

The Impact of excluding the death penalty application in the Rome Statute to the decisions of the International Criminal Court

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Abstract

That life is a gift of Heaven to the human being, absolutely, this gift cannot be stolen by anyone, thus, most of the heavenly and statutory laws came to regulate these punishments as it is one of the harshest penalties imposed on individuals because it removes them from the existence, as most state legal legislations tend to limit and reduce them to the maximum extent possible, that is limited to serious criminal cases which threaten world peace and severe crimes, that its application is compatible with the requirements of justice in not implementing it with children or pregnant women, the arguments which was presented by the supporters of both ideologies, the ideology of retaining the death penalty, while the ideology of concealing the death penalty remains subject to analyze the opinions and ideas all of the supporters and opponents of the death penalty. That the countries that have ratified the Rome Statute of the permanent international criminal court and whose charter is devoid of applying the death penalty to crimes that the International Court is competent to consider, also countries that did not want to join the Rome Statute due to the non-application of the death penalty are among the sanctions which was imposed by the court which it is called upon to take the initiative in reaching a solution in which justice satisfies the victims and the people who are victimized from the civilians and others who fall victim to the horrific and dangerous crimes, which it constitutes a threat to international peace and security.

Keywords: death penalty application, Rome Statute, International Criminal Court

The Introduction

First: the research Subject and its importance:

The death penalty, whether at the national or international criminal level, is one of the penalties that acquires a very important nature, in that, it is a deterrent and appropriate punishment for serious crimes that costs the lives of people within the internal criminal law ambit, as well as, the crimes of an international nature, such as crimes of genocide, crimes against humanity and war crimes, because of these ugliness and danger, thousands of people threaten their lives and property, hence the importance of researching this deterrent punishment in relation to this type of crimes, as the seriousness of these violations in the international ambit is much greater than the internal criminal ambit, as the Rome Statute of the International Criminal Court, which is the founding system for this court, omits mentioning this punishment in enumerating the sanctions which were imposed by the International Criminal Court on convicted criminals under its provisions, that was compared to the type of crimes they commit, as the type of sanctions imposed on them, therefore, our research focuses on the effect of excluding this punishment, specifically within the scope of international criminal law, with the questions and inquiries that this topic raises, the research project is trying to discuss and answer them.

Second: The problems of research:

The importance of the research lies in its being a legal research attempt, which is discussing and solving a set of questions, including: What is the definition of the death penalty? What are the arguments of its supporters and opponents for applying them at the international and national criminal levels? What are the consequences of its

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exclusion at the international level with regard to serious and serious crimes, with the presentation of jurisprudential and judicial trends regarding advanced questions?

Third: Research Methodology:

In the view of the importance of the research topic, we adopted the analytical deductive method in order to be able to analyze the legal texts which are related to the death penalty, knowing the penalties that are available under the Rome Statute, also discussing the matter extensively in light of the developments of the international criminal law, in other cases, resorting to the historical method, which will enable us to know the stages in which this punishment was applied, without being an independent approach, with an attempt to establish some relevant legal ideas through what was proposed by jurists and what was included in the preparatory work for the Rome Statute of the International Criminal Court in this regard.

Fourth: Research ambit:

The research project deals with the position of the criminal judiciary and international criminal jurisprudence regarding the application of the death penalty, with reference to the position of the national criminal judiciary in this regard as well as its jurists, for reaching the position of the Rome Statute of the International Criminal Court and the scope of the penalties imposed under it with the seeking of the legal implications of excluding the death penalty from the Basic Charter of the International Criminal Court.

Fifth: Dividing the research plan:

For the importance of the death penalty and its effectiveness at the international and national criminal levels, we have dealt with the subject of studying the research which is tagged as: **(The Impact of excluding the death penalty application in the Rome Statute to the decisions of the International Criminal Court)**, in two requirements, the first of which dealt with the definition of the death penalty, with the arguments of supporters and opponents of its application, whether at the international or national criminal level, knowing the opinions of jurists about this, as for the second requirement, we deal with the sanctions that are imposed under the Rome Statute of the International Criminal Court, with the effect of excluding the application of the death penalty from the penalties that are imposed on the decisions which were issued by it, as well as the introduction, which contained a brief summary of the research subject, the study is ending with the conclusion that includes the most important results and recommendations that were obtained.

What is the death penalty and the arguments of supporters and opponents for its application?

There are multiple legal definitions of the death penalty in the light of the national criminal law, as its application in light of this law will be broader in relation to other laws in crimes punishable under it, Likewise, the arguments of those who support it according to national criminal law or international criminal law differ accordingly, so that to answer these questions we will divide this requirement into two branches, at first we show the definition of the death penalty, while in the second we address the arguments of the supporters and opponents for its applications at the national and international levels, while showing the opinions of jurists about this in order to complete its legal image.

The Defining of the death penalty

The death penalty is known from ancient times, which is considered one of the most dangerous and most severe penalties in terms of its severity and its impact on the convict, that it has been stipulated in the Holy Qur'an in the Almighty's saying: (And you have a life in retribution, O chief of you, so that you may fear) ⁽¹⁾, as the definition of the death penalty is the cornerstone in understanding what is intended by the law, also distinguishing it from the rest of the penalties that were imposed by law, where some was defined it as (the death penalty), which is the loss of the soul of the convict by a means that was determined by the law, so that it is considered one of the oldest and most severe penalties, as it was found in various laws and its application was established for a large number of crimes, then its application is not limited to the loss of the soul of the convict, but extends to torture and mutilation of the convict body of the ⁽²⁾. It is also defined as a penalty in the name of society in implementation of the judicial order for those who were proved their responsibility for committing a crime, or is it a penalty that involves pain that touches the convict because he violated the law and did not obey it, while the jurisprudence has indicated that execution is taking the soul away from the convict ⁽³⁾, while the Iraqi legislator has defined the death penalty in the amended Penal Code No. 111 of 1969, by hanging the convict to death ⁽⁴⁾, this method does not represent the only method of execution in Iraq, but rather by reviewing the Military Penal Code, it is possible to implement the death penalty by firing squad ⁽⁵⁾, whereas Arabic laws, through their review, may include a specific definition of the death penalty, while some are not defined by a specific definition, however, some of these laws include it among other penalties mentioned in its subject, thus, the death penalty, are the ways in which it was carried out, which was differed between countries, but its only essence is the loss of the soul of the convict due to a crime which was committed by him, whether at the national

criminal level or the international criminal level in the event that such penalties are established for serious international crimes threatening international peace and security.

The Arguments of The Supporters and Opponents for The Application of The Death Penalty

Reviewing of the ideas that dealt with the death penalty fluctuates between rejection and acceptance. The parties that welcomed about this punishment and is calling for its application, especially in the resources of intentional killing accompanied by the torture of the victim before his killing, are considered the highest levels of the application of justice, whereas, those who reject the death penalty believe that human life is a holy life endowed by God Almighty and that it cannot be manipulated and violated ⁽⁶⁾, in all cases, in this section we will show the evidences and clues of each of the two parties who support and oppose the death penalty application as:

First: The arguments of those who are calling for concealing of the death penalty:

This team has presented a set of evidence and clues that calls for concealing the death penalty, whether at the national or international criminal level, among these arguments put forward by the owners of this theory that this punishment is characterized by severity, cruel and inhuman, thus it is considered contrary to all international standards ⁽⁷⁾, they also affirmed that its percentage has not decreased in the countries that maintained it, so that its deterrence is not scientifically proven, it was noticed that the crimes were not high in the countries that canceled it, it is also impossible to remedy the control this punishment in the event that which if it is found after its implementation, that there is a mistake in the judgement, it is obligatory to do so according to the law, or if the convict is covered by the amnesty law, while it is possible in the case if the convicted person of negative punishment that deprived of liberty such as jailing or imprisonment then emerged after that the convicted was innocent, in this case it is possible to stop the implementation of this punishment, which is not applicable in the case that the convicted person has been implemented the judgement of the death penalty. ⁽⁸⁾ thus, many legislations, including the Iraqi Criminal Procedure Law No. 23 of 1971 in subjects (270-279), have permitted that it is possible to retry a convicted person judgement to a sentence in cases in which a sentence has been passed with a penalty or measure in felonies or other conditions, just as in the event that the convicted person is sentenced to the crime of killing a person, then it is found that the person alleged to have killed him is alive ⁽⁹⁾, thus, this error may happen in terms of practical reality, since it is possible for a person to pass a death sentence, as it becomes evident that after the execution of the death sentence was carried out, an error has occurred in the judging issued because it is not possible to restore life to the one who was died, in this case, it is considered that it violates all international standards and the international human rights circular, then this publication stipulated that there are approximately (23) executions that were carried out in the United States of America by mistake ⁽¹⁰⁾.

Second: The arguments of those who are calling for maintaining the death penalty:

As for those who advocate maintaining of the death penalty, they refuted all the arguments which were put forward by the owners of the theory of the concealing of the death penalty, the owners of this opinion has justified that by saying that the death penalty cannot be avoided after its execution in the event that if it turns out that there is a mistake in its execution, this is counterproductive, this is because the error in the execution of the death penalty, although it cannot be corrected, however, that such errors are very rare in comparison to the errors in the implementation of other penalties, while the impossibility of rectifying their effects applies as well in the case that the judgment is implemented in error on other penalties, including penalties depriving of freedom, whether it was jailing or imprisoning, so it is not possible for the convict to compensate for what was executed against him, and this error may not be seen in its implementation until after the expiry of the entire adjudicated period ⁽¹¹⁾.

Also, Saying that the death penalty cannot be deterred is a non-compelling argument, due to the fact that if the number of crimes which are committed is known despite the existence of the death penalty, it is not possible to know the number of serious crimes that did not occur due to fear and frightened of the death penalty, whereas the countries that have concealed the death penalty have no indications in it of low levels of crimes and aggressions on the people lives in them in the comparisons to the countries that have maintained the death penalty in their laws, also, the reform of the person sentenced to the death penalty may be impossible, as it is repercussed because it is not possible to find a punishment to replace it in the case of its concealing, or to replace it with a sentence of life imprisonment, it is useless because of the high costs, that the death sentence for this person who was imprisoned in a solitary cell is one of misery as he is executed, as all attempts to reform it are futile if he remains in prison for his life ⁽¹²⁾.

Thus, it can be said that through reviewing the opinions of supporters and opponents of the application of the death penalty, we can conclude that states, whether at the national criminal level or the international criminal level, have endeavored to limit this punishment and through their modern legislation by applying it in a very narrow range, it does not decide it except for serious crimes, and that its implementation is limited to the loss of the soul of the convicted person, which is away from the procedures of torture and representation that were prevalent in the past in order to achieve justice from its application ⁽¹³⁾.

The Penalties Have Mentioned Under the Rome Statute of the International Criminal Court and the Effect of Excluding the Application of The Death Penalty to Its Decisions

The behavior which is presented by a person, whether it is positive or negative which is criminalizing by the law according to its texts, considering it as a crime that requires punishment, thus, if a crime is committed, whether it is a crime, a misdemeanor, or a violation by the person, then there is punishment in the texts of the law, that the punishment is to face the criminal danger in the person in order to protect the security and safety of society, a side of jurisprudence defines it as a sanction which is established by the Criminal Code for the benefit of the society in implementation of a judicial judging on the person who is proven responsible for the crime in order to prevent the commission of other crimes by the criminal himself or by the rest of the citizens in society ⁽¹⁴⁾.

By this, we will address in this request the penalties that were mentioned under the provisions or texts of the Rome Statute establishing which is established the Permanent International Criminal Court that imposed for facing the criminal behavior, in which it is considering an international crime, according to the first section of this requirement, while in the second section we discuss the legal effects of excluding the death penalty from among the penalties which were imposed under the Rome Statute for crimes, before this court that are characterized by their threat to international peace and security because of the implications of violations of the lives and property of civilians, in the second section of this requirement.

The Sanctions that are received under the Rome Statute of the permanent international criminal court

We can consider the punishment and portray it as a painful penalty that is imposed on the person who committed a behavior constituting a crime, that the law stipulates that the committer of this behavior is punished according to its punitive texts by diminishing the rights of the committer of this criminal behavior, or detracting from his interests for violating the rule of law, with the extent of a certain part, so that it is painful and proportionate according to the crime that he committed, in such a way that this penalty and its various types have mentioned in the law do not occur except for those who are proven responsible for the crime committed by the person who constitutes its conduct, thus, it can be said that it is inconceivable that there would be a crime without a penalty as it takes its legal status under the provisions of the law from being the natural result of the behavior that which criminalizes by the law and instead of the crime that he committed, so its purpose is to prevent the commission of other crimes by the criminal himself or other persons, thus it'll be determined with the interest of society, security and safety by means of a criminal case, whose moving will be in his name, that the criminal judging that is issued in this case is the adjudication thereof ⁽¹⁵⁾.

By reviewing subject (77) of the Rome Statute of the International Criminal Court, it will become clear that the penalties which are imposed and applicable to the convicted person of committing one of the crimes within the jurisdiction of the court that the court can apply are imprisonment for a specified period of years and a maximum period of that is (30) years, in some serious cases and within narrow limits, life imprisonment can be imposed, as this punishment may be justified due to the seriousness of the crime and the circumstances of the convicted person, likewise, due to the seriousness of the crime that is committed, the criminal court can also impose additional complementary penalties for people who are convicted under its provisions in accordance with the legal rules and standards stipulated in the procedural rules and evidences, as well as the criminal court can govern the seizure of funds and the confiscation of property and other financial assets for the convicted persons in front of it, also anything that belongs to them, which may come from international crime directly or indirectly ⁽¹⁶⁾.

The effect of excluding the application of the death penalty from sanctions that are imposed under the Rome Statute of the International Criminal Court

By reviewing the provisions of the subject (77) in the Rome Statute of the permanent international criminal court, which has formed the court according to the provisions and texts of this Charter which was signed by the states parties for it, we find that the International Criminal Court cannot pass the death penalty because of the lack of provision for This punishment is among the penalties that the court can impose on convicted persons,

There is no doubt that the comparison between what was stated in the preamble of the statute of the International Criminal Court according to the seriousness of the crimes within the jurisdiction of the court over the security and safety of the international community for the damage caused by it, what was stated in the text of the subject (77) that was referred to earlier in the above regarding the penal system that did not include the text on the imposition of the death penalty, we anticipated a legal problem stating that the legal system of the International Criminal Court, which is the Rome Statute, has a legal loophole due to the lack of stipulation of a penalty Executions and must be taken to prevent them ⁽¹⁷⁾.

Without entering into the aforementioned jurisprudence opinions that support and reject the application of the death penalty, we find that we support the jurisprudence opinions that support the application of the death penalty as its inclusion in the text of the aforementioned subject in order to confront the criminal risk in persons who commit serious international crimes, like war crimes, crimes against humanity, crimes of genocide, crimes of aggression, even

that if the international community does not agree on the definition of this crime yet, this is because they without controversy constitute the strongest and most effective deterrent against those who commit these serious crimes, thus, the failure to stipulate the death penalty considered one of the most important reasons that led a group of countries to wait and refrain from signing the statute of the International Criminal Court in the period in which the door for signature was available for states to sign, likewise, this contributed to the waiting form in joining to it until now⁽¹⁸⁾.

Thus, the position of the member states of the Rome Statute in the event that a person commits one of the crimes within the jurisdiction of the court (such as genocide, crimes against humanity or war crimes), Through reference to the text of subject (80) of the Rome Statute, which states that: (nothing in this part of the Statute that prevents the states parties from signing the penalties stipulated in their national laws or prevents the application of the laws of countries that do not stipulate the penalties that are specified in this context), Thus, this subject includes the clues which are not compromised to the application of the national criminal laws of the member states of the Rome Statute of the International Criminal Court, if these internal laws provide for the application of the death penalty against persons who commit crimes, Which fall within the jurisdiction of the International Criminal Court as stipulated in subject (5) of the Basic Law⁽¹⁹⁾.

So, if the accused person does not appear in front of the International Criminal Court because of the failure of the court to apply the death penalty for international crimes that he committed due to the failure of the International Criminal Court to impose the death penalty from among the penalties mentioned in subject (77) from the Rome Statute, the accused person may be punished in front of another jurisdiction, such as the national jurisdiction of the accused person, i.e. the jurisdiction of the state that he follows, based on the principle of complementarity between the national criminal justice and the international criminal jurisdiction, because this principle is mentioned in item (10) of the preamble of the statute system of the International Criminal Court, as subject (1) of the statute that the International Criminal Court be complementary to national criminal jurisdiction, likewise, what the subjects (15-17-18-19) of the Rome Statute of the International Criminal Court indicated in the event that a national criminal court affirms that it has exercised its jurisdiction in the case of the case and the same persons who committed international crime in the event that the state has this jurisdiction under its national criminal law⁽²⁰⁾.

The Conclusion

After the research has reached its conclusion, we must refer to the most important suggestions and results that can be reached, which contribute to strengthen legal efforts that are aimed at deepening the legal understanding of the death penalty in the light of national criminal legislation or international criminal legislation, for the sake of not repeating or prolonging, we shall proceed to outline the most important results and suggestions as follows:

First: The Results:

1- The establishment of the permanent international criminal court under the Rome Statute has made from this system as a legal source for the International Criminal Court in conducting investigation and trial procedures, penalty procedures and the type of penalties that have imposed, whether imprisonment (30) years or life imprisonment for serious crimes or forfeiture, fine and other penalties, as it is the source from which these sanctions derive their legal legitimacy in applying to the persons who appear in front of trial and who commit the serious crimes which were mentioned in subject (5) in the Basic Law, such as genocide, crimes against humanity, war crimes and crimes of aggression.

2- The failure to provide a text for the death penalty application from among the penalties that the court can impose on persons appearing in front of it, as subject (77) did not stipulate the application of the death penalty among the penalties that the court can impose, that the most severe punishment that the court can apply is life imprisonment, within narrow limits that are related to the serious international crime that has been committed by the accused or convicted person or what relates to the circumstances that were surrounding to the convicted person.

Second: Recommendations:

1- It can be said that this modest research has revealed to us the legislative deficiency in the text of subject (77) in the Rome Statute of the International Criminal Court, the death penalty must be included among the penalties that the International Criminal Court can impose for serious international crimes that threaten and endanger international peace and security.

2 - The research recommends for formation of an international committee whose task is to scrutinize and monitor death penalties through which were produced by the International Criminal Court, in order to ensure transparency and equality in their application in accordance with one legal standard.

Margins and Sources

First: The Mragins:

- 1- See: The Holy Qur'an, Surat Al-Baqara, verse (179).
- 2- See: Dr. Ali Hussain Al-Khalaf, Dr. Sultan Abdul Qadir Al-Shawi, General Principles in the Penal Code, 1st Floor, Al-Resala Printing Press, Kuwait, 1982, p. 416.
- 3- See: Dr. Mahmoud Naguib Hosni, Explanation of the Penal Code, Edition 1, Arab Renaissance House, Cairo, Egypt, 1982, p. 69
- 4- See: the text of Article (406) of the Iraqi Penal Code No. 111 of 1969, as amended
- 5- See: the text of Article (17) of the Iraqi Military Penal Code No. 13 of 1940 repealed
- 6-See: Dr. Qais Al-Qaisi, Crime in International Law, Cairo Publications, Cairo, Egypt, 1978, p. 56
- 7- See: Dr. Majed Al-Masry, The Death Penalty, Cairo University, Cairo, Egypt, 1977, p. 40
- 8- See: Dr. Ali Hassan Al-Khalaf, Dr. 0 Sultan Abdul Qadir Al-Shawi, Previous Reference, pp. 417
- 9- See: the text of Article (27/1) of the Iraqi Criminal Procedure Law No. 23 of 1971
- 10- See: Amnesty International Report on the Death Penalty, published in February
- 11- See: Dr. Jundi Abdul-Malik, Criminal Encyclopedia, Legal Literature House, Part V, Lebanon, 1942, p. 188
- 12- See: Dr. Jundi Abdel Malik , previous reference, p. 39
- 13- See: Dr. Muhammad al-Fadil, General Principles in the Penal Code, Part 1, Syria, Damascus, 1963, p. 391.
- 14- See: Dr. Ali Hussein Al-Khalaf, Dr. 0 Sultan Abdul Qadir Al-Shawi, General Principles in the Penal Code, previous reference, p. 405.
- 15- See: Dr. Mahmoud Mahmoud Mustafa, Explanation of the Penal Code, 1st floor, Cairo, Egypt, 1977, p. 433
- 16- See: the text of Article (77) of the Rome Statute of the permanent International Criminal Court
- 17- See: text of Article (77) of the Rome Statute of the permanent International Criminal Court
- 18- See: Collection of Proposals for the Establishment of the International Criminal Court, Rules of Procedure and Evidence and Applicable Law, Document Number (1/5/1999)
- 19-See: Article (80) of the Rome Statute of the permanent International Criminal Court
- 20- See: Antonio Cassese, International Criminal Law, 1st floor, published by Publishers, Beirut, Lebanon, 2015, p. 535.