



Punishment for Crimes Against Humanity in Afghan Law and the Statute of the International Criminal Court

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Abstract

Crimes against humanity are one of the most serious and unforgivable crimes in international law, which are considered a serious violation of the fundamental principles of the international community from a legal, moral and humanitarian perspective. This article examines the penalties associated with crimes against humanity in two legal frameworks: the domestic law of Afghanistan and the Statute of the International Criminal Court. First, the Afghan legal system and its judicial institutions are analyzed in the context of punishing crimes against humanity, and the challenges in implementing these crimes in the Afghan judicial system, especially after recent developments in the country, are examined. Then, the Statute of the International Criminal Court and its mechanisms for investigating crimes against humanity and determining their punishments are discussed. This section particularly emphasizes the role of the International Criminal Court in establishing global standards for the punishment of crimes against humanity and international cooperation in the prosecution of criminals. The study also provides a comparative comparison between the penalties established in Afghan law and the principles outlined in the Statute of the International Criminal Court, emphasizing the strengths and weaknesses of each. This article aims to analyze the degree of alignment and practical challenges in adapting these two legal systems in dealing with crimes against humanity.

Keywords: *Crimes Against Humanity; Prosecution; Punishment; Afghan Law; International Criminal Court; International Criminal Justice*

Introduction

Crimes against humanity are among the most atrocious international crimes committed intentionally and on a large scale against civilians. These crimes can take the form of murder, extermination, enslavement, forced deportation or displacement, imprisonment and severe deprivation of physical liberty, torture, serious sexual crimes, persecution and persecution on political, racial, or national grounds, disappearances, racial discrimination, and other inhumane acts. These crimes target the bodies and lives of the victims and wound the collective conscience of humanity. Although the criminalization of

crimes against humanity and other international crimes in Afghan criminal law has been carried out by international documents such as the Statute of the International Criminal Court, at the same time, the foundations, sources, and origins of law in Afghanistan stem from Islamic ideas and sometimes local customs.

While international law is usually regulated by international custom and treaties and is shaped by the agreement of states and international organizations, the differences and discrepancies between Afghanistan's domestic laws, which are rooted in Islamic teachings, and international laws, which are derived from international custom and treaties, are predictable and at the same time acceptable. The relationship between criminal law and the national sovereignty of countries and the reflection of national values in the criminal laws of each country leads to differences and disputes between different countries. Because each nation is trying to protect its values, political stability, and national interests through criminal law. While international law is not bound by the specific values and interests of a country.

This raises a fundamental question: What penalties does Afghan criminal law provide for crimes against humanity, compared to the Statute of the International Criminal Court? In this regard, the question arises as to what the criminal response to crimes against humanity is in Afghanistan's domestic law, and how these punishments compare to those of the International Criminal Court.

1. Conceptology

Defining or identifying the key concepts used in any research is certainly effective and influential in accurately understanding the dimensions of the research in question. The most important concepts used in this research that need to be examined and are going to be examined are as follows:

1.1. The Concept of Punishment/Jaza

Jaza is an Arabic word meaning reward, retribution, or compensation for good or bad, and qasbah means rewarding good or bad. (Dehkhoda, Dictionary, Vol. 17, 1377, p. 408.) Keyfar is the Persian equivalent of jaza, meaning reward for good and reward for bad. In legal terminology, Dr. Langeroudy defines punishment as: "The hardship that the legislator imposes on the criminal." In the definition of punishment, he writes: "In the literal sense, it means punishment and punishment that is given to someone who has behaved contrary to the law, morality, or custom and habit and has committed a bad deed." (Langeroudi, Legal Terminology, p. 615).

And finally, the Afghan Penal Code defines the Jafari penalty as follows: "Punishment is a sanction that is foreseen in the law for committing a crime and is imposed by the court on the perpetrator in accordance with the principles of this law."

1.2. The Concept of Execution

Execution literally means to destroy, kill, impoverish, and render worthless, and in terminology, it is considered a life-threatening punishment, whereby a person sentenced to death is hanged and remains on the gallows for a certain period of time." (Shamloo Ahmadi, 2001, p. 58.). The Islamic Encyclopedia writes about execution: "Execution is the death penalty for committing specific crimes. Execution comes from the root "absence" which means to kill, and also to destroy. In jurisprudence and law, it is the death penalty for committing specific crimes that is issued by the court or other authorities. The method of carrying out this punishment is by hanging, crucifying, shooting the criminal, or other methods." The Islamic Encyclopedia writes about execution: "Execution is the death penalty for committing specific crimes. Execution comes from the root "absence" which literally means to destroy, kill, and also to destroy. In jurisprudence and law, it is the death penalty for committing specific crimes that is issued by the court or other authorities. The method of carrying out this punishment is by hanging, crucifying,

shooting the criminal, or other methods." Article 169 of the Penal Code defines the death penalty as follows: "Execution is the removal of a natural person by law after a ruling by a competent court and approved by the President."

1.3. The Concept of Imprisonment

In the Moein dictionary, imprisonment means imprisonment and detention (Moein, 2010, p. 391). Imprisonment is defined in the idiomatic sense as follows: "Deprivation of freedom and self-determination for a specific or indefinite period, in such a way that there is no release, and if there is a waiting period, it is called detention, not imprisonment" (Jafari Langeroudi, 2007, vol. 1, p. 1374). According to Article 145 of the Afghan Penal Code, "Imprisonment means imprisoning a convicted person against a final court verdict in a prison designated by the government for this purpose."

2. Criminal Responses to Crimes Against Humanity

Punishment is divided into three categories: primary, supplementary, and secondary. The punishment must either be mentioned in the sentence to be applied, or it does not need to be mentioned in the sentence, which is called secondary punishment. The first category is of two types; either it does not need to be mentioned alongside the main punishment, which is called the main punishment, or it must be mentioned alongside another punishment, which is called the supplementary punishment. (Haji Dehabadi, 2017, p. 353). This division is also considered in the criminal laws of Afghanistan. According to Article 136 of the Penal Code, the types of punishment are: "Punishment includes primary, secondary, and supplementary punishments." In Afghan criminal law, crimes against humanity, in addition to carrying the main punishment, also have supplementary and secondary punishments. What is intended in this study is simply to compare the criminal responses of the Afghan legal system with the Statute of the Court as the most important international document regarding crimes against humanity.

In the Afghan criminal law, Article 336 of the Penal Code provides for the following penalties for crimes against humanity: The text of this article is as follows:

- (1) A person who commits a crime against humanity as outlined in Article 335 of this law shall be punished as follows:
 1. In the event of committing the crime as outlined in Part 1, depending on the circumstances, by life imprisonment of the first degree or execution.
 2. In the event of committing one of the crimes as outlined in Parts 2 to 5, by life imprisonment of the first degree.
 3. In case of committing one of the crimes listed in sections 6 and 7, to life imprisonment of the 2nd degree.
 4. In case of committing one of the crimes listed in sections 8 to 11, to long imprisonment.
- (2) "If the commission of the crimes listed in Article 335 of this law results in the death of the victim, the perpetrator shall be sentenced to death. "If the commission of the crimes listed in Article 335 of this law results in the death of the victim, the perpetrator shall be sentenced to death."

Unlike the Afghan Penal Code and other national criminal laws, which immediately determine the punishment for each crime after defining and determining its material element, the Statute of the International Criminal Court has organized all the punishments considered for all crimes under its jurisdiction in one place and collectively in one article. Article 77 of the Statute, which is responsible for stating all applicable penalties under the Statute, states in this regard:

1. Subject to Article 110, the Court may impose one of the following penalties on a person convicted of any of the crimes outlined in Article 5:
 - (a) Imprisonment for a fixed term (not exceeding thirty years), or (b) Life imprisonment if justified by the gravity of the crime and the personal circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
 - (a) The payment of a fine by the rules of procedure and evidence;
 - (b) The confiscation of proceeds, property, and assets derived directly or indirectly from the crime (without prejudice to the rights of bona fide third parties).

By looking at the text of these two articles of these two international documents, it can be seen that at least three types of punishment are considered for perpetrators of crimes against humanity. These types include: the death penalty, imprisonment, and fine. A comparison of the details, amount, and method of applying each type of punishment will be followed based on the text of these two legal documents.

3. Crimes Against Humanity and the Death Penalty

Execution is a punishment, a deterrent, a degrading punishment, and the most important type of punishment that ends the life of a criminal. The purpose of execution is to permanently exclude the criminal from society, and the death penalty is usually applied to criminals who have committed the most serious crimes, are dangerous to society, and are themselves irreparable, and their crimes are also unforgivable. In terms of severity, the most severe, irreversible, and cruel punishment among corporal punishments; indeed, among all punishments, is the "death penalty." The actual number of executions carried out today is relatively small, but the severity, certainty, and moral and spiritual issues surrounding this "fateful" punishment have been largely reflected in books and articles that deal with the subject.

3.1. History, Method and Scope of the Death Penalty

Taking the life of criminals has a long history in the history of human social life and has been practiced throughout history among different tribes and nations. A study of religious books also shows the legislation of the death penalty in religions; For example, the Zoroastrian religion, in the Avesta (which is the most important written work of Zoroastrian law), has provided for the death penalty in verses 50 to 55 for the punishment of adultery, sodomy, abortion, etc. (Marzieh Sadat Agha Mirsalim, A Study of Islamic Punishments with a Focus on the Death Penalty, *Shahr-e-Qanun Quarterly*, Year 3, Issue 10, Summer 2014, Pages: 53 to 55, p. 53).

The "Torah," which contains the laws of the Jewish religion, generally contains very severe punishments. Individual heresy, group heresy, calling for heresy, and even dreaming of heresy are punishable by death. Anyone who worships other gods is stoned to death. Kidnapping, cursing one's parents, working on the Sabbath, adultery, sodomy, intercourse with animals, intentional murder, and assault are also punishable by death according to the Torah. (Marzieh Sadat Agha Mirsalim, previous, p. 53).

Unlike Judaism, which has imposed many punishments, the "Christian Bible" has prescribed few punishments and the reactions are more instructive than threatening and punitive. For example, the death penalty is only mentioned in the case of apostasy (Marzieh Sadat Agha Mirsalim, previous, p. 53).

In Islamic law, killing others, both Muslims and non-Muslims, is mainly prescribed in four cases:

1. In war, whether in a primitive form or against rebels.

2. In self-defense, defending oneself and one's privacy.
3. For criminal punishment of sin.
4. For retribution. (Mohammad Jafar Harandi, A View of the Death Penalty in Islam, Quarterly Journal of Islamic Jurisprudence and Law Studies, Summer 2007 (No. 8), pages 219 to 236, p. 226). Some of these rulings have also been specified in the Holy Quran. The death penalty for the crime of war (Ma'idah/33) and retribution for murder (Baqarah/178) are among them.

Regarding the method of execution of the death penalty, unfortunately, human history has witnessed the implementation of various cruel and inhuman methods. The main goal in most cases was that the method of execution should be of such a quality that the executed person should experience the worst pain and torture for the longest possible time. In some cases, the method of execution was a symbolic symbol of a specific ritual. However, it can be argued that some of the most brutal methods of execution in history include execution by death cage, drowning with snakes, scaphism or boat, torture with rats, lingchi or slow butchery, sawing the body, cement shoes, Catherine wheel, execution by guillotine, metal collar, brass bull, two-headed fork, Spanish donkey, execution by elephant, burning and of course human roasting, Execution by cannon, electric chair, hanging by cage, tanning or flaying alive, Mongolian execution, use of bamboo, bloody eagle.

(<https://techrato.com/2020/12/14/variety-of-execution-methods>)

Unfortunately, the widespread use of the death penalty is another sad story in its history. The contemporary history of Afghanistan alone is evidence of the irregular and widespread use of this punishment. The story of the assassination of Nader Shah and the punishment of his murderer is an example of the widespread use of this punishment. In response to the murder of one person, not only the accused (Abdul Khaliq) but also a group of family members, relatives, classmates, and even the cleric of their mosque were beheaded in front of his eyes. (Mohammad Nasir Mehrin, A Corner of Political Murders in Afghanistan, p. 79.)

From the perspective of international law, the death penalty in the Middle Ages was considered a privilege of rulers and a penal tool and penal policy of countries throughout the centuries, and national sovereignty had a monopoly on it in front of the international community, and the famous provisions of Article 2, Paragraph 7 of the United Nations Charter were also against it.

The death penalty is implemented in more than half of the world's legal systems (one hundred countries and territories), and its establishment is far from a common assumption and practice. (Petersonka, The Death Penalty from a Human Rights Perspective, translated by Ardebili, Mohammad Ali, International Criminal Law, Selected Articles 1, p. 201, Tehran, Mizan, 2003).

3.2. International Documents and the Death Penalty

The orientation of international documents regarding the abolition of the death penalty is generally based on the principles of human rights, and in particular the "right to life":

- The Universal Declaration of Human Rights, adopted on December 10, 1948, emphasizes in Article 3 that: "Everyone has the right to life, liberty and security of person." It was in this context of the right to life that the issue of the death penalty was discussed during the preparatory work for the Declaration. The minority view, which wanted the death penalty to be declared a violation of the right to life, did not meet with unanimous agreement, and as a result, the final text did not mention this punishment, as it seemed obvious to the drafters of the declaration that this did not contradict the right to life. (Petersonka, The Death Penalty from a Human Rights Perspective,

translated by Ardebili, Mohammad Ali, *International Criminal Law, Selected Articles 1*, p. 202, Tehran, Mizan, 2003).

- The 1966 International Covenant on Civil and Political Rights, in its first legal attempt to limit the use of the death penalty, states in Article 6 of the Covenant: "The right to life is an inherent right of the human person. This right shall be protected by law; no one shall be arbitrarily deprived of life."
- As the United Nations Human Rights Committee, a body consisting of 18 individual experts selected by the States Parties to monitor the implementation of the Covenant, has stated several times that the death penalty is not in itself contrary to the first paragraph of Article 6. In particular, due to a series of restrictions on its implementation specified in paragraphs 2 to 5 of the said Article. Consequently, although States Parties are not bound by Article 6 to abolish the death penalty, they must restrict its application... It has thus sought to limit the nature of the crimes which are punishable by death. The vague nature of the provisions of this provision led the Committee to emphasize that the gravity of the crime varies from one State to another, but that the provision should be interpreted in such a way that the death penalty acquires the character of a "purely exceptional measure". (Petersonka, *The Death Penalty from a Human Rights Perspective*, translated by Ardebili, Mohammad Ali, *International Criminal Law, Selected Articles 1*, pp. 202-203, Tehran, Mizan, 2003).
- The United Nations Economic and Social Council (ECOSOC), which has the authority to "make recommendations to ensure effective respect for human rights and fundamental freedoms for all" under Article 62 of the UN Charter, adopted a text in 1984 on safeguards to protect the rights of persons sentenced to death. This text, which is primarily intended to combat summary arbitrary executions and not to interpret the provisions of the Covenant, clarifies that the phrase "most serious crimes" should be understood to mean "intentional crimes that have harmful effects or other disproportionately important effects." (Petersonka, *The Death Penalty from a Human Rights Perspective*, translated by Ardebili, Mohammad Ali, *International Criminal Law, Selected Articles 1*, p. 203, Tehran, Mizan, 2003).
- The Second Optional Protocol to the International Covenant on Civil and Political Rights is on the abolition of the death penalty. This 11-article protocol is in fact the first international document that aims to completely abolish the death penalty in peacetime. The preparation and implementation of this document can be considered a progress, albeit relative, due to the voluntary nature of its adoption, the small number of contracting states, and the very long process of its adoption. Its first article contains two different provisions, the first of which, with its self-executing nature, obliges contracting states to no longer carry out the death penalty. (Abdul Aziz Noori, *Human Rights*, Kabul, Kateb University Press, 2018, p. 84).
- No to the death penalty in the International Criminal Court; The process of drafting and approving the Statute of the International Criminal Court can be considered a scene of confrontation or conflict between supporters of the death penalty and opponents of this punishment, a process whose final product is the ratification of the Statute. The first efforts to abolish the death penalty in international criminal law began in 1996 at the International Law Commission. In that year, the Commission had prepared a draft for the Statute of the International Criminal Court and had referred the issue of the death penalty to a working group there. It was on July 6, 1998, that the Working Group announced that there was no basis for reaching an agreement on the issue of the death penalty, while at the same time, some countries were enthusiastically seeking to gather votes for this penalty. This became a conflict, and the issue of including the death penalty in the final statute of the International Court of Justice was not resolved until July 19, 1998, when the battle finally ended in favor of opponents of the death penalty in the statute. However, some legal

scholars believe: "Although the Statute of the Court, as enacted at that time, did not accept the death penalty, the Statute of the International Criminal Court has not yet prevented national courts from resorting to the legislative response of the death penalty for crimes within the jurisdiction of the Court, including crimes against humanity, and does not create any obstacle. Therefore, according to Article 77 of the Statute on "applicable penalties", the Court can only enforce the following penalties against criminals:

- A. "Temporary imprisonment for a maximum of 30 years;
- B. Permanent imprisonment, provided that it is proportionate to the extreme gravity of the crime and the personal situation of the convicted person"

However, advocates of abolishing the death penalty clearly observe that, according to Article 80 of the Statute of the Court, no authority can affect the execution of penalties provided for in the domestic law of countries. It will also not create an obstacle for the laws of countries that have not taken into account the responses provided in this chapter.

To resolve this conflict, it is possible to refer to the issue of the complementarity of the Court's jurisdiction and the primacy of the proceedings of domestic courts, according to their adopted laws. This is because the preamble to the Statute (the penultimate paragraph) emphasizes that the International Criminal Court will be complementary to criminal courts, and paragraph 5 also mentions that states are obliged to exercise their criminal jurisdiction over perpetrators of international crimes. Article 17, paragraph 1, also stipulates that if an internationally committed crime is investigated and prosecuted by a competent domestic state, the Court will no longer have jurisdiction to intervene, and Article 80 also stipulates that the provisions of the Court's chapter on penalties shall not affect the execution of penalties prescribed by national laws.

In international law, the defense of the death penalty is not limited to Islamic thinkers and jurists. In addition to classical philosophers such as Plato, some philosophers and thinkers of the Age of Enlightenment such as Rousseau, Kant, and Hegel have also defended the death penalty. Defenders of the death penalty see it as a means of intimidating and deterring others from committing illegal acts, protecting citizens from criminals, and a suitable method of retaliation and revenge. Thus, murder, as an arbitrary and brutal method of punishment of past generations for revenge or destruction and ensuring "justice," has gradually given way to the death penalty law as a form of duty, defense of rights, or deterrent. This law does not deny murder but rather places the right to murder, especially intentional murder, exclusively in the hands of the state, and no one else is allowed to use intentional murder. Some philosophers of the Enlightenment and modernity, such as Kant, defended the principle of equal punishment for crime and wrote in his book "Metaphysics of Morals": If a person kills another person, that person should be killed.

3.3. The Death Penalty as a Response to Crimes Against Humanity in Afghan Criminal Law

Afghanistan's criminal law criminalized international crimes for the first time in a codified form in the 2019 Penal Code and provided for a criminal response to their commission. One of the penalties provided in this law for crimes against humanity is the death penalty. Article 336 of the Penal Code, which is included after the examples of these crimes in the previous article, is responsible for the legislator's response to the commission of crimes against humanity. The penalties foreseen for each of the examples of crimes against humanity are as follows:

- (1) A person who commits a crime against humanity as stipulated in Article 335 of this law shall be punished as follows:

- 1- In case of committing the crime mentioned in Part 1, depending on the circumstances, the penalty shall be imprisonment of the first degree or execution.
- 2- If the commission of the crimes mentioned in Article 335 of this law leads to the death of the victim, the perpetrator shall be sentenced to death.

As can be seen from the text of the article, this article only prescribes the death penalty in two cases and for the commission of two different instances of crimes against humanity:

3.3.1. The Death Penalty Is the Answer to Committing Murder

The definition of intentional homicide in the legal context means killing or slaughtering, and it is “causing harm to another person’s life, whether through a material and physical act or omission.” (Jafari Langeroudi, previous, p. 528) Intentional homicide is defined in paragraph 1 of Article 546 of the Penal Code as follows: “Intentional murder is the taking of the life of another living person with the intent to kill” (Criminal Code, Article 546). Committing homicide, provided that the conduct committed intentionally and knowingly is part of a widespread or organized attack against a civilian group, is recognized as a crime against humanity and, according to Part 1 of Paragraph 1 of Article 336, is punishable by imprisonment for a term of more than twenty to thirty years or the death penalty for those who commit murder.

Therefore, considering the above, the commission of a crime against humanity in the form of intentional murder is established if the following elements are met:

- a) The perpetrator killed one or more persons;
- b) The killing of the victim resulted directly from the perpetrator’s act or omission;
- c) At the time of committing the murder, the perpetrator intended to kill the victim, or to inflict grievous bodily harm likely to result in death, even if he was not aware of the consequences of his act;
- d) The criminal act of murder is part of a widespread or organized attack against a civilian population;
- e) The perpetrator or perpetrators knew that the criminal act of murder was part of a widespread or organized attack against a civilian population.

In this case, it is important to note two points:

First point: If the specific intent to commit a crime against humanity (knowledge that his intentional killing was part of a widespread or organized attack) is not established, the perpetrator's act is considered the crime of ordinary murder.

Second point: The perpetrator may himself be a principal agent and may have killed an individual or several individuals through persons under his command. Both the mastermind and the one who orders the commission of intentional murder are considered perpetrators of a crime against humanity if the other elements and conditions are met.

3.3.2. The Death Penalty Response to Crimes Resulting in Manslaughter

The second case of the death penalty in Afghan criminal law for committing crimes against humanity is a case where the perpetrator intends to commit a crime against humanity, but wants to commit other crimes other than murder and never intends to commit murder, but at the same time, his action also leads to murder, for example, a criminal intentionally and knowingly commits torture or violent sexual crimes against individuals with the intention that his actions be part of a widespread or

organized attack against a civilian group, but his criminal act unintentionally results in the death of the victim. In this case, if the other elements and conditions of committing a crime against humanity are present, the perpetrator is eligible for the death penalty under Afghan law. In this regard, the second paragraph of Article 336 of the Penal Code stipulates that “whenever the commission of the crimes listed in Article 335 of this law results in the death of the victim, the perpetrator shall be sentenced to death.”

3.4. Analysis and Evaluation of the Execution Response

The death penalty is not an important ideological issue in international human rights law. Above all, it often provokes a more moral and political debate between abolitionists and moralists than a legal debate in which utility, legitimacy, cruelty, etc. are constantly relied upon. (Petersonka, *The Death Penalty from a Human Rights Perspective*, translated by Ardebili, Mohammad Ali, International Criminal Law, Selected Articles 1, p. 201, Tehran, Mizan, 2003).

Despite the adoption of the death penalty for perpetrators of crimes against humanity in Afghan criminal law and the failure to approve such a punishment in the Statute of the Court, it can be said that there will be no conflict between the domestic laws of countries and the Statute of the Court; because Article 80 of the Statute recognizes domestic punishments and in this case, it states: "Nothing in this Chapter shall affect the application by States of penalties provided for in their national laws, nor shall it affect the laws of States which do not provide for the penalties specified in this Chapter in their laws." In addition, according to Article 17 of the Statute, the Court's jurisdiction over crimes committed in the territory of member states is complementary, meaning that the state that owns the territory has priority over the crimes that occurred. Therefore, the courts of that country can impose the death penalty by flogging national laws, and this action will not cause any problems. (Mehdi Niknafs and Masoud Kumari, *Crimes and Punishments in the International Criminal Statute and Iranian Criminal Laws*, Majles va pazhohesh, 38, Summer 2003, p. 314.)

However, the mere existence of guarantees of imprisonment and fines in the statute for major crimes has presented this international document with the following challenges:

1. Failure to observe the principle of proportionality between crime and punishment; although the "principle of proportionality" has been emphasized as a mandatory rule of international criminal law in Articles 76 and 78 of the Statute and Article 145 of the Rules of Procedure and Evidence of the International Criminal Court, the mere punishment of imprisonment or a fine has no proportion to heinous and major international crimes.
2. Lack of justice: There is no doubt about the acceptance and pursuit of the aforementioned aspirations as the main goals of the Charter. There have also been detailed discussions regarding the various meanings and interpretations of the term justice, and its potential for challenge has been analyzed. The above challenge refers to the contradiction that arises at the international level between maintaining peace as the main priority of the international community and maintaining justice as the ideal goal of human society. In fact, the aforementioned challenge is a challenge between politics and justice, in that even when confronting enemies, politicians propose to ignore the mistakes and crimes of their fellow believers under the pretext of preventing further discord and chaos and achieving peace, while the angel of justice believes that a criminal must be punished for his actions, especially when his crimes cover a wide area.
3. Finally, given that global criminal justice is not sectional or regional, to create a sense of revenge among warring groups due to pessimism towards those who administer justice, but rather seeks to generalize and harmoniously expand consensus-based criminal perspectives, prioritizing the provision of justice over peace seems more desirable and wiser. As is well known, the world is based on the three pillars of truth, justice, and peace, but in explaining the above foundations, it is stated: “In principle, there is only one pillar, and that is justice, truth within justice, and peace as

its result.” (Fereidoon Jafari, Evaluation of the Theoretical and Philosophical Challenges of the International Criminal Court).

4. Crimes Against Humanity and the Response of Imprisonment

One of the most widely used and widely defended types of formal punishment in the penal system of countries is the deprivation of liberty or the punishment of "imprisonment". This punishment is imposed to deprive an individual of his freedom. "Imprisonment or deprivation of liberty entered the penal arsenal of European nations with a penal approach in the late Middle Ages and the beginning of the Renaissance, and the criminal laws of the French Revolution, especially the Napoleonic Codes of 1808 and 1810, recognized it. (Mohammad Reza Goodarzi Boroujerdi and Mozaffar Alvandi, Human Rights in the Penal System and Prisons, p. 43).

4.1. Criminal Law of Afghanistan (Imprisonment as a Response to Crimes Against Humanity)

Given that the main punishment for crimes against humanity in Afghan criminal law is imprisonment, it is important and necessary to compare the conditions, duration, and quality of imprisonment. The custodial sentences provided for in Afghan criminal laws for crimes against humanity are as follows:

1. 1st degree life imprisonment.
2. 2nd degree life imprisonment.
3. Long imprisonment.

4.1.1. 1st Degree Life Imprisonment

According to the legal provisions, perpetrators of crimes against humanity must bear the punishment of first-degree life imprisonment in the following cases. In cases where, according to Article 336 of the Penal Code, the perpetrator of a crime against humanity has committed the crimes listed in Article 335 of this law, the punishment is as follows:

1. For those who have committed murder, the penalty is first-degree life imprisonment (imprisonment of more than twenty to thirty years), provided that the perpetrator is not sentenced to death.
2. For perpetrators of the criminal acts foreseen in paragraphs 2 to 5 of Article 335 of the Penal Code (extermination, enslavement, expulsion, or forced migration of a population and imprisonment or severe deprivation of physical freedoms in violation of the fundamental rules of international law), the penalty is imprisonment for a term of 1st degree (imprisonment of more than twenty years up to thirty years).

It should be noted that the punishment of first-degree life imprisonment is only if the crimes committed did not result in the death of the victim, otherwise, based on the same article, the perpetrator will be sentenced to death.

4.1.2. 2nd Degree Life Imprisonment

For perpetrators of the criminal acts foreseen in paragraphs 6 and 7 (torture and sexual rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence at the same level), the punishment of 2nd degree long-term imprisonment (imprisonment of more than sixteen years and up to twenty years) is foreseen in the criminal laws.

It should be noted that the punishment of second-degree life imprisonment can only be applied if the crimes committed did not result in the death of the victim, otherwise, based on the same article, the perpetrator will be sentenced to death.

4.1.3. Long Imprisonment

For perpetrators of the criminal acts foreseen in paragraphs 8 to 11 (Persecution and harassment of any group or specific group of individuals for political, racial, national, ethnic, cultural, religious, gender, or other reasons in connection with any of the acts referred to in this article or any other crime within the jurisdiction of the International Criminal Court and the Final Act of the Rome Diplomatic Conference, which has been recognized as illegal throughout the world under international law) Enforced disappearance of persons, the crime of racial discrimination, other inhumane acts committed intentionally with the intent to cause great suffering or serious injury to the body or mental or physical health), long-term imprisonment (imprisonment of more than five years up to sixteen years) is foreseen in the law.

It is noteworthy that the punishment of long imprisonment can only be applied if the crimes committed did not result in the death of the victim, otherwise, based on the same article, the perpetrator will be sentenced to death.

4.2. International Criminal Court (Imprisonment as a Response to Crimes Against Humanity)

After the abolitionist idea of capital punishment for international crimes prevailed, imprisonment became the first and main punishment in the international penal arsenal. Even from the series of international negotiations and exchanges of views in this field, it can be inferred that this punishment has seriously replaced the death penalty and the same goals (such as protecting society, compensating victims, intimidation, and eliminating the motivation to commit crimes) are expected from its functioning.

Article 77 of the Statute defines the penalties applicable to perpetrators of crimes within the jurisdiction of the Court as including the following: imprisonment for a fixed term not exceeding thirty years and life imprisonment, provided that the gravity of the crime committed and the circumstances of the convicted person so require.

- Normal Imprisonment

The basic penalty provided for in the Statute of the Court is a maximum of thirty years' imprisonment, but Article 77(b)(1) empowers the Court to impose life imprisonment in cases where the gravity of the crime and the circumstances of the convicted person so require. Article 165 of the Rules of Procedure and Evidence, under the heading "Determination of Punishment" under the seventh Chapter, adopted by the Preparatory Commission of the Court, is not detailed but comprehensive. When determining the totality of any punishment, including imprisonment and fines, as the case may be, the International Criminal Court must reflect the degree of responsibility of the convicted person, must also establish proportionality between all relevant factors, including mitigating and aggravating factors, and must take into account the circumstances of the convicted person and the crime. The International Criminal Court, in addition to the importance and gravity of the crime and the circumstances of the convicted person, shall consider, among other things, the extent of the harm caused, in particular, the harm caused to the victims and their families, the unlawful conduct and means used to commit the crime, the extent of the convicted person's participation; the degree of intent; the circumstances affecting the conduct, time and place; and the age, educational, social and economic conditions of the convicted person. (Kriyanak Sakkit Chaisari, *International Criminal Law*, pp. 376-377).

Therefore, imprisonment is the most important guarantee of criminal execution applicable to international crimes. To determine the duration of this punishment, it is specified without mentioning the minimum to the maximum of thirty years. The minimum amount of imprisonment starts from a few days,

a few weeks, and a few months and continues up to a maximum of thirty years. Considering the importance of international crimes, the Court determines the amount of imprisonment in proportion to the severity, scope, number, and type of crime. If the influencing factors and circumstances require it, imprisonment will be determined permanently. (Abolfath Khaleghi, *Public International Criminal Law*, Vol. 1, Tehran; Majd Publications, 2015, p. 206.)

- Life Imprisonment

As mentioned, the Statute of the Court, in Article 77, paragraph 1, Paragraph B, establishes life imprisonment as one of the punishments for perpetrators of international crimes (including crimes against humanity), provided that it is justified by the gravity of the crime and the personal circumstances of the convicted person. Therefore, life imprisonment is the most severe punishment that can be imposed on an international criminal under the Statute of the Court.

The idea of replacing the death penalty with life imprisonment has been met with much opposition. The use of the adjective “life” for imprisonment to fill the void of the lack of severity and violence of an ideal and deterrent punishment resulting from the abolition of the death penalty in the field of international law. However, the aspects related to the rehabilitation and reform of life imprisonment are very strong and lasting. The adoption of such a punishment in the International Law Commission, influenced by human rights thinking, has provoked some criticism. However, the undeniable gravity, importance, and pervasiveness of international crimes were seriously considered to justify the use of this penalty. According to some members of the Commission, including “Mr. Grafrat”, the death penalty is nevertheless much harsher than life imprisonment, which is itself an inhumane punishment and a violation of human rights; In our opinion, a sentence of 25 years in prison is the heaviest punishment (Behzad Razavifard, *The Efficiency and Inefficiency of Prison Sentences in International Criminal Law*, *Quarterly Journal of Criminal Law Research*, Year 1, Issue 1, Fall 2012, pp. 181-203, p. 188). However, some religious leaders, such as the Pope, oppose the imposition of life imprisonment and believe that this punishment is a form of secret execution. (Abolfath Khaleghi, *General International Criminal Law*, Vol. 1, Tehran; Majd Publications, 2015, p. 206.)

3.4. Analysis and Evaluation of the Confinement Response

From the above explanation and analysis regarding crimes against humanity and imprisonment in Afghan criminal law, the following points seem worth mentioning:

1. The principle of legality of “punishment” in Afghan criminal law has been carefully considered in relation to crimes against humanity, while the Statute of the Court faces challenges in this regard; because in this document (unlike domestic criminal law), punishment is not based on the crime, but all the legislated punishments are included in one article (Article 77) for all international punishments. Therefore, determining the amount and duration of imprisonment in the Statute of the Court seems increasingly relative and uncertain, because all individuals who are found guilty by the court are subject to imprisonment, which can be increased to life imprisonment, so this may be abused.
2. Severity, importance, and pervasiveness are unique and undeniable characteristics of international crimes, and it is clear that a crime with such characteristics requires a punishment that is definitive, severe, and promptly enforced to deter it. The speed of implementation usually depends on the performance of the executive branch and its capabilities and is less relevant in the area of legislation. Afghan criminal law has left an acceptable performance in terms of severity and certainty; In addition to legislating the death penalty, the intended prison sentences are also severe, depending on the severity of the crime, and depending on the degree of the crime in question in the criminal law, they are precise, definitive, and non-convertible, while according to Article 77(a) of the Statute of the Court, “it provides for a maximum sentence of 30 years of

provisional imprisonment.” Such a sentence, of course, would apply to international crimes committed that do not have aggravating characteristics. In this case, we can imagine a prison sentence of at least one day up to 30 years.

3. Article 77, Part B, Paragraph 1 of the Statute of the International Criminal Court states: The Court may impose a sentence of life imprisonment, "provided that the gravity of the crime committed and the situation of the convicted person justify it." If we carefully examine the aforementioned text, we see that there are some conditions stipulated in paragraph A that are worth considering. In other words, issuing a sentence of imprisonment for a maximum of 30 years is quite simple and does not require any conditions, but for life imprisonment, first the “extraordinary gravity of the crime committed” must be assessed and weighed (paragraph 3 of Rule 145 of the Rules of Procedure and Evidence of the International Criminal Court) and then the “personal situation of the convicted person” must also require the issuance of such a sentence. With these explanations, undoubtedly, the characteristic of teaching a lesson is necessarily achieved by describing the “eternal and eternal” imprisonment. In addition, its replacement with the death penalty strengthens the symbolic status of this punishment. However, the fact that the sentence is “life” does not mean that the sentence will continue until the death of the convicted person. Because, like domestic criminal law, the Statute of the Court has also considered the issue of reduction of sentence in its Article 110 with conditions. Among them is “the expiration of two-thirds of the term of imprisonment or the serving of 25 years of that sentence.” In these circumstances, it seems that the existence of a real prison sentence in the arsenal of the Court is also questionable.
4. Article 78 of the Statute of the Court provides for the determination of the amount of the sentence: “... 3) If a person has been convicted of more than one crime, the court shall pronounce a separate sentence for each crime and a general sentence specifying the total period of imprisonment. This period shall not be less than the longest sentence determined separately for each crime and shall not exceed a term of imprisonment of 30 years or life imprisonment by article 77, paragraph 1 (b).” According to this article, a situation may arise where a court chamber issues a sentence of 30 years in prison for one crime (i.e., imposes the maximum penalty) and issues the same sentence for committing multiple crimes. Since the judge must consider the importance and severity of the crime according to paragraph 1 of this article, sometimes the importance and severity of a crime may require the maximum penalty. However, if the same person has committed other crimes, the other crimes will effectively remain unpunished.

5. Crimes Against Humanity and Financial Response

In crimes where the motive is to gain profit, it is appropriate to threaten the perpetrator with financial punishment and to provide a cash fine for the perpetrator of these crimes, which is more effective than prison, does not have the disadvantages of prison, and can act as a safe substitute for prison. If a cash penalty is proportionate to the financial situation and ability of the convict, it can achieve the goal of intimidating the individual and preventing him from repeating the crime.

5.1. Criminal Law of Afghanistan (Financial Response to Crimes Against Humanity)

The conditions of the fine that must be observed in the sentence are reflected in Article 141: “In determining the fine provided for in this law, the court shall observe the following minimum and maximum conditions and circumstances:

1. To achieve the goals of the penalty.
2. The personal, social, and economic circumstances of the perpetrator.

3. The amount of benefit that was obtained from committing the crime or was expected to be obtained.
4. The nature of the right or interest that was violated.”

...And the last point about the cash penalty is that according to Article 143:

“The determination of a cash penalty in a felony is not permitted unless this law expressly provides for it.”

Since crimes against humanity are classified as crimes, the above article prohibits the imposition of monetary penalties on these crimes. Therefore, Afghan criminal law has not imposed any monetary penalties on crimes against humanity.

5.2. Statute of the Court and Financial Response

Contrary to the negligence and carelessness they have shown regarding corporal punishment, the Statute of the Court has paid attention to financial penalties for the perpetrators of these crimes and, depending on the case, has used both cash penalties and confiscation of property.

- Statute of the Court and Fines

Article 77(2)(a) provides: In addition to imprisonment, the Court may make the following orders:

- (a) Payment of a fine by the provisions laid down in the Rules of Procedure and Evidence;

Considering the section of the Court's Statute regarding monetary penalties, it can be claimed that Article 77 of the Statute of the International Criminal Court stipulates that the Court may, in addition to imposing imprisonment, order the collection of a fine, without prejudice to the rights of a third party acting in good faith. According to Rule 146 of the Rules of Procedure and Evidence, entitled “Imposition of Fines under Article 77”, which was finally adopted by the Pre-Trial Commission of the Court, in determining whether to impose a fine and in determining the amount of the fine, the Court shall determine whether a sentence of imprisonment is sufficient. The Court shall, having regard to the financial capacity of the convicted person, *inter alia*, order confiscation and compensation. The Court shall, in addition to the above, consider the extent to which the motive for the offense was financial gain. In addition to the factors mentioned above, the Court shall take into account in particular the harm and damage suffered and the proportionate benefits derived from the offence by the offender. However, the amount of the financial penalty and fine shall in no case exceed 75 percent of the value of the offender's identifiable assets. Property that, in an appropriate amount, meets the financial and essential needs of the convict and his dependents. (Khaleghi Abolfateh, *International Crimes Trial*, Vol. 1, Tehran; Majd Publications, 2010, p. 209).

- Statute of the Court and Confiscation of Property

Article 77(2)(b) states: In addition to imprisonment, the Court may order: (b) confiscation of proceeds, property, and assets derived directly or indirectly from the crime (without prejudice to the rights of bona fide third parties).

Although crimes against humanity are among the most serious crimes that must be met with appropriate criminal responses, since in some cases the commission of a crime against humanity may be carried out with the motive of acquiring wealth or the looting of the victim's property may increase the violence to commit the crime, the provisions of the Court's Statute can be a threat to such criminal

motives and, as a result, lead to a reduction in the commission of the crime or a reduction in the amount of violence used in it.

According to Article 146 of the Rules of Procedure and Evidence, entitled “Determination of Fines Pursuant to Article 77,” which was ultimately accepted by the Pre-Trial Commission of the Court, in determining whether to issue a fine and in determining the amount of the fine, the Court shall determine whether a sentence of imprisonment is sufficient. The Court shall, taking into account the financial capacity of the convicted person, *inter alia*, order confiscation and compensation. The Court shall, in addition to the above, take into account the extent to which the crime was motivated by financial gain. In addition to the factors mentioned above, the Court shall take into account in particular the harm and injuries suffered and the proportionate benefits derived from the crime by the perpetrator. However, the total amount of the fine shall not exceed 75 percent of the value of the property and identifiable assets, cash or non-cash, of the convicted person's property, after deducting an amount sufficient to meet the financial needs of the convicted person and his or her relatives. The International Criminal Court may calculate the fine by the daily penalty system. In this case, the minimum period is 30 days and the maximum period is five years. The Court may convert the period of imprisonment into a fine, but in this case, the period of imprisonment shall not exceed the total term of imprisonment, i.e., thirty years.

5.3. Analysis and Evaluation of Financial Response

As mentioned, according to Article 143 of the Penal Code, “it is not permissible to impose a fine for a felony” and crimes against humanity are considered major crimes in both national laws and even international documents, and as a result, there is no financial penalty in Afghan criminal law (regardless of the general rule of compensation for damages caused by the crime). At first glance, it seems that the failure to impose a financial penalty is not only a violation but also a privilege for Afghan criminal law; Because this is done with the motive of seeking justice and the effect of cash punishment is minimal for wealthy criminals and devastating for less wealthy people. However, careful consideration of the motive for committing the crime can reject this argument and reveal the violation of Afghanistan's criminal law in this regard; Because by not determining financial punishment, on the one hand, criminal motives (especially in crimes involving profit) are left unsuppressed, and on the other hand, in crimes where the perpetrator has gained material benefit through committing the crime, he is still considered the winner of the legal process, and by having possession of the property acquired through the crime, justice is still served incompletely in his case. Therefore, it is worthy of due attention to address this deficiency in Afghan criminal law.

6. Research Results and Findings

An analysis of the punishment for crimes against humanity in Afghan criminal law and the Statute of the International Criminal Court shows that although these two criminal instruments have made significant efforts to administer justice, reduce the immunity of major criminals, and prevent the commission of crimes against humanity, there are still serious violations in the criminal accountability section of these instruments. These challenges can affect the goals set out in these documents and make achieving these goals difficult, and in some cases, impossible.

One of the main challenges in the Statute of the International Criminal Court is the elimination of the death penalty for core international crimes. This omission has led to the neglect of the principle of “proportion between crime and punishment”, and as a result, justice for criminal behavior is not properly administered. This is especially true in the case of crimes against humanity, which are legally perpetuated by creating new layers of immunity for major criminals from corporal punishment. In these circumstances, the prospect of peace without justice becomes extremely shaky and fragile.

On the other hand, the Afghan criminal justice system, which places a strong emphasis on corporal punishment, has neglected to impose financial penalties on perpetrators of crimes against humanity. This limitation on penalties is largely limited to death sentences and imprisonment, thus ignoring criminal motivations, especially in the case of financial criminals. Even if the legal sentence is carried out, criminals may still benefit from the property obtained from committing the crime and feel like winners in the justice process.

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