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Does The Principle Of Lex Mitior Limit The Iraqi High Tribunal's Ability To Impose The Death Sentence On Those Found Guilty Of Capital Crimes?

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MEMORANDUM FOR THE IRAQI HIGH TRIBUNAL

ISSUE:

DOES THE PRINCIPLE OF *LEX MITIOR* LIMIT THE IRAQI HIGH TRIBUNAL'S ABILITY TO IMPOSE THE DEATH SENTENCE ON THOSE FOUND GUILTY OF CAPITAL CRIMES?

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue[1]

The Iraqi High Tribunal, since its inception, has assumed that capital punishment was a viable penalty for certain offences including willful killing. The Statute of the Tribunal was in fact created in part to allow the use of capital punishment. Recently, however, some legal scholars have voiced doubt as to this assumption. Scholars have hypothesized that the principle of *lex mitior*, when applied to the potential sentences of defendants at the Iraqi High Tribunal, will limit the Tribunal's ability to impose the death sentence.

On June 9th, 2003, the Coalition Provisional Authority suspended capital punishment in section 3(1) of CPA Order No. 7. On August 8th, 2004, the Iraqi Interim Government reinstated the death penalty for certain offenses including willful killing. Section 2(2) of the Iraqi Penal Code of 1969, referenced in Article 24(1) of the IHT Statute, incorporates the principle of *lex mitior*, stating that "if one or more laws are enacted after an offense has been committed and before final judgment is given, then the law that is most favorable to the convicted person is applied."

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[1] On June 9th, 2003, the Coalition Provisional Authority suspended capital punishment in section 3(1) of CPA Order No. 7. On August 8th, 2004, the Iraqi Interim Government reinstated the death penalty for certain offenses including willful killing. Section 2(2) of the Iraqi Penal Code of 1969, referenced in Article 24(1) of the IHT Statute, states that "if one or more laws are enacted after an offense has been committed and before final judgment is given, then the law that is most favorable to the convicted person is applied." The provision has been interpreted by legal scholars to preclude the IHT from imposing the death sentence upon anyone whom the IHT convicts – even if the conviction is for willful murder. The principle set forth in Section 2(2) of the Iraqi Penal Code of 1969 is known as the lex mitior principle.

Please discuss the contours of the lex mitior principle in international law and analyze whether it limits the Iraqi High Tribunal's ability to impose the death sentence on those found guilty of capital crimes.

This memorandum addresses the potential negative effects of the *lex mitior* principle on the Iraqi High Tribunal's ability to impose capital punishment.

B. Summary of Conclusions

1. The principle of *lex mitior* is widely accepted in international law.

The Principle of *lex Mitior* is a widely accepted rule of international law and can be found within numerous international treaties, conventions, and statutes, including the International Covenant on Civil and Political Rights and the Rome Statute of the International Criminal Court. This principle is also included in the statutes of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

2. The Iraqi High Tribunal is bound by the principle of *lex mitior* based on its inclusion in The Iraqi Penal Code of 1969, and therefore included in the Statute of the Iraqi High Tribunal.

The principle of *lex mitior* is contained within the Statute for the Iraqi High Tribunal. The Iraqi High Tribunal Statute, Article 24 (1) states that "the penalties that shall be imposed by the Court shall be those prescribed by the Iraqi Penal Code No. 111 of 1969."[2] The Iraqi Penal Code of 1969, Section 2(2) provides that "if one or more laws are enacted after an offense has been committed and before final judgment is given, then the law that is most favorable to the convicted person is applied."[3]

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[2] IRAQI HIGH CRIMINAL COURT LAW, No. 4406, English translation, August 2005, at http://law.case.edu/grotian-moment-blog/documents/IST_statute_official_english.pdf (visited on September 29th, 2006) [reproduced in the accompanying notebook at Tab 3].

[3] IRAQI (BAGHDADI) PENAL CODE (LAW), No. 111 of 1969, at http://law.case.edu/grotian-moment-blog/documents/Iraqi_Penal_Code_1969.pdf (visited on September 29th, 2006) [reproduced in the accompanying notebook at Tab 1].

3. The Statute of the Iraqi High Tribunal established the court as an entity independent from the Iraqi Criminal System and the Iraqi Government, comparable to the international ad hoc tribunals.

Article 1(1), of the Iraqi High Tribunal Statute, states that "a court is hereby established and shall be known as The Iraqi Higher Criminal Court (the "Court"). *The Court shall be fully independent*."[4] In addition, Article 27 (2) of the Iraqi High Tribunal established the "Enforcement of Sentences." It states in part that "no authority, including the President of the Republic, may grant a pardon or mitigate the punishment issued by the Court."[5]

The Law of Administration for the State of Iraq for the Transitional Period, Chapter Seven, The Special Tribunal and National Commissions, Article 48 (a) states that "the statute establishing the Iraqi Special Tribunal issued on December 2003 is confirmed. That statute exclusively defines its jurisdiction and procedures, *notwithstanding the provisions of this Law*." [6]

4. The Iraqi High Tribunal Statute opted to utilize the Iraqi Penal Code No. 111 of 1969 for all non-stipulated provisions of criminal law. This referred specifically to the Iraqi Penal Code which existed from Dec.15th, 1969 until May 1st, 2003. CPA Order No. 7 was issued on June 9th, 2003. Therefore, the Penal Code utilized by the IHT is unaffected by the CPA Order No. 7

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[4] IRAQI HIGH CRIMINAL COURT LAW, *supra* note 2, (emphasis added) [reproduced in the accompanying notebook at Tab 3].

[5] *Id.*

[6] LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD, March 8th 2004, at http://law.case.edu/grotian-moment-blog/documents/TAL.pdf (visited on September 29th, 2006) (emphasis added) [reproduced in the accompanying notebook at Tab 7].

Article 17 (1) A-C of the Statute for the Iraqi High Tribunal deals with the General Principles of Criminal Law applicable to this independent Court. The Article states that

> in case a stipulation is not found in this Law and the rules made thereunder, the general provisions of criminal law shall be applied in connection with the accusation and prosecution of any accused person shall be those contained in:
>
> A-The Baghdadi Penal Law of 1919, for the period starting from July 17, 1968, till Dec. 14, 1969.
>
> B-*The Penal Law no. 111 of 1969, which was in force in 1985 (third version), for the period starting from Dec. 15, 1969, till May 1, 2003.*
>
> C-The Military Penal Law no. 13 of 1940, and the military procedure law no. 44 of 1941.[7]

The section of the Penal Code no. 111 of 1969, quoted above, is again reiterated in Article 24 of the Iraqi High Tribunal Statute, entitled "Penalties". This article states that "the penalties that shall be imposed by the Court shall be those prescribed by the Iraqi Penal Code no. 111 of 1969, …."[8]

Therefore, the Penal Code utilized by the Iraqi High Tribunal was unaffected by the suspension made to the Iraqi Penal Code, utilized by the domestic courts of Iraq, when CPA Order No. 7 was established. The gap in the dates creates two separate versions of the Iraqi Penal Code. The Iraqi High Tribunal specifically refers only to the version predating Order No. 7.

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[7] IRAQI HIGH CRIMINAL COURT LAW, *supra* note 2, (emphasis added) [reproduced in the accompanying notebook at Tab 3].

[8] *Id.*

5. Actions taken in the *Nikolic* case, at the International Criminal Tribunal for the Former Yugoslavia, illustrate the application of *lex mitior* within an international tribunal.

The International Criminal Tribunal for the Former Yugoslavia's (ICTY) first indictment was that of Dragan Nikolic on November 4th, 1994.[9] Dragan Nikolic contested the severity of his sentence which was handed down after his conviction at the ICTY. Nikolic claimed that his sentence should be mitigated due to a law newly passed in the domestic courts of the Former Yugoslavia. The ICTY held that *lex mitior* constitutes an internationally recognized standard. In addition, the Court held that *lex mitior* requires the more lenient law apply if the law has been amended as is established in international law. However, the Court found that, in order to apply, the amended law must be binding on the court. In conclusion, the ICTY held that *lex mitior* is inapplicable regarding the law of the International Criminal Court for the Former Yugoslavia in reference to laws of domestic courts. According to this precedent, the Iraqi High Tribunal is not bound by changes or suspensions made to the domestic criminal law of Iraq.

6. The principle of *lex mitior* does not limit the Iraqi High Tribunals ability to impose the death sentence.

Changes made to the domestic law of Iraq, specifically to laws contained with the Iraqi Penal Code of 1969, are not binding upon the Iraqi High Tribunal. The Tribunal's statute mandates its independent jurisdiction. As with the International Criminal Tribunal for the Former Yugoslavia, only changes made to the statute of the Tribunal itself would

[9] Human Rights Watch, *Genocide, War Crimes and Crimes Against Humanity; A Topical Digest of the Case Law of the International Tribunal for the Former Yugoslavia* (2006) [reproduced in the accompanying notebook at Tab 22].

trigger the application of the principle of *lex mitior*. Therefore, the High Tribunal is in no way limited in its use of capital punishment.

II. FACTUAL BACKGROUND

Iraq is extremely proud of its long-standing legal tradition.[10] In fact, Iraq was the first country to create a criminal code, the Code of Hammurabi, some 2,700 years ago.[11] Iraq's criminal code has always contained the penalty of capital punishment for certain crimes. It has become an important "part of their cultural heritage."[12]

The criminal code in use in Iraq, prior to the United States and United Kingdom attack and invasion in the Spring of 2003, was the Iraqi Penal Code no. 111, of 1969. The death penalty was included among the list of penalties. Chapter Five "The Penalty," in Section One "Primary Penalties," the death penalty is actually listed as the first penalty. Later in that same section, the death penalty is described as "the hanging of the condemned person by the neck until he is dead."[13]

On March 20th, 2003, as the U.S. invasion began, the government of Saddam Hussein was deposed and the country of Iraq was occupied. "The initial responsibility for overseeing administration of Iraq's reconstruction fell to the U.S. Department of

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[10] Michael Scharf, *Should Saddam Hussein be Exposed to the Death Penalty? YES*, at www.grotianmoment.com. (Currently found in: Michael P. Scharf, *Saddam on Trial; Understanding and Debating the Iraqi High Tribunal*, Carolina Academic Press (2006)). [reproduced in the accompanying notebook at Tab 23].

[11] *Id.*

[12] *Id.*

[13] IRAQI (BAGHDADI) PENAL CODE (LAW), No. 111 of 1969, *supra* note 3 [reproduced in the accompanying notebook at Tab 1].

Defense's Office of Reconstruction and Humanitarian Assistance (ORHA)."[14] However, President George Bush appointed Mr. L. Paul Bremer III to serve as the civilian administrator of Iraq.[15] It was only after this that the public began to hear the term Coalition Provisional Authority [CPA]. The exact basis for the establishment of the CPA, created to replace the pre-existing ORHA, is still debated.[16]

On May 22nd, 2003, the United Nations Security Council adopted Resolution 1483.[17] This Resolution recognized the "occupying powers" of the United States and the United Kingdom in Iraq.[18] It also recognized that the CPA's purpose was to "promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability."[19]

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[14] Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Use of Force and Arms Control; Coalition Laws and Transition Arrangements During Occupation of Iraq*, 98 A. J. Int'l Law 601 (2004). [reproduced in the accompanying notebook at Tab 20].

[15] Remarks Following a Meeting with Secretary of Defense Donald H. Rumsfeld and an Exchange with Reporters, 39 WEEKLY COMP. PRES. DOC. 549 (May 6, 2003). [reproduced in the accompanying notebook at Tab 29].

[16] Sean D. Murphy, *Contemporary Practice of the United States, supra* note 14 [reproduced in the accompanying notebook at Tab 20].

[17] Coalition Provisional Authority Order Number 7, 9 June 2003, entered into force by Paul Bremer, Administrator of Coalition Provisional Authority at www.cpa-iraq.org [reproduced in the accompanying notebook at Tab 27].

[18] *Id.*

[19] *Id.*

On June 9th, 2003, the Coalition Provisional Authority issued Order Number 7.[20] In section 3(1) of this Order, the CPA suspended the use of capital punishment throughout Iraq. According to the CPA Internet Site, CPA orders were binding directives.[21]

It is important to explore why this suspension was ordered. Two theories have surfaced. Some have argued that in suspending the death penalty the CPA was simply working towards it goal of "security and stability" after the tyrannical rule of Saddam Hussein. Michael Newton, a professor at Vanderbilt University Law School who helped establish the Iraqi High Tribunal, has pointed out that in issuing Order No. 7, the CPA "cited its duty to ensure the 'effective administration of justice.'"[22]

However, William Schabas, the director of the Irish Centre for Human Rights at the National University of Ireland, Galway, has speculated that the United Kingdom, being bound by the European Convention on Human Rights (ECHR),[23] asserted its desire to suspend the death penalty during the occupation in order to lend its assistance to the United States forces without violating its own treaty obligations.[24] The United Kingdom

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[20] *Id.*

[21] *See at* www.cpa-iraq.org.

[22] Michael Newton, *Should Saddam Hussein be Exposed to the Death Penalty? YES*, at www.grotianmoment.com. (Currently found in: Michael P. Scharf, *Saddam on Trial; Understanding and Debating the Iraqi High Tribunal*, Carolina Academic Press (2006)). [reproduced in the accompanying notebook at Tab 25].

[23] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, 4.XI.1950 at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm. [reproduced in the accompanying notebook at Tab 28].

is a signatory to the ECHR and its two protocols, all of which abolish the use of capital punishment.[25] Regardless of what prompted the suspension, the Coalition Provisional Authority's suspension of capital punishment was a free choice and not required under any international law.

On July 13th, 2003 the Coalition Provisional Authority established the Iraqi Governing Council (GC), made up of Iraqi political and religious leaders.[26] A year after the invasion and occupation began, in March 2004, the Law of Administration for the State of Iraq for the Transitional Period was written. On June 1st, 2004 the CPA established the Interim Iraqi government, which led to democratic elections throughout Iraq.[27]

Within the Law of Administration for the State of Iraq, the Iraqi Interim Government confirmed the establishment of the Iraqi Special Tribunal and its statute, which had been issued on December 10th, 2003.[28] The Law of Administration, Chapter Seven, The Special Tribunal and National Commissions, Article 48 (a), states that "the statute establishing the Iraqi Special Tribunal issued on December 10th, 2003 is

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[24] William Schabas, *Should Saddam Hussein be Exposed to the Death Penalty? NO,* at www.grotianmoment.com. (Currently found in: Michael P. Scharf, *Saddam on Trial; Understanding and Debating the Iraqi High Tribunal*, Carolina Academic Press (2006)). [reproduced in the accompanying notebook at Tab 24].

[25] European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 23 [reproduced in the accompanying notebook at Tab 28].

[26] Sean D. Murphy, *Contemporary Practice of the United States, supra* note 14 [reproduced in the accompanying notebook at Tab 20].

[27] *Id.*

[28] LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD, March 8th 2004, *supra* note 6 [reproduced in the accompanying notebook at Tab 7].

confirmed. That statute exclusively defines its jurisdiction and procedures, *notwithstanding the provision of this Law*." [29]

On June 28th, 2004, sovereignty was transferred to the Iraqi Interim government. On this day the Coalition Provisional Authority ceased to exist. Mr. Negroponte became the U.S. ambassador to Iraq, and Mr. Bremer's position dissolved. On August 8th, 2004, the Iraqi Interim government reinstated certain laws that had been suspended by the CPA, including the death penalty.[30]

Both the Iraqi High Tribunal and the democratically elected Iraqi government have been administering their jurisdictions since June 28th, 2004.

III. LEGAL ANALYSIS

In the 2005 Journal of International Law, Michael Bohlander, a professor of law at the University of Durham (UK), raised doubts as to the Iraqi High Tribunal's ability to impose the death penalty. Bohlander argues that the Iraqi High Tribunal is bound by the CPA's suspension of the death penalty. The suspension of capital punishment is, in his opinion, a change in the applicable law. Therefore, under the principle of *lex mitior*, the convicted criminal must receive the more lenient of the two laws, in this case, life in prison as opposed to the death penalty.[31] Bohlander argues that a suspension, though temporary, is a viable "change" made to the law and should, therefore, be treated as such.

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[29] *Id.*

[30] Sean D. Murphy, *Contemporary Practice of the United States, supra* note 14 [reproduced in the accompanying notebook at Tab 20].

[31] Michael Bohlander, *Can the Iraqi Special Tribunal Sentence Saddam Hussein to Death?*, 3 J. of Int'l Crim. Just. 463 (2005) [reproduced in the accompanying notebook at Tab 16].

Regardless of the semantics of the word "suspension," and although the principle of *lex mitior* is widely accepted and is included within the Iraqi High Tribunal Statute, the Coalition Provisional Authorities suspension of capital punishment in Iraq does not limit the Iraqi High Tribunal's ability to impose the death penalty. The following legal analysis will illustrate, based on precedent from the International Criminal Tribunal for the Former Yugoslavia, that the Iraqi High Tribunal is an independent tribunal, whose laws cannot be influenced by changes made to the domestic laws of Iraq.

1. The principle of *lex mitior* is a widely accepted principle in international law.

The term *lex mitior* is used to describe a situation in which a change in the law has occurred after a crime was committed. In such a case, when prosecuting and punishing the criminal, the more lenient of the available laws must be applied.[32] This practice, in keeping with the criminal law principle of interpreting laws to favor defendant, favors the defendant by awarding him/her the less severe penalty.

The principle of *lex mitior* is a widely accepted rule of international law and appears in numerous international treaties, conventions, and statutes. The International Covenant on Civil and Political Rights, Article 15 1(3), provides that "if, after the

[32] INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Article 15(1), *adopted and opened for signature* December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). [reproduced in the accompanying notebook at Tab 10]. See also, Statute of the International Criminal Court [reproduced in the accompanying notebook at Tab 11].

commission of an offence a change in the law provides for a more lenient sentence, the suspect shall reap the benefits of this change."[33]

The Rome Statute of the International Criminal Court, Article 24, states that "in the event of a change in the law applicable to a given case prior to a final judgment, the law more favorable to the person being investigated, prosecuted or convicted shall apply."[34] This principle is also included in the statutes of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

2. The Iraqi High Tribunal is bound by the principle of *lex mitior* based on its inclusion in The Iraqi Penal Code of 1969, and therefore included in the Statute of the Iraqi High Tribunal.

The principle of *lex mitior* is contained within the Statute for the Iraqi High Tribunal. The Iraqi High Tribunal Statute, Article 24 (1), states that "the penalties that shall be imposed by the Court shall be those prescribed by the Iraqi Penal Code No. 111 of 1969."[35] The Iraqi Penal Code 111 of 1969, Section 2(2) establishes that "if one or more laws are enacted after an offense has been committed and before final judgment is given, then the law that is most favorable to the convicted person is applied."[36] Section

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[33] *Id.*

[34] INTERNATIONAL CRIMINAL COURT STATUTE, Article 24(2), U.N. Doc. A/CONF.183/9*, Rome Statute(c) United Nations 1999-2000, at http://www.un.org/law/icc/statute/romefra.htm. [reproduced in the accompanying notebook at Tab 11].

[35] IRAQI HIGH CRIMINAL COURT LAW, *supra* note 2, [reproduced in the accompanying notebook at Tab 3].

[36] IRAQI (BAGHDADI) PENAL CODE (LAW), No. 111 of 1969, *supra* note 3 [reproduced in the accompanying notebook at Tab 1].

2(2), the principle of *lex mitior*, is binding upon all courts which rely upon the Iraqi Penal Code 111.

3. The Statute of the Iraqi High Tribunal established the court as an entity independent from the Iraqi Criminal System and the Iraqi Government, comparable to the international ad hoc tribunals.

The Iraqi High Tribunal has been described by many scholars as an "internationalized domestic court."[37] The Tribunal was "modeled upon the United Nations war crimes tribunals for the former Yugoslavia, Rwanda, and Sierra Leone, and its statute requires the IHT to follow the precedent of the U.N. Tribunals."[38] Article 17, Second, in Section Five General Principles of Criminal Law, of the Iraqi High Tribunal Statute states that "[t]o interpret Articles . . . of this law. The Cassation Court and Panel may resort to the relevant decisions of the international criminal courts."[39]

Article 1(1) of the Iraqi High Tribunal Statute states that "a court is hereby established and shall be known as The Iraqi Higher Criminal Court (the "Court"). *The Court shall be fully independent.*"[40] This, as well as many other Articles of the Statute, mirrors articles contained within the Statutes for the International Criminal Tribunal for the Former Yugoslavia, The International Criminal Tribunal for Rwanda, and The International Criminal Court. The implications of an independent court, found in this Article, flow from the policy interests of the Tribunal itself. Each criminal Tribunal has

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[37] Michael Scharf, *Should Saddam Hussein be Exposed to the Death Penalty? YES*, *supra* note 10 [reproduced in the accompanying notebook at Tab 23].

[38] *Id.*

[39] IRAQI HIGH CRIMINAL COURT LAW, *supra* note 2, [reproduced in the accompanying notebook at Tab 3].

[40] *Id.*

been created to prosecute individuals suspected of committing the most heinous of all crimes, including genocide. It is imperative that this process not be undermined in anyway, and that the proceedings be held to the highest of standards. Therefore, to avoid local political influence, beginning with Nuremberg, international criminal tribunals have been independent from the domestic criminal systems of the countries within which they operate.

A prime example of this policy in action is contained within Article 27 (2) of the Statute for the Iraqi High Tribunal. This Article establishes the procedure for the "Enforcement of Sentences." It states, in part, that "[n]o authority, including the President of the Republic, may grant a pardon or mitigate the punishment issued by the Court. The punishment must be executed within 30 days of the date when the judgment becomes final and non-appealable."[41] This Article manifests the drafter's desire to render the Tribunal completely separate from any other governing body.

Another section of the Statute which clarifies the independent status of the Court is found on its last page, in an unnumbered section entitled Justifying Reasons. This section states that the court is established

> [i]n order to expose the crimes committed in Iraq from July 17, 1968 until May 1, 2005 against the Iraqi people and the people of the region and the subsequent savage massacres, and for laying down the rules and punishments to condemn after a fair trial the perpetrators of such crimes for waging wars, mass extermination and crimes against humanity, and for the purpose of forming an Iraqi national high criminal court from among Iraqi judges with high experience, competence and integrity to specialize in trying these criminals.[42]

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[41] *Id.*

[42] *Id.*

The severity of the crimes allegedly committed was much too grave for the indictees to be tried in the Iraqi domestic court. Historically, creators of independent tribunals have had the desire to create a new and unbiased court for the prosecution of genocide. Therefore, as in the Former Yugoslavia, Rwanda, and Sierra Leone, an independent Criminal Tribunal was created.

Finally, from the outset of the Tribunal's creation, all applicable statutes pertaining to the Iraqi High Tribunal, such as the Iraqi Penal Code[43] and the Iraqi Criminal Procedure Law,[44] refer to capital punishment as a potential penalty for certain crimes. This point illustrates the assumption, by all of those involved in creating the Tribunal, that the death penalty was inherent in their mandate.

It is important to note that the Iraqi High Tribunal is independent from the Domestic Court System of Iraqi, despite the fact that it can and has been influences by the executive branch of the Iraqi Government. The President of Iraq has and can make changes to the Iraqi High Tribunal, such as a change in the sitting judge, based on his discretion.[45]

4. The Iraqi High Tribunal Statute opted to utilize the Iraqi Penal Code No. 111 of 1969 for all non-stipulated provisions of criminal law. This referred specifically to the Iraqi Penal Code which existed from Dec.15th, 1969 until May 1st, 2003. CPA Order No. 7 was issued on June 9th, 2003. Therefore, the Penal Code utilized by the IHT is unaffected by the CPA Order No. 7

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[43] IRAQI (BAGHDADI) PENAL CODE (LAW), No. 111 of 1969, *supra* note 3 [reproduced in the accompanying notebook at Tab 1].

[44] RULES OF PROCEDURE AND EVIDENCE OF THE IRAQI SPECIAL TRIBUNAL, No. 4006, English translation (October 2005). http://law.case.edu/grotian-moment-blog/documents/IST_rules_procedure_evidence.pdf (visited on September 29th, 2006) [reproduced in the accompanying notebook at Tab 4].

[45] IRAQI HIGH CRIMINAL COURT LAW, *supra* note 2 [reproduced in the accompanying notebook at Tab 3].

Due to the presence of Iraqi judges, familiar with the current Iraqi law, as well as to save the drafters of the Statute from having to formulate all new criminal procedures, the Iraqi High Tribunal Statute embraces the pre-existing Iraqi Penal Code no. 111, of 1969. Article 17 (1) (A-C) of the Statute for the Iraqi High Tribunal enumerates the General Principles of Criminal Law applicable to this independent Court. The Article states that

> in case a stipulation is not found in this Law and the rules made thereunder, the general provisions of criminal law shall be applied in connection with the accusation and prosecution of any accused person shall be those contained in:
>
> A - The Baghdadi Penal Law of 1919, for the period starting from July 17, 1968, till Dec. 14, 1969.
>
> B - *The Penal Law no. 111 of 1969, which was in force in 1985 (third version), for the period starting from Dec. 15, 1969, till May 1, 2003.*
>
> C - The Military Penal Law no. 13 of 1940, and the military procedure law no. 44 of 1941.[46]

The section regarding the Penal Code no. 111 of 1969, quoted above, is reiterated in Article 24 of the Iraqi High Tribunal Statute, entitled Penalties. This article states that "the penalties that shall be imposed by the Court shall be those prescribed by the Iraqi Penal Code no. 111 of 1969, …."[47]

A key factor of the above Article is that fact that in embracing the Iraqi Penal Code, the drafters of the Statute specify that the Iraqi Penal Law applicable to the Court, shall be the one which was "in force in 1985, for the period starting from Dec. 15, 1969,

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[46] *Id.*

[47] *Id.*

till May 1, 2003." This is a vital detail because the Iraqi Penal Law was completely unchanged during that period of time. The initial statute establishing the Iraqi Special Tribunal was issued on December 10th, 2003.[48] This statute established the Tribunal's jurisdiction "over every natural person whether Iraqi or non-Iraqi resident of Iraq and accused of one of the crimes listed in Article 11 to 14, committed during the period of July 17, 1968 and *until May 1, 2003, ….*"[49] It is based on this time period, therefore, that the Iraqi Penal Code utilized by the Tribunal was limited to the dates above. May 1st, 2003 is the cut off date for both the jurisdiction and the applicable penal code.

The suspension of the death penalty, which is the basis for Bohlander's argument, occurred on June 9th, 2003, over a month after the date mentioned above, May 1st, 2003. The Iraqi High Tribunal Statute is not bound to any changes made to the Penal Code after May 1st, 2003, because they are outside the terms of its General Principles. Therefore, the Iraqi High Tribunal, although controlled by the Iraqi Penal Code of 1969, is unaffected by any changes made to the Iraqi domestic system after May 1st, 2003. One such non-affecting change is the suspension of the death penalty.

5. Actions taken in *Prosecutor v. Nikolic,* at the International Criminal Tribunal for the Former Yugoslavia, illustrates the application of *lex mitior* within an international tribunal.

It will be helpful to examine a case from the International Criminal Tribunal for the Former Yugoslavia's [ICTY] to see how that court dealt with the principle of lex mitior and a claim based on a change in a domestic law.

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[48] LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD, *supra* note 6 [reproduced in the accompanying notebook at Tab 7].

[49] IRAQI HIGH CRIMINAL COURT LAW, No. 4406, *supra* note 2 (*emphasis added*) [reproduced in the accompanying notebook at Tab 3].

The ICTY's first indictment was that of Dragan Nikolic on November 4th, 1994.[50] Dragan Nikolic, a Bosnian-Serb, was the commander of the Susica detention camp and was charged with individual criminal responsibility for atrocities which occurred there.[51] The Susica detention camp was located near the town of Vlasenica in eastern Bosnia and Herzegovina. Between May and October of 1992, as many as 8,000 Muslims or other non-Serbs were murdered, raped, or tortured at the Susica detention camp.[52]

After his apprehension in April of 2000, Nikolic was charged with 80 counts of Crimes Against Humanity, Grave Breaches of the Geneva Conventions, and Violations of the Laws or Customs of War. Nikolic plead not guilt, to all counts against him. His indictment was revised based on a lack of evidence, and certain charges were erased. Despite the changes, Nikolic once again plead not guilty. After a final revision of the indictment, a plea agreement was reached. Finally, Nikolic plead guilty on September 4th, 2003, to four counts of Crimes Against Humanity. Convicted on these four counts, Nikolic was sentenced to 23 years in prison, having already spent approximately four years in prison, which counted towards his term.[53]

Nikolic's defense team appealed the severity of his sentence. Nikolic claimed that his sentence should be mitigated due to a newly passed law in the domestic courts of

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[50] Human Rights Watch, *supra* note 9 [reproduced in the accompanying notebook at Tab 22].

[51] *Prosecutor v. Nikolic*, Case No. IT-94-2-S, Judgment in the Case (December 18th, 2003). [reproduced in the accompanying notebook at Tab 12].

[52] Human Rights Watch, *supra* note 9, [reproduced in the accompanying notebook at Tab 22].

[53] *Prosecutor v. Nikolic*, Case No. IT-94-2-S, Sentencing Judgment (December 18th, 2003). [reproduced in the accompanying notebook at Tab 13].

the Former Yugoslavia. In 2003, the law of the Former Yugoslavia that applied to sentencing was changed. The new law restricted jail terms to a "fixed term of imprisonment of between 20 and 45 years instead of a term up to and including the remainder of the convicted person's life as is provided . . .."[54] The actual applicability of this new law to Nikolic's sentence was also contested but that discussion is not relevant to the issue of *lex mitior*.

In analyzing Nikolic's claim, the ICTY Appeals Chamber made four findings. The Court began by finding that the principle of *lex mitior* "constitutes an internationally recognized standard regarding the rights of the accused.[55] It then defined the principle of *lex mitior* as being "understood to mean that the more lenient law has to be applied if the laws relevant to the offence have been amended."[56]

The Court concluded that before applying *lex mitior*, it must first be determined whether or not the amended law is in fact binding upon the Court at hand. The amended law in question was one contained within the domestic legal system of the Former Yugoslavia. The Appeals Chamber concluded that

> [i]t is an inherent element of [the] principle [of *lex mitior*] that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds

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[54] *Id.*

[55] *Id* at para. 160. ("The Trial Chamber referred to the obligation of the International Tribunal under which it must 'fully respect internationally recognized standards regarding the rights of the accused' as set out in para. 106 of the Report of the Secretary-General Pursuant to Para. 2 of the Security Council Resolution 808 (1993, S/25704, 3 May 1993).")

[56] *Id.*

> the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.[57]

Thus, the Appeals Chamber held that changes made to the domestic laws of the Former Yugoslavia would not effect the independent laws of the ICTR. "As the International Tribunal is not bound by the law or sentencing practice of the former Yugoslavia, the principle of *lex mitior* is not applicable in relation to those laws."[58]

The Appeals Chamber pointed to the ICTY's own statute in explaining its independence from the domestic legal system of the former Yugoslavia. In addition, the Court presented a strong policy argument to solidify its holding. The Court stated that "[a]llowing the principle of *lex mitior* to be applied to sentences of the International Tribunal on the basis of changes in the laws of the former Yugoslavia would mean that the States of the former Yugoslavia have the power to undermine the sentencing discretion of the International Tribunal judges." In turn, "States could prevent their citizens from being properly sentenced by this Tribunal," which would not be consistent with the Statute and the mandate of the Tribunal.[59]

Upon summarizing its argument, the Appeals Chamber stated that it would fully adhere to the principle of *lex mitior* based upon all amendments made to the Statute of the

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[57] *Prosecutor v. Nikolic*, Case No. IT-94-2-S, Appeals Chamber Judgment in the Case (February 4th, 2005). [reproduced in the accompanying notebook at Tab 14].

[58] *Id.*

[59] *Id.*

ICTY itself, but that subsequent changes made to domestic laws of the former Yugoslavia are not imported.[60] Therefore, Nikolic's appeal was denied.

The precedent set by the *Nikolic* case was followed by the ICTY Appeals Chamber when the defense lawyers for Miroslav Deronjic appealed their client's sentence, based on the principle of *lex mitior*. Deronjic's prosecution involved his ordering of an attack on the village of Glogova on May 9th, 1992. Having held numerous government positions, Deronjic was in the position to order the attack, which eventually led to the brutal murders of sixty-four Muslims. The attack was a part of a larger plan of Deronjic's to permanently "remove" all Muslims from Glogova.[61]

Deronjic was found guilty of crimes against humanity and was sentenced to ten years in prison.[62] Deronjic appealed his sentence, in part based on his theory of the application of the principle of *lex mitior*. For the appeal of Deronjoc's sentence, the Appeals Chamber cited to *Prosecutor v. Nikolic*. The Appeals Chamber reiterated that *lex mitior* is an internationally recognized standard and that it is universally understood to protect the convicted person by applying the most lenient law. The Chamber reiterated the Sentencing Judgment from the *Nikolic* case, in holding that changes to domestic laws are not binding upon the independent international tribunal. Therefore, *lex mitior* was inapplicable in this case as well.[63] Thus, Deronjic's appeal was denied.

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[60] Human Rights Watch, *supra* note 9, [reproduced in the accompanying notebook at Tab 22].

[61] *Id.*

[62] *Id.*

[63] *Prosecutor v. Deronjic*, Case No. IT-99-2-S, Appeals Judgment in the Case (July 20th, 2005). [reproduced in the accompanying notebook at Tab 15].

IHT Statute, Article 17, Second, in Section Five "General Principles of Criminal Law", states that in order "[t]o interpret Articles . . . of this law, the Cassation Court and Panel may resort to the relevant decisions of the international criminal courts."[64] Therefore, the precedent of the ICTY is persuasive upon the Iraqi High Tribunal.

The Iraqi High Tribunal, through its repeated reference to the *lex mitior* principle within its Statute, concedes that *lex mitior* is in fact an internationally recognized principle. In addition, the definition and application of the principle are well established. However, like the ICTY in both the *Nikolic* and *Deronjic* cases, The Iraqi High Tribunal, a criminal court, largely independent of domestic laws which temporarily suspended capital punishment in Iraq was made to the domestic laws of Iraq, not to the Statute of the Iraqi High Tribunal. Therefore, the suspension of the death penalty does not effect the jurisdictional law of the Tribunal and does not limit the Tribunal's ability to utilize it as an appropriate penalty. Similar to the ICTY's statement that the courts of the Former Yugoslavia can in not undermine the ICTY by altering their own domestic laws, neither the Iraqi government nor the CPA may threaten the legitimacy of the Iraqi High Tribunal by changing or suspending Iraqi domestic laws. If the Statute of the Iraqi High Tribunal were itself changed would the principle of *lex mitior* apply.

IV. Conclusion

The principle of *lex mitior* does not limit the Iraqi High Tribunal's ability to impose the death sentence on those found guilty of capital crimes. The Iraqi High Tribunal was established as an entity independent from the domestic court system of Iraqi

[64] IRAQI HIGH CRIMINAL COURT LAW, *supra* note 2, [reproduced in the accompanying notebook at Tab 3].

parallel in that respect to the Tribunals for the former Yugoslavia, Rwanda, and Sierra Leone. The Statute of the Iraqi High Tribunal established that all non-stipulated laws pertaining to criminal procedure will come directly from the Iraqi Penal Code no. 111 of 1969, in use up until May 1st, 2003. The suspension of capital punishment as a penalty for certain crimes, by CPA Order no. 7, on June 9th, 2003 functions because of its timing as a change to the Iraqi Penal Code used by the domestic legal system in Iraq, but is void in terms of the Code utilized by the Iraqi High Tribunal. According to the ICTY precedent established in *Prosecutor v. Nikolic*, changes to domestic laws have no effect upon the laws of the independent international Tribunals. To allow such effects would violate the statute, jurisdiction, and policy of these criminal tribunals.

Changes to the domestic law of Iraq, specifically to laws contained with the Iraqi Penal Code of 1969 after May 1st, 2003 are not binding upon the Iraqi High Tribunal. The Tribunal's statute mandates its independent jurisdiction. As with the International Criminal Tribunal for the Former Yugoslavia, only changes made to the statute of the Tribunal itself would trigger the application of the principle of *lex mitior*. Therefore, the CPA Order No. 7 suspension of the death penalty does not trigger a lex mitior limitation on the Iraqi High Tribunal's use of capital punishment.