

Can the Iraqi Special Tribunal Sentence Saddam Hussein to Death?

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This brief intervention is meant to address the question of whether the Iraqi Special Tribunal (IST) has the power to hand down the death penalty¹ for crimes within its jurisdiction. The penalties available under the IST Statute (ISTS) are set out in Article 24 ISTS.² The ISTS was subsequently confirmed

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1 See, e.g. the concerns expressed by J.E. Alvarez, 'Trying Hussein: Between Hubris and Hegemony', 2 *JICJ* (2004) 319; D. Zolo, 'The Iraqi Special Tribunal: Back to the Nuremberg Paradigm?', 2 *JICJ* (2004) 313; O. Olusanya, 'The Statute of the Iraqi Special Tribunal for Crimes Against Humanity: Progressive or Regressive', 5 *German Law Journal* (2004) 859.

2 Article 24.

- (a) The penalties that shall be imposed by the Tribunal shall be those prescribed by Iraqi law (especially Law Number 111 of 1969 of the Iraqi Criminal Code), save that for the purposes of this Tribunal, sentences of life imprisonment shall mean the remaining natural life of the person.
- (b) Subject to paragraph (a) above, the penalties for crimes under Article 14 shall be those prescribed under the relevant provisions of Iraqi law.
- (c) The penalty for crimes under Articles 11 to 13 shall be determined by the Trial Chambers, taking into account the factors contained in paragraph (d) and (e) below.
- (d) A person convicted of:
 1. An offence involving murder or rape as defined under Iraqi law; or
 2. An offence ancillary to such offence of murder or rape;shall be dealt with as for an offence of, as the case may be, murder or rape or the corresponding ancillary offences in relation to murder or rape.
- (e) The penalty for any crimes under Articles 11 to 13 which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents.
- (f) The Trial Chambers may order the forfeiture of proceeds, property or assets derived directly or indirectly from that crime, without prejudice to the rights of the *bona fide* third parties.
- (g) In accordance with Article 307 of the Iraqi Criminal Procedure Code, the Tribunal has authority to confiscate any goods prohibited by law regardless of whether the case has been discharged for any lawful reason.

by Article 48 of the Interim Constitution of 2004.³ In addition, Article 26 of the Interim Constitution 2004 provides that the law of the Coalition Provisional Authority (CPA) shall remain in effect until rescinded or amended.⁴

The IST is a creation of the CPA in the guise of the CPA-appointed Governing Council. It is, as long as there is no provision to the contrary, bound by previous CPA law under Article 26 of the Constitution, which, under its Article 3, is the 'Supreme Law of the land and shall be binding in all parts of Iraq without exception'.

Article 24(a) ISTS contains a blanket reference to the Iraqi law on penalties and sentencing, with a few qualifications regarding the offences which so far had not been part of Iraqi criminal law in subsections (b) and (c). It does not restrict the reference to a certain version of the law or the Penal Code, as Article 17(a)(ii) ISTS does with respect to the question of which general principles of criminal law shall be applicable. The ISTS itself does not explicitly mention that the IST can mete out capital punishment. This means that the reference to the Iraqi law on penalties in Article 24 is a dynamic reference; it has binding effect at least so long as the later developments are more lenient to the accused under the general principle of *lex mitior*, which can be found in section 2(2) of the Iraqi Penal Code of 1969, referred to in Article 24 ISTS and Article 17(a)(ii) ISTS. Section 2 of the Iraqi Penal Code of 1969 reads:

(1) The occurrence and consequences of an offence are determined in accordance with the law in force-at the time of its commission and the time of commission is determined by reference to the time at which the criminal act occurs and *not by reference to the time when the consequence of the offence is realised*:

(2) However, if one or more laws are enacted after an offence has been committed and before final judgment is given, then the law that is most favourable to the convicted person is applied. (Emphases added.)

3 Article 48 [Iraqi Special Tribunal]

(A) The statute establishing the Iraqi Special Tribunal issued on 10 December 2003 is confirmed. That statute exclusively defines its jurisdiction and procedures, notwithstanding the provisions of this Law.

(B) No other court shall have jurisdiction to examine cases within the competence of the Iraqi Special Tribunal, except to the extent provided by its founding statute.

(C) The judges of the Iraqi Special Tribunal shall be appointed in accordance with the provisions of its founding statute.

4 Article 26 [Old Laws, CPA-Laws]

(A) Except as otherwise provided in this Law, the laws in force in Iraq on 30 June 2004 shall remain in effect unless and until rescinded or amended by the Iraqi Transitional Government in accordance with this Law.

(B) Legislation issued by the federal legislative authority shall supersede any other legislation issued by any other legislative authority in the event that they contradict each other, except as provided in Article 54(B).

(C) The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.

The CPA had suspended capital punishment in section 3(1) of CPA Order No. 7 of 9 June 2003:⁵

Section 3 — Penalties

(1) Capital punishment is suspended. In each case where the death penalty is the only available penalty prescribed for an offence, the court may substitute the lesser penalty of life imprisonment, or such other lesser penalty as provided for in the Penal Code.

Similar restrictions on maximum penalties for certain offences could be found in CPA Order No. 31 of 10 September 2003,⁶ e.g. reducing the death penalty for kidnapping combined with sexual intercourse (section 423 of the 1969 Penal Code, as amended) to a maximum of life imprisonment. The Iraqi Interim Government reinstated the death penalty for certain offences⁷ on 8 August 2004.⁸ This could mean that the death penalty is available again under the ISTS in so far as the offences under the ISTS overlap with those for which the death penalty has been reintroduced.

However, it is necessary to point out again in this context that section 2(2) of the Iraqi Penal Code, to which sections 17(a)(ii) and 24 ISTS refer, subscribes to the absolute *lex mitior* principle, which means that if there are several changes in the law after a certain offence, then the *most favourable*, not the latest law, must be applied, i.e. if the law is relaxed and then tightened again before the judgment, the most lenient law during the period between offence and decision must be applied. This means that once the death penalty is abolished, the reinstatement takes effect *ex nunc*, not *ex tunc*.

Three objections could be raised against this. First of all, one might wish to argue that the method of punishment or the degree of sanction does not partake of the principle of *lex mitior*. Secondly, one could argue that CPA Order No. 7 talks about ‘suspending’, not ‘abolishing’, the death penalty. And thirdly, someone might argue that the CPA only wanted the suspension to have effect *ex nunc*, leaving the death penalty available for offences committed prior to the entry into force of Order No. 7. All of these objections are unfounded, in my view.

First, it is common ground that the severity of a law is not only characterized by the legal classification of an offence as a felony, misdemeanour or minor infraction, but mainly by the punishment connected with it. From a practical and common-sense point of view, this must be so, because it is the sanction that decides the severity of an offence more than anything else. What is important in deciding the question of which law is the more lenient is an overall

5 See www.iraqcoalition.org/regulations/20030610_CPAORD.7_Penal.Code.pdf (visited 7 February 2005).

6 See www.iraqcoalition.org/regulations/20030921_CPAORD31.pdf (visited 7 February 2005).

7 It was not possible to ascertain the exact wording of the law, but for the reasons mentioned below, that is also irrelevant.

8 See report by Reuters at www.iol.co.za/index.php?sf=2813&art_id=qw1091976122311B262 (visited 8 February 2005).

evaluation of the state of the law at all times during the period between offence and judgment. It would be nonsensical to argue that to reclassify an offence in a different category, e.g. from misdemeanours to felonies, without a change in the sentencing range would be a negative change in the law that triggers the *lex mitior* principle, whereas a downgrading from felonies to misdemeanours, but with an increase in the sentencing range, would not. In Germany and France, for example, the inclusion of the sanction into the ambit of the *lex mitior* principle has been expressly recognized as an emanation of the ban on retroactive punishment.⁹ The principle of *lex mitior* has also been recognized without any restriction as to offence elements or sanction in the ICC Statute under Article 24(2), and can be safely counted among the general principles of law recognized by all civilized nations, although that again would be, strictly speaking, of no relevance in the domestic context, if the domestic law were clearly and expressly opposed to this principle.

The second objection is based on a purely terminological argument, not on substance. The use of the word 'suspended' instead of 'abolished' is irrelevant, if the effect of the law in CPA Order No. 7 was the abolition of the death penalty. CPA Order No. 7, in effect, required Iraqi courts to substitute the death penalty with life imprisonment or lesser sanctions, if the death penalty was the only available punishment under the law. It did not allow the courts to hand down a death sentence and then merely suspend its execution. They had to substitute the sanction at judgment time, which meant that the death sentence could no longer be pronounced as such. A similar argument can be made on the basis of the changes to section 423 of the 1969 Penal Code by CPA Order No. 31, mentioned above. CPA Order No. 7 had the consequence that the death penalty was, to all purposes, excluded from the arsenal of criminal sanctions. That, in a common-sense view, amounts to an abolition of the sanction as such.

The third assumption that the effect of CPA Order No. 7 was to be *ex nunc* and not *ex tunc* is also untenable. First of all, the Order dates from 9 June 2003. At that time, the offences triable in the courts of Iraq *and* having reached the trial level would overwhelmingly have been committed before the cut-off date of 1 May 2003. It was more likely than not that the courts would have to try such cases and the wording of the Order would have caused confusion. From this flows the second, and more convincing, argument against an *ex nunc* effect: because of the consequences of the *lex mitior* principle described above, the Order would have had to state explicitly that it was meant to take effect merely for the future. Because there is no such restriction in the wording, the full consequences under section 2(2) of the Penal Code of 1969 must take effect.

There is yet another circumstance that may militate against the view put forward here. The second draft of the IST Provisional Rules of Procedure and

9 See, e.g. H.-H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (5th edition, Berlin: Duncker and Humblot, 1996), 139.

Evidence (RPE) of 3 June 2004,¹⁰ in its article 112(D) — and elsewhere — was apparently written on the assumption that the death penalty would be available:

(D) After conclusion of the sentencing hearing, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A specific sentence may be adjudged for each count only when a majority of the Trial Chamber agrees upon the adjudged sentence. *However, the death penalty may only be adjudged by a unanimous decision.* (Emphasis added.)

However, this is irrelevant again, as the RPE have not been promulgated so far and are still nothing more than a draft. Moreover, in the hierarchy of norms, they are inferior to the ISTS as the authorizing piece of legislation and if the law under the ISTS leads to the conclusion that the death penalty is not available, then it cannot be introduced through the backdoor of secondary legislation.

Since it was not feasible at the time of writing to get hold of the law reinstating the death penalty itself,¹¹ one has to address the possibility that the Interim Government wanted to have the death penalty applied retroactively to the temporal jurisdiction of the IST and did state this explicitly in the Act. That would compensate for the ambiguity of CPA Order No. 7. However, it would run afoul of Article 15(A) of the Interim Constitution of 2004, which states:

There shall be neither a crime nor punishment, except by law in effect at the time the crime is committed.

10 Copy on file with the author.

11 The press releases of the days after the reinstatement suggest that no clear indication as to retroactivity for the temporal jurisdiction of the IST was made. See the article of 9 August 2004 by S. Yacoub, 'Iraq reinstates capital punishment: BAGHDAD, Iraq — Iraq reinstated capital punishment for people guilty of *murder, endangering national security and distributing drugs*, the government announced Sunday, saying the *death penalty was necessary to help put down the country's persistent insurgency*. The announcement came a day after the government offered an amnesty to Iraqis who committed minor crimes since the fall of Saddam Hussein's regime last year. The two laws were part of a carrot-and-stick approach by the government to try to put down the 15-month-old campaign of violence. Capital punishment was suspended during the U.S. occupation. Under Saddam's regime, some 114 offenses could garner the death penalty. The new law was more restrictive than that had been. "This is not an open door to execute anyone and everyone, or people whom the government dislikes. This is not Saddam's law," Minister of State Adnan al-Janabi said. Many Iraqis also wanted the death penalty reinstated so it could be applied to Saddam, who faces trial on war crimes charges. *It was not immediately clear how the new law would effect Saddam*. In announcing the law, Janabi and Human Rights Minister Bakhtiar Amin said they regretted the need to bring back the death penalty, *but it was needed to fight the militants destabilizing the country with car bombings, kidnappings, sabotage and other violence*. "The tough task in front of us in this country is maintaining security and stability, combatting terror and organized crime," Amin said. "I assure you that none of us in the government are comfortable with reinstating capital punishment." (emphases added), available online at www.thebatt.com/news/2004/08/09/News/Iraq-Reinstates.Capital.Punishment-701753.shtml (visited 11 February 2005).

The same would apply under Article 21(b) of the preceding Interim Constitution of 1990:

There can be no crime, nor punishment, except in conformity with the law. No penalty shall be imposed, except for acts punishable by the law, while they are committed.

A severer penalty than that prescribed by the law, when the act was committed, cannot be inflicted.

Based on the fact that under the *lex mitior* principle, all those liable for offences until 1 May 2003 had already acquired the safe position under section 2(2) of the Penal Code of 1969, namely that the death penalty could no longer be used, the re-imposition of capital punishment would amount to a retroactive increase of the severity of punishment and violate constitutional law. The enforcement of the death penalty, and indeed any death sentence, would be manifestly unlawful. In this context, it is irrelevant whether Article 15 II ICCPR would allow retroactive punishment on an international human rights level, because the domestic law already forbids it.

The upshot of this examination is that the IST, at the moment, cannot sentence anyone to death, because its temporal jurisdiction ends on 1 May 2003. CPA Order No. 7 dates from June 2003. Reference to the *effects* of the criminal acts, which may still occur today, in order to define the time of the offence, is excluded by section 2(1) of the Iraqi Penal Code of 1969, mentioned above. All offences committed under the IST's temporal jurisdiction are therefore exempt from capital punishment.

Postscript:

After the manuscript had gone to the publisher, the author was provided with an English translation of the Order of 8 August 2004 re-instating the death penalty, which reads in its Article 4:

This order becomes effective on the date it is issued, and will be published in the Official Gazette. Any penalty of Death imposed prior to the date this order becomes effective shall be null and void and substituted with the lesser penalty of life imprisonment.

Therefore no issue of retro-activity is involved. Interestingly the order would also have had the consequence that any death penalty already handed down by the IST would have been annulled. There is also a new version of the RPE that was passed by the IST judges in December 2004. A copy of these was provided to the author. They still contain a reference to the death penalty. However, the arguments made above regarding the hierarchy of norms still apply.