraqi government to enforce international criminal law in its domestic legislation by implementation in the form of statutes.

Nonetheless, in international law and according to the maxim *aut dedere aut judicare* that is 'extradite' or 'prosecute' either the Supreme Iraqi Criminal Tribunal tries Saddam Hussein that is it exercises jurisdiction over a crime of an international character in which it has no jurisdiction or the decision of the court is *ultra vires* unless this local Iraqi court exercises as a universal jurisdiction that is, as the court suggested in the matter of *Attorney-General of the Government of Israel v. Eichmann*<sup>xxii</sup>, it is prosecuting the accused in whose punishment all States have an equal interest.

Again, it is unclear whether the Supreme Iraqi Criminal Tribunal has universal jurisdiction in the trial of Saddam Hussein or that all States have an equal interest and it is also very unlikely that the Supreme Iraqi Criminal Tribunal has jurisdiction in the trial in the absence of a domestic statutory legislation and that the principle of *nullem crimen sine lege*, which goes back to the time of the early Roman law and which is firmly embedded in various legal systems of the world, would probably constitute a hurdle to any such prosecution but the trial seems to be a proof by itself where it reflects that the sacrosanct principle of non-retroactivity has been violated for once and all.

Both domestic law and some international instruments, as an important source of law, support and approve this suggestion. According to Iraqi law, section 2 of Article 19 of the present Constitution enacts that:

*“ 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”.*

In Iraqi Law this Article 19 is also supported by the Penal Code. Article 1 of the Penal Code expressly provides that:

*“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”.*

Hard or soft law most countries have at least a piece of statutory enactment, which provides for the non-retroactivity of penal law. Non retroactivity of penal laws also forms part of fundamental rights of the citizens in the Constitution, the supreme law of the country of the Republic of Mauritius which provide in its section 10(4) that:

*“ No person shall be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such as offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed”.*

In the absence of any proper, direct and specific enactment, which gives jurisdiction to the Supreme Iraqi Criminal Tribunal to prosecute violators of crime against humanity, it is obvious that the procedure in the indictment of Saddam Hussein was tainted with irregularities. Some international instruments also confirm that the conviction is wrong in principle and there is ground to question the trial's legitimacy.

#### **B. The validity of the conviction under international human rights instruments.**

Most international instruments confirm that no person shall be guilty of a criminal offence on account of any act or omission that *“did not, at the time it took place, constitute such as offence”*. Indirectly, most international instruments pledge for a mis-trial in the conviction of the former dictator.

For instance under the Universal Declaration of Human Rights (1948), its article 11.2 provides that:

*“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 penal offence was committed”.*

Iraqi law has been inspired from international instruments such as the International Covenant on Civil and Political Rights (1987), which provides fundamental constitutional rights of the accused available to him prior to his trial. Article 15, section 1 of this covenant, which is guaranteed under Iraqi law, provides that:

*“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”.*

Even the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950) support the principle of legality. Article 7, section 1 of this convention provides that:

*“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”.*

Relying on the provisions of these international legal instruments *The George Boudarel’s case* and *The Pinochet case* confirmed the application *stricto sensu* of the legality principle where an accused cannot be tried and convicted for an act he committed when there was no law forbidding doing that certain act nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. Similarly, the House of Lords in the Pinochet decision stated that it was clear that the alleged acts must be committed under United Kingdom law at the “*date*” of the commission of the alleged acts.

Does article 12 of the Law 10 of 2005 enact that Iraqi Law includes penalties for offences of crimes against humanity, do the judges of the Special Court have the absolute autonomy to impose penalties for crime against humanity and does that imply that they have the jurisdiction to impose penalty for crimes against humanity when the law does not specifically provide for it? This explains why most jurists still question the trial’s legitimacy and the validity of the proceedings.

## -II-

**PROCEDURAL ASPECTS UNDER NATIONAL LAW**

Regardless of the provisions of the Geneva Conventions other international legal instruments reflect holistically that the principle of legality has not been scrupulously respected and secondly, according to common law, relevant statutory enactments and relevant case law demonstrate, by contrast, that the procedure may nevertheless be valid.

There are still conflicting views between the procedural aspects linked with the retroactivity or non-retroactivity of penal law and its application by the S.I.C.T (-A-), the interpretation of repealed enactments by domestic courts and its *stare decisis* and conflicting views as well (B).

**A. Procedures are tracked according to the International Criminal Tribunal.**

By analogy, the trial of Saddam Hussein and the indictment are similar to that established by the international military tribunal to try some major Nazi leaders who perpetrated war crimes, crimes against humanity during World War II. Similarly and by analogy, the Tribunal of Nuremberg was criticised for its composition and that the principle of *nulla poena sine lege* was violated since war crimes and crimes against humanity were crimes, which were still unknown in international law at the time they were perpetrated.

Nevertheless, nothing has prevented the establishment a court of law, which was impartial, and the accused were tried, prosecuted and convicted by the Nuremberg tribunal and the Tokyo Tribunal. The crimes committed at that time were defined under the London Charter (1945) which aim to “try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members or as members of organizations, committed any of a number of crimes including crimes against humanity<sup>xxiii</sup>”. The crimes against humanity were defined as:

*“Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”.*

Unlike the London Charter, which authorises prosecution whether or not the acts violated the domestic law of the place where they were perpetrated in its article 6(c), there is doubts as to whether the Supreme Iraqi Criminal Tribunal (SICT) has jurisdiction in the matter since the Iraqi national legal system was modified and amended to include Law No. 10 of 2005 so that it may now include genocide, war crimes, and crimes against humanity but in no any way do these amendments form

part of Iraqi law: international customary law are peremptory norms or *jus cogens*<sup>xxiv</sup>, which are not binding on all States unless they consent to it.

Again, critics have questioned the legitimacy of the SICT, the validity of the proceedings that led to Saddam Hussein's conviction and sentence: Iraq was under occupation, that Law Number 10<sup>xxv</sup> which abolished the 2003 statute was a creation of the occupying power which make it possible to deal with genocide, crimes against humanity, war crimes at the time Saddam Hussein was officially in power, that articles of Law Number 10 were drafted in close conformity with the Rome Statute of the International Criminal Court (1998) which unfortunately provide no penalty<sup>xxvi</sup> and that crime against humanity has not been declared officially as a crime in either the Iraqi Penal Code or any other Iraqi criminal statutes, and that most decisions came from an interim government, which was under the control of the Occupying powers, which has no power to promulgate any particular piece of law and other statutory enactments.

In the end, after amendments made, the S.I.C.T shall have jurisdiction similar to the International Criminal Tribunal for Rwanda (I.C.T.R) and the International Criminal Tribunal for the Former Yugoslavia (I.C.T.F.Y). Indeed, article 24 of Law Number 10 gives jurisdiction to the S.I.C.T to pass sentence as the I.C.T.R and the I.C.T.F.Y and it shall be guided by its judicial precedents. During the trial, nevertheless, the tribunal has no choice to apply most enactments of the Iraqi Criminal Procedures Code and the Rules of Procedure and Evidence though Iraq has not yet incorporated the international offence of crimes against humanity.

However, unlike the I.C.T.R and the I.C.T.F.Y where the accused had a fair trial, defendants in the al-Dujail's<sup>xxvii</sup> case were unable to prepare their defence properly since the S.I.C.T failed to inform the defence of the exact charges, which have been retained against them. Furthermore, neither article 21(c) of the Rome Statute finds its application in the al-Dujail's case nor article 24(1) of the same statute which expressly provides that no person shall be criminally responsible under the Rome Statute for conduct prior to the entry into force of the Statute. Article 21(c) provides that:

*“Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.”*

The Iraqi law was applicable but since article 24 of Law No. 10 of 2005 provides that the SICT shall be guided by decisions rendered by the two former international criminal tribunals the defendants did not enjoy the principle of non-retroactivity



*rationae personae* as enacted at article 24(1) of the Rome Statute. This article provides that:

*“1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”*

The S.I.C.T was a domestic court and either the Iraqi penal code was applicable or the Rome Statute but not both simultaneously. Nonetheless, Article 12 of Law No. 10 appears to be a mixture of national and international norms, which may be a subject of interest for legal scholars of international criminal law.

If article 12 of Law No. 10 provides that the S.I.C.T shall be guided by the decisions of the former international criminal tribunals (I.C.T.R and I.C.T.F.Y) then does the S.I.C.T have jurisdiction, unlike the two international criminal tribunals, in the al-Dujail’s case for international crimes like genocide, war crimes or crimes against humanity?

### **B. Conflicting *stare decisis*.**

The George Boudarel’s case and The Pinochet case are in heavy contrast with the Finta’s case and the Scilingo’s affair. The Canadian Courts had extra-jurisdiction for crimes against humanity under a 1987 law and were therefore empowered to deal with cases which dated back to 1944 when Imre Finta was charged with crime against humanity but the Court, however, adopted the notion of an act *“illegal but not criminal”* at the time it was committed.

In the case of Finta the High Court of Canada stated that sections of the law which have been amended to create new crimes, crimes against humanity and war crimes, were not unconstitutional due to its retroactivity whereas in the Spanish case of Scilingo<sup>xxviii</sup> though Article 607 (bis) was finally added to the Spanish Penal Code only in 2004 it has a retroactive effect since Adolfo Scilingo was arrested in Spain in 2001 and he was charged with international offences perpetrated in Argentina, the Spanish Supreme Court stated that:

*“The nature of the crime is such that it represents a jus cogens which is now a fundamental norm of international law that no country could ignore”.*

The two domestic courts independently suggested that there is a retroactive application of domestic law to crimes recognised by international law.

The Judicial Committee of the Privy Council and the famous *Cour de cassation* had the opportunity to deal with the retroactivity of an enactment. The *Cour de cassation*<sup>xxix</sup> has made it clear in its judgments<sup>xxx</sup> that once a law is passed and promulgated it applies even *“to facts committed before the coming in force of the enactment”* because of retroactivity and it offended the sacrosanct principle of the

non retroactivity of laws. Furthermore, France has also amended article 211 of its penal code<sup>xxxii</sup> in 1994 to include crimes against humanity, which Iraqi law fails to do or is unable to do because of anarchy where the separation of powers are not under any control. Article 211.1 of the French Penal Code provides that:

*“Genocide is an action, according to a concerted plan, directed at the total or partial destruction of a national ethnic, racial or religious group, or of any particular group defined according to any other arbitrary criteria, through commission or causing others to commit, towards the members of such group, any of the following acts: an intentional attempt against human life; grave assault against physical or psychic integrity; submission to conditions of existence of such a nature as to cause the total or partial destruction of the group; measures designed to prevent births; forced transportation of children. Genocide is punishable by life imprisonment”.*

By so doing the French government wanted to include crimes committed during the Algerian war to punish violators of human rights and international humanitarian law<sup>xxxiii</sup>.

In the local case of *DPP v. Ahnee*<sup>xxxiii</sup>, the point was canvassed whether the absence of any limitation on the penalty that can be inflicted for contempt of the Supreme Court of Mauritius did infringe the principle “*nulla poena sine lege*”? On appeal to the Judicial Committee of the Privy Council<sup>xxxiv</sup> the lords confirmed the decision reached by the Supreme Court and stated that “*no objection can be taken from the fact that there is no prescribed penalty, since the range of appropriate penalties was at all material times apparent from the decisions of the Supreme Court*”<sup>xxxv</sup>.

Retroactivity of penal law is better explained by rules of interpretation: from mischief rule to the contextual rule most common law countries have codified statutory enactments where the coming into force of a new enactment may be interpreted.

Law No. 10/05 repealed the 2003 Statute and the judges of the SICT convicted Saddam Hussein under the new enactment. Under common law where any person is liable under a repealed enactment to a penalty, forfeiture or punishment which is lighter than that imposed by the repealing enactment, the lighter penalty, forfeiture, or punishment shall be inflicted.

In the matter of *R v. Mazar Khan Chinkan Ali*<sup>xxxvi</sup>, where the Supreme Court of Mauritius had to deal with retroactivity of penal law, the accused was arrested for illegally importing heroin on the 12th September 1986 in breach of section 28(1) (c) of the Dangerous Drugs Act (DDA) 1986 which, by coincidence, came into operation on the 12<sup>th</sup> September 1986 that is on the precise date the unlawful act was perpetrated. Under the new DDA (1986) any person found guilty of importing drugs may be sentenced to death. It repeals the Dangerous Drugs Act of 1974,

which provides a lighter sentence such that a person would be punished for a term of not less than five years and not more than twenty years for the same offence under the DDA (1986). Justice Ahnee of the Supreme Court of Mauritius stated, *inter alia*, that he would violate the sacrosanct principle of *nullum crimen* in case he would impose the heavier penalty and there was strong evidence that the proclamation issued by the Governor-General was only published in an extraordinary gazette late in the afternoon of 12<sup>th</sup> September 1986, well after the offence was charged. The accused was convicted and sentenced according to the repealed enactment (Dangerous Drugs Act 1974), the lighter sentence was applied (twenty years imprisonment) and the decision of the trial judge was confirmed on appeal<sup>xxxvii</sup> by three judges. The Court, which quoted the *stare decisis* of Chief Justice Rivalland and Senior Puisne Judge Lalouette in the matter of *Thomas v. R*<sup>xxxviii</sup>, held that:

*“Section 8(4) of the Constitution of Mauritius published under GN No.7 of 1967 lays down that no person is to be held guilty of a criminal offence on account of an act that did not, at the time it took place, constitute such a no offence. We doubt that the question of retroactivity can arise in circumstances such as the present one”.*

The S.I.C.T, in its judgment, has completely ignored the sacrosanct principle of non-retroactivity<sup>xxxix</sup> of penal law and the ex President of Iraq was sentenced to death penalty according to the Rome Statute, which has never been part of Iraqi Law. The procedure would have been different if the defendants have been tried at The Hague.

## CONCLUSION

With regard to the retroactivity of domestic penal laws for crimes against humanity, the Saddam Hussein’s trial reflects also to what extent human rights and international norms are disregarded when a State is in anarchy. Iraq is a sovereign State but the occupying powers had imposed an interim government and passed a new piece of legislation whose procedures are difficult to handle but easy to apply when retroactivity of penal laws are in issue. It is also important to add that with the exception of the Military Tribunal of Nuremberg neither the Rome Statute (1998), the International Criminal Tribunal for the Former Yugoslavia<sup>xl</sup>, the International Criminal Tribunal for Rwanda<sup>xli</sup> nor the Special Court for Sierra Leone<sup>xlii</sup> allow the death penalty for crimes against humanity. One question still remains unanswered: why the defendants, with their strong ‘personalities<sup>xliii</sup>’, were not been able to enjoy the status of prisoners of war, based on the *Marten’s Clause*, with all its privileges. Unfortunately, the decisions reached by the S.I.C.T took a great step backward in the development of public international law. However, the only justification of the jurisdiction of the SICT, which was reached, was the international consensus of Law 10 as ‘*norms of international customary law*,

which are not generally binding on a State without its consent, and as peremptory norms or *jus cogens*<sup>xliv</sup>’. True is it that a judgment; in a world of chaos, turmoil and disorder; was finally rendered and, except for a very few, it seems that justice seems to be done for all but the trial of Saddam Hussein will always be a case to remember as a very tricky case.



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- i The opinions expressed in this article are those from the author and not from the Editor. They never intend to challenge any decision of the Court nor opinions of its judges. It reflects only the basic procedure of the case linked to indictment and the principle of legality to one and all.
- ii The Supreme Iraqi Criminal Tribunal. Newton M. (2005): *The Iraqi Special Tribunal: a human rights perspective*. 38 Cornell Law Journal 863.
- iii Warner A. M. (1991): *The case against Saddam Hussein-The case for world order*, 43 Mercer Law Review 563, K.13.E36.
- iv According to Issam Michael Saliba: “*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*” in “*Comments on the indictment of Saddam Hussein mid-trial*”, The Law library of Congress.
- v i.e. “*Pas de délit, pas de peine sans texte*”.
- vi Alvarez J. E. (2004): *Trying Hussein: Between Hubris and Hegemony*. 2 Journal of International Criminal Justice 319, 2004.
- vii Indeed, law No. 10 was imposed by the occupying powers and was implemented in the legal system of Iraqi law in the absence of the separation of powers. In fact, the accused in the al-Dujail’s case must have been tried by an international criminal court in the Netherlands and sentenced if they have been found guilty but international pressure burst from outside and the trial was rushed into a precipice. Was there any other option? Was the death penalty the appropriate remedy?
- viii Schwarzenberger G. (1957): *International law as applied by international courts and tribunals*, London, Stevens.
- ix According to Issam Michael Saliba (2006): *Is the death penalty an option in the trial of Saddam Hussein?* , The Law Library of Congress.
- x Bassiouni C. M. (2005): *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 Cornell International Law Journal 327,378.
- xi Scharf M. P. (2005): *Will Saddam Hussein get a fair trial?* Case Western Reserve Journal of International Law.

- xii Pr. Dugard J. (2000): International law : a South African Perspective, Juta & Co. Ltd, 473 p., p.236.
- xiii Article 85 of the Iraqi Penal Code provides for death penalty but under Iraqi law only.
- xiv Schabas W. A. (1996): *Sentencing by international tribunals: a human rights approach*. Duke Journal of Comparative and international law 461.
- xv According to the Grand Chamber of the European Court of Human Rights in the case of Ocalan v. Turkey, App. No. 46221/99, 37 Eur.Ct.H.R. 238 (2003).
- xvi Prosecutor v. Erdemovic Drazen, Case No. IT-96-2-T, T.Ch.I, Nov. 29, 1996.
- xvii For example article 9, paragraph 2 of the International Covenant on Civil and Political Rights 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”.
- xviii Commission for the international due process. The draft indictment of Saddam Hussein, 20 Denver Journal of International Law and Policy 91. 1991-1992.
- xix Bali A U. ((2005): Justice under occupation: rule of law and the ethics of nations-building in Iraq. 30 Yale Journal of International Law 431.
- xx Article 23 of the Rome Statute (1998) provides that a person convicted by the Court may be punished only in accordance with this Statute. In fact, the Iraqi law was applicable in the trial as decided by the SICT!
- xxi The Geneva Conventions and its Additional Protocols have been implemented, in the Rep. of Mauritius, as the Geneva Conventions Act .
- xxii Attorney-General of the Government of Israel v. Eichmann 36 ILR 277, pp. 298-304.
- xxiii Finkelstein C. (1995): *Changing Notions of State Agency in International Law: The case of Paul Touvier*, 30 Texas International Law Journal L.J. 261.
- xxiv Brownlie I (1972): *Principles of Public International Law*, ELBS, 1972, 743 p., p.670.
- xxv Law Number 10 is a legislative act. It contains articles pertaining to different types of offences.
- xxvi Saddam Hussein was sentenced to death according to Article 85 (Part One) of the Iraqi Penal Code and not according to Law Number 10.
- xxvii Six hundred and eighty-four detainees, residents of al-Dujail, were detained and 184 were condemned to death after a brief trial by the S. Hussein’s regime. Others were detained in camps and forty-six persons died in prison as a result of corporal and psychological punishment.
- xxviii Gil A. (2005): *The flaws of the Scilingo Judgment*. 3 Journal of International Criminal Justice Law, 1083.
- xxix Dalloz, Encyclopédie Pénale, Vo. Lois et Décrets.

- xxx Crim. 21 December 1954, Bull.Crim., No. 417; 12 mai 1959, no 260; 22 July 1959; 4 April 1960.
- xxxI Livre II, Titre I: *Crimes against humanity* (articles 211-1 to 212-3 of the French Penal Code).
- xxxii Masse M. (1994): *Les crimes contre l'humanité dans le nouveau Code penal français*, Revue Sc. Crim., 376 and Annexes, *Crimes contre l'humanité*.
- xxxiii DPP v. Ahnee 1993 MR 360.
- xxxiv Ahnee & Ors v. DPP 1998 Privy Council Appeal No.28 of 1998, judgment delivered on 17<sup>th</sup> March 1999.
- xxxv According to P.R. Domingue in Manual of Criminal Law, UoM.
- xxxvi *R v. Mazar Khan Chinkan Ali Supreme Court Judgment 1987 Mauritius Report 162/ Supreme Court Judgment 411*
- xxxvii Chinkan Ali v. R 1988 MR 226.
- xxxviii Thomas v. R 1968 MR 27.
- xxxix Professor Kelsen H. (1947): *Will the judgment in the Nuremberg Trial Constitute a Precedent in International Law?* International Law Quarter Review 153. According to him, the *nullum crimen* or *ex post facto* rule is retroactive for application of criminal law but the acts are illegal but not criminal. It is an exception to the general rule.
- xl Article 24 of the ICTFY.
- xli Article 23 of the ICTR provides: “ *Penalties*
1. *The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.*
  2. *In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.*
  3. *In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners”.*
- xlii Article 19 of the Special Court for Sierra Leone.
- xliii Post J.M.; Panis L.K. (2005) : *Tyranny on trial: personality and courtroom conduct of defendants Slobodan Milosevic and Saddam Hussein*, 38 Cornell International Law Journal 823.
- xliv Christenson G.A. (1987): *The World Court and Jus Cogens*, 81 American Journal of International Law 93.