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The Principles of No Crime and No Punishment without Law in Iraq

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Abstract

This article addresses the issue of the mandatory implementation in Iraqi criminal law of the fundamental UN standard of 'no crime or punishment without law'. The importance of its full legislative implementation for Iraq has been revealed. The problem ultimately concerns both domestic criminal cases and legal proceedings for international judicial cooperation in criminal matters. Solutions have been tentatively proposed to interested authorities and experts (local and foreign). They are designed to increase the fairness and efficiency of criminal and related proceedings in Iraq.

Keywords: *Iraq, Law, Crime, Punishment, Principle, Standard.*

INTRODUCTION

Iraq is an Arabic country situated in the Middle East. It belongs to the group of "civil law" (Latin) counties. Iraqi criminal law (substantive and procedural) is codified.

Iraq is considered the cradle of law. This is because the region (mostly, the area of Mesopotamia within modern-day Iraq) was home to some of the earliest civilizations, including Sumer and Babylonia, which developed the first written law codes.

However, Iraq has been experiencing enormous difficulties over the last 20 years after its dictator, Saddam Hussein, was pushed out of power in 2003. Serious problems have been affecting its two formal criminal justice systems: the one in central Iraq and the one in the factually independent Iraqi Kurdistan Region. The process of updating local substantive and procedural penal laws is slow and somewhat controversial.

Adherence to contemporary human rights standards in criminal cases is a crucial aspect of this process. Primarily, the process involves the domestic implementation of international human rights standards. A significant part of them is in the 1966 International Covenant on Civil and Political Rights.

The first and probably the most fundamental such standard is the one that embodies the *no crime without law* and *no punishment without law* principles. The full implementation of this standard is the subject of this presentation. The result may support the efforts of international experts and local lawyers tasked with modernizing the criminal laws and justice in Iraq proper and Iraqi Kurdistan[1].

THE STANDARD

1. The basic international legal instrument that contains this standard, binding on Iraq, is the 1966 International Covenant on Civil and Political Rights (entered into force in 1976). It is binding on Iraq as it ratified this UN instrument on 25 January 1971. Article 15.1 of the said instrument [further – the ICCPR] embodies the substantive law principles that there is "*no crime without law or punishment without law*" (Latin: nullum crimen, nulla poena sine lege)[2].

The ICCPR provisions have been directly applicable to the Iraqi judicial authorities ever since it entered into force in 1976. Their applicability shall not be dependent on any

1 Pursuant to Article 121(1) of the Iraqi Constitution, new laws and amendments to existing laws originating from Baghdad are not recognized as applicable in the Iraqi Kurdistan Region unless expressly endorsed by legislation of the Kurdistan Parliament.

2 The other rules of the ICCPR that enshrine mandatory international standards most relevant to Iraqi criminal investigations and trials are: Article 14.1-4 on the right to defence, incl. the presumption of innocence as the most complex guarantee of the accused's right to defence; Article 9 on another such guarantee; the principle of personal inviolability; Article 14.7 on 'Ne bis in idem' ("Not twice for the same") principle; Article 6 on the right to life; Article 14.1 on the right to equality; and Article 17 on the right to privacy.

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national "enabling legislation" as in common law countries, and the Iraqi judicial officials responsible for criminal investigations, trials, and related legal proceedings do not need to look for such pieces of legislation to abide by Article 15.1 of the ICCPR.

2. Article 15.1 of the ICCPR reads as follows: "*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence … at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.*"

No crime without law and no punishment without law are the two constitutive principles of the standard outlined in Article 15.1 of the ICCPR. These two closely related principles are reproduced also in Article 15 (1) of the 2008 Arab Charter on Human Rights[3], as well as in the national law of the Republic of Iraq, namely, in Article 19 (2) of the Iraqi Constitution and Article 1 (1) of the Iraqi Penal Code.

Article 15.1 of the ICCPR is an essential safeguard against the arbitrariness of state authorities. Its importance is such that no derogation from it is allowed even "*in time of public emergency which threatens the life of the nation*" – Article 4 (2) of the ICCPR. This refers even to criminal investigations into genocide, crimes against humanity, war crimes, and terrorism as well. Even most serious crimes do not justify deviations from the principles of "no crime and punishment without law".

The correct understanding of the two principles and their implications is neither a matter of theory nor solely a problem of legislation. Their proper clarification in practice is a prerequisite for **the correct determination of applicable penal law** by the judicial actors responsible for criminal investigations and trials in Iraq. There might be no justice and fair criminal proceedings at all if the right provisions of penal law were not found and applied.

The two principles under Article 15.1 of the ICCPR are substantive. They concern the making and application of penal laws only and shall not substantiate any restrictions to possible modifications in procedural regimes. Article 15.1 of the ICCPR does not prohibit, for example, the change in the bodies authorized to carry out criminal proceedings, including investigations, even where the powers of the newly authorized bodies seem stronger and/or their practice seems less favourable to actors concerned[4].

THE NO CRIME WITHOUT LAW PRINCIPLE

3. The principle of no crime without law means that conduct (act or omission) shall constitute a crime only by some provision of national statute law. It follows, first of all, that no customary or any other non-state law, including religious ones, is in the position to criminalize any conduct. International law shall not directly criminalize either. Some international conventions do require the criminalization of given conduct, e.g. the corruption offences under the UN Convention against Corruption[5], but their requirements are addressed solely to the legislative authorities (the parliaments) of the parties[6]. Hence, until the legislative authorities of a given party implement the requirement in the international convention, this requirement does not become applicable law in the country, namely, one or more criminalizing provisions.

Secondly, the principle that there is no crime without law means that no criminalizing provision shall be applied by analogy to conduct that has not been criminalized[7]. Otherwise, if such a provision is applied by analogy, the affected conduct would constitute a crime without any law at all. As a result, this application of the criminalizing provision would violate Article 15.1(i) of the ICCPR, as well as Article 19(2) of the Iraqi Constitution and Article 1(1) of the Iraqi Penal Code. Thus, the prohibition of the analogical application of criminalizing provisions supports compliance with the principle of no crime without law.

However, the prohibition against the analogical application of criminalizing provisions does not prevent them from being construed expansively. Besides, nothing prohibits the application by analogy of penal provisions that are favourable to actors. The principle "No crime without law" cannot prevent their application as they fall beyond its scope. If the application of criminalizing provisions by analogy is prohibited, then *per argumentum a contrario* the application of other provisions by analogy shall not be prohibited, esp. if the provisions are beneficial to the actor. There are such provisions in the general part of penal law (codified or not), mainly[8].

3 Ratified by Iraq on 24 October 2008.

4 E.g. Point 6.15 of the UN Human Rights Committee decision of 19 December 2017 (CCPR/C/121/D/ 2764/ 2016).

5 Ratified by Iraq on 17 March 2008.

6 Thus, according to Article 16(1) of the Convention, for example, "Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity..."

7 This application by analogy refers to situations where a criminalizing provision is applied to some harmful deed (act/omission) although the provision, even expansively construed, does not envisage this deed. At the same time, there is no analogy where a legal rule extends the criminalizing provision to cover a specific situation. For example, the object of theft under Article 439 of the Iraqi Penal Code is movable property, but Para. 2 of this Article also includes energy in it. Energy is not any movable property per se because it has no mass.

8 See Лопашенко, Наталья. Основы уголовно-правового воздействия: уголовное право, уголовный закон. Уголовно-правовая политика. – Санкт-Петербург: Изд-во Р. Асланова "Юридический центр Пресс", 2004, с. 278.

The penal regulation of justified/reasonable risk is an appropriate example. In part, this justification exists in the Iraqi Penal Code. Article 41(3) (ii) of this Code outlines the so-called permissible medical risk. There are other countries that also regulate permissible risk in part. Thus, Article 13a of the Bulgarian Penal Code envisages economic risk only.

However, there is also military risk, cosmic risk, risk of security operations, etc. In view thereof, the penal codes of some other foreign countries contain provisions codifying all permissible/reasonable risks into a single justification, e.g. Article 27 of the Polish Penal Code, Article 41 of the Russian Penal Code, and Article 44 of the Tajik Penal Code[9].

Such articles in penal codes provide a positive legal framework for reasonable risk. Even before its legislative recognition through penal law rules, such as the abovementioned, this risk was also acceptable as a justification for crime. It was regulated by borrowing the rules on the state of necessity. Where existing rules envisaged only some type of risk (e.g. medical, as in Iraq, or economic as in Bulgaria), they were borrowed, where appropriate, for regulating other types of risk[10].

As these justifying rules represented favourable penal law provisions, they were applicable, accordingly (to a reasonable extent), by statutory analogy. This is because ANALOGIA LEGIS is not forbidden when it favours the actor. Thus, penal law is applicable by analogy *in bonam partem* [Lat.: "in a good sense, with a positive connotation"], and such an application never violates the "nullum crimen sine lege" principle, in particular[11].

Thirdly, the "no crime without law" principle, particularly the idea of fairness it materializes, is a prerequisite for ascertaining the applicability of new criminalizing provisions. A provision criminalizing a given conduct shall be applied, in compliance with the aforementioned principle, if it has already been in force by the time of the commission of the conduct. Otherwise, if a provision that enters into force afterwards is also applied to the conduct, the actor would be unfairly surprised and unable to avoid perpetrating this conduct.

In view thereof, the application of such a criminalizing provision is considered a violation of the "no crime without law" principle. Its application would be unfair and unacceptable regardless of whether or not the provision criminalizes the given conduct for the first time or replaces an established (existing) one criminalizing the same conduct unless this new provision is more beneficial to the actor.

Moreover, for the purposes of avoiding any unjustifiable surprises to actors, any new criminalizing provision shall be applicable only if it was already in force when the act or the omission had not yet been completed entirely, as its negative consequences, in particular, had not occurred yet. The new criminalizing provision is applicable to the conduct also when entered into force before their occurrence. It is sufficient, therefore, that the provision entered into force before the conduct completion.

Article 2(1) of the Iraqi Penal Code also expresses and confirms that the time of the conduct (constitutive action or inaction) is the only marker. It reads:

"*The occurrence and consequences of an offence are determined in accordance with the law in force at the time of its commission, and the time of commission is determined by reference to the time at which the criminal act occurs and not by reference to the time when the consequence of the offence is realized.*"

It follows that consequences do not count. Their non-occurrence does not prevent the new penal law from being applied to the conduct that eventually causes them. Only the completion of the conduct shall prevent the new law from being applied to it. *Per argumentum a contrario*, the non-completed conduct shall not prevent the application of the new penal law to it.

Therefore, the entry into force of the new law before the full completion of the envisaged activity alone is sufficient for this law's applicability to it. Only if the law entered into force afterwards shall it be inapplicable. If applied, this would constitute a retroactive application of a detrimental penal law and violate the principle of "no crime without law". In this way, the principle ultimately protects actors from detrimental laws that they could not have been aware of at the time when they perpetrated their activities.

These considerations, regarding the relevance of the time of the conduct completion, are valid for the so-called complicated criminal activities as well. Such activities are

9 "Article 44. Reasonable risk (1) Damnification to the interests protected by this Code is not a crime in the case of reasonable risk for the achievement of the socially useful purpose. (2) Risk is reasonable if the specified objectives could not be achieved by the actions (failure to act) that do not involve any risk and the person allowed to risk took necessary measures for prevention of harm to the interests protected by this Code. (3) Risk is not reasonable if it was, obviously, inherent in the threat of death of people, environmental disaster or public disaster." IN CONTRAST TO ACTS IN NECESSITY, THE RISKY ACT IS UNSUCCESSFUL.

10 E.g.. Михайлов, Димитър. Оправданият производствен риск в социалистическото наказателно право, в сп. Социалистическо право, София, 1979, бр. 1, с. 22.

11 Also Foundations of European Criminal law (author of the Chapter – Tracogna, C.), Bucureşti, Editura C.H. Beck, 2014, p. 16. Available at: https://epub.sub.uni-hamburg.de/epub/volltexte/2014/31856 /pdf/6355_fp_ 3502_ Foundations_ of_ European_Criminal_Law. pdf, accessed on 01 June 2024 and Fitrakis, Eftichis. The principle of legality in Greek criminal law, in Revue Hellénique de Droit International, Athens, 2014, vol. 2, pp. 1210-1212.

continuing (permanent) crimes[12], continued (successive) crimes[13], crimes of systematic perpetration[14], etc. Usually, the perpetration of such crimes lasts more than one day, and the law applicable to them is the one that was in force at the time before their finalization. Neither their start nor the middle of their perpetration is relevant. Hence, even the application of a law entering into force shortly before the crimes are completed would not constitute any retroactive application either, although the greater part of the criminal activities was perpetrated before the entry into force of the law.

This might be better specified in Article 4 of the Iraqi Penal Code, as it deals with some of the complicated criminal activities. Section 2(2) of the German Penal Code is a good example in this regard: "*If the penalty is amended during the commission of the act, the law in force at the time the act is completed shall be applied.*" Certainly, the fact that some or most of the newly criminalized conduct was perpetrated before the penal law envisaging it entered into force would be regarded as a mitigating circumstance in meting out punishment.

4. Undoubtedly, criminalizing provisions shall never apply retroactively to produce criminal liability for previous conduct: acts or omissions. No criminalization applies to activities accomplished before its entry into force. However, criminalizing provisions might be retroactively taken into account for other purposes, e.g. to fulfil the dual criminality requirement in extradition cases under Article 357(A)(1) of the Iraqi Criminal Procedure Code [CPC]. This provision reads that the crime for which extradition is sought "*should carry a prison sentence of not less than two years under the laws of the state requesting extradition and of Iraq.*"

The retroactive consideration of new criminalizations in Iraq is possible under Article 48(1) of the Riyadh Arab Agreement for Judicial Cooperation (1983)[15]. It prescribes that dual criminality is determined by the time of receipt of the extradition request rather than the commission of the conduct in respect of which the extradition is being sought[16]. This is justifiable by the procedural nature of extradition (Articles 357-367 of the CPC).

Hence, if Iraq criminalizes the conduct after its commission, the dual criminality is not fulfiled if the criminalization occurs before the receipt of the extradition request. However, if the requesting country is not a party to the said Agreement a different concept might be valid. Again, given the procedural nature of extradition, the fulfilment of the dual criminality requirement might be considered by the time of the decision on the incoming request for extradition[17]. Such an option looks like a reasonable and fair one[18]. It means that if the conduct in respect of which extradition was requested has been decriminalized, the Iraqi decision on the foreign request shall be negative. Thus, the dual criminality requirement is fulfilable also in situations when the offence, for which extradition is requested, has been criminalized after its commission and even after the submission of the request for extradition but before the decision on this request.

In both above-mentioned situations, therefore, it is sufficient that the law of the requesting foreign country has criminalized the offence before its commission. After all, the extraditee would be held criminally responsible in the requesting country for an act or omission that was a crime there by the time of its commission[19]. *Per argumentum a contrario*, extradition shall never be granted if requested in respect of conduct that was not criminalized there at the time of its commission. No extradition for trial shall be granted either if the conduct was decriminalized afterwards until the decision in the requested country. Posterior and

12 E.g. Articles 204(2) (a), 217, 219, 273 of the Iraqi Penal Code.

13 See Article 142 of the Iraqi Penal Code. No legal definition of these crimes exists in Iraq, though.

14 E.g. Articles 289 and 290 of the Iraqi Penal Code.

15 Ratified by Iraq on 16 March 1984.

16 Extradition under this Agreement is in respect of "acts punishable by the laws of each of the two contracting parties" [Article 40(A)]. "The competent authority of each of the contracting parties shall decide on extradition requests submitted to it in accordance with the laws in force at the time of such submission" [Article 4 (1)].

17 See the European countries maintaining this position in "Compilation of replies to the questionnaire on the reference moment to be applied when considering double criminality as regards extradition requests". EUROPEAN COMMITTEE ON CRIME PROBLEMS, Council of Europe, Strasbourg, 2014 [PC-OC/Docs 2013/PC-OC(2013)12 Bil. Rev3]. Available at: https://rm.coe.int/168048bce6, accessed on 29 May 2025.

18 It should not be confused with the solution regarding the time when the nationality of the wanted person is determined. This is the time of the commission of the act/omission, according to Article 39(2) of the Agreement. Most often, if the wanted person is a national of the requested country, his/her extradition is refused – see Article 39(1) of the Agreement and Article 358.4 of the Iraqi CPC.

19 Obviously, this model is not applicable for the requested country to the two adversarial modalities of international judicial cooperation, which also require dual criminality: the takeover of foreign criminal proceedings for their completion and the recognition and enforcement of foreign criminal judgments. When it comes to any of them, the person concerned is to be held responsible in the requested country. As a result, it is not sufficient that the respective conduct (act or omission) has become a crime by the time of this country's decision on the incoming request. It is necessary that the conduct was a crime under its law at the time of its commission, also. It makes no difference even if it was a crime under the requesting country's law at that time. See also Girginov, Anton. Judicial Cooperation with Iraq in respect of Terrorism, Organized Crime and Other Major Crimes, Sarajevo: TDP 2017, p. 64-84.

therefore retroactive criminalizations of this conduct by the requesting country are out of the question and, as explained, shall never be legally accepted.

Situations with delayed criminalization in requested countries occur "once in a blue moon". However, they are not excluded, and each country should have in advance the law to regulate them. Such situations have been observed with cyber and biotechnology violations, for example. Many countries in the world criminalized them later than others.

5. As everywhere, the retroactive application of new laws is allowed under some specific conditions, and the general condition is that the new law is beneficial to actors. In such a situation, its application is allowed; only a conclusive rule to this effect in the law is necessary. This is particularly valid for penal provisions that introduce some new justification for crime, e.g. the mentioned permissible risk – see footnote № 9. Any such provision is beneficial to the actor as it eliminates the criminality of his/her conduct. In view thereof, its retroactive application might not be in conflict with any legal prohibition – international or Iraqi.

Obviously, in adverse situations where the new law is not beneficial to the actor, its retroactive applicability shall not be allowed. As most of the penal rules are detrimental to actors, they shall not be retroactively applied.

It is to be taken into account that the general ban on retroactive application of new provisions affects not only the rules of the Penal Code. Necessarily, the ban affects other rules as well, unless they are more favourable to actors. Such typical non-penal rules that shall also be excluded from any retroactive applicability are those completing blanket indications in (the blanket parts of) the legal descriptions of some crimes[20]. The said rules complete/"complement" the descriptions by filling out their blanket indications. Article 348 of the Iraqi Penal Code gives an example of such a legal description. It reads:

"*Any person who conveys or attempts to convey explosives or inflammable substances by any mode of land, sea, or air transport or by letter or parcel in contravention of accepted rules and regulations is punishable by detention plus a fine or by one of those penalties*."

The applicable non-penal rules that complement the blanket part of the legal description (the *accepted rules and regulations* indication, in particular) are those in force at the time and place of commission of the alleged crime. Hence, if it was committed in some foreign country, the applicable non-penal rules are the ones valid in its territory irrespective of the difficulties in finding them and establishing whether or not they were subsequently modified to the benefit of the alleged offender. For example, a national of Iraq may cause, unintentionally and as a result of careless disregard for existing regulations, the death of one or more persons. Such lethal conduct (deed) is legally qualified under Article 411(1) of the Penal Code[21]. This article would also apply abroad to road traffic crimes committed by Iraqi nationals – Article 10 or Article 12 of the Penal Code. The investigation is mandatory once allowed by the competent central authority under Article 3(B) of the Iraqi CPC. Thereafter, if the way to criminal investigation is paved, the responsible judicial actor (investigator, prosecutor, judge) may face some real professional challenges.

The judicial investigation in Iraq is initiated on materials received from the country where the conduct (deed) was committed. In case the Iraqi national returned home, the authorities of the other country are not expected to try to obtain his/her extradition, as Iraq does not surrender its nationals - Article 358.4 of the Iraqi CPC.

The Iraqi national might have been a diplomatic agent. This is why, even if s/he is still in the territory of the accepting country, no penal action is taken against him/her because of his/her immunity. In such cases, the person is expelled, and the local authorities send the materials against him/her to Iraq.

Once the Iraqi authorities receive these materials, they can find in them the regulations the alleged offender has broken in the foreign country at the time of the incident. These regulations complement the legal description of the crime under Article 411(1) of the Penal Code – footnote № 21. The blanket indication of the description referring to them – "*any law, regulation, or decree*" – is filled out if the actor has not complied with what they prescribe. The foreign authorities blame the person for involvement in the lethal incident on the ground that s/he has disregarded one or more of their road traffic regulations.

6. However, complementing non-penal rules are amended continuously. This is also valid for rules that regulate road traffic issues, both in Iraq and abroad. The new rules in force after the alleged crime may sometimes be beneficial (more lenient) to the perpetrator and, as such, shall be considered for application.

20 This word "blank" comes from the term "blank criminal law" (Blankettstrafgesetz in German). This term was first used by Karl Binding in his 1872 work: 'Die Normen und ihre Ubertretung'. He defines "blank penal law" as "those incomplete laws that simply set a certain penalty, leaving the mission to another norm to complete its determination, that is, the specific description of the criminal offence". Thus, blank provisions (such as the quoted Articles 348 and 411 of the Iraqi Penal Code) are those that do not fully describe the prohibited conduct. They are completed by other rules, belonging to other branches of law, usually, to fulfil that description of the conduct.

21 "Any person who accidentally kills another or causes him to be killed without premeditation so that it is the result of negligence, thoughtlessness, lack of due care and attention, or lack of regard for any law, regulation, or decree is punishable by ..."

Similarly, an Iraqi national working for a chemical or biological laboratory in Iraq or abroad may cause the death of somebody by breaking their safety rules. Such laboratories have strict and often updated regulations governing their risky activities. Posterior amendments in such regulations are possible and, if beneficial to actors, shall not be disregarded.

Serious problems are likely to occur when the Iraqi national commits his/her act or omission abroad. In the criminal proceedings in Iraq against him/her for what s/he has committed abroad, his/her defence lawyer is likely to argue that new rules on the laboratory's activity have come into force. S/he might be expected to say, "My client is innocent because he has not broken any of the newly introduced rules applicable to his/her conduct in the foreign country."

But even if the defence lawyer does not raise this issue, the presumption of innocence dictates to the Iraqi state judicial actors responsible for the case to prove the absence of new exculpating rules. If these judicial actors opt to maintain the charges against the accused, they must prove that there are no new rules beneficial to the accused. Because if any such rule has come into force, it shall be applied, according to Article 19(2) of the Iraqi Constitution, Article 2(2) of the Iraqi Penal Code, and Article 15.1 of the ICCPR. This is why the other country should be requested for information about new rules. This is also valid for rules that complement any blanket legal description of the alleged crime attributed to the accused. There are no grounds for denying their applicability either if more favourable to him/her[22].

No doubt, it is a difficult situation for the competent judicial authorities of Iraq. However, laws referred to require making the necessary efforts.

To be successful, one should be aware that, first of all, foreign countries do not like informing about their internal rules, especially those regulating the work of nuclear power stations, chemical and biological laboratories, and suchlike. Besides, if the notifying foreign country cooperates, the interested Iraqi authorities must find out how to request such information.

This particular country might create difficulties by regarding the relevant new rules as "normative facts" that pertain to the Iraqi criminal proceedings "subject of proof" as all other relevant facts. In this case, the rules shall be requested by a rogatory commission (letter rogatory) under Article 355 of the Iraqi CPC. This commission is, undoubtedly, the right device for obtaining evidence of facts from abroad. Otherwise, if the rules in question constitute law rather than facts, the information about them is obtainable less formally. An official document from the other country quoting its new rules on the subject will do.

"Which of the two shall we resort to (?)" is a question that should stay without any answer. It is to be posed to the competent authorities of the other country responsible for international legal assistance. Expectedly, those authorities should clarify in advance whether or not they need a rogatory commission under Article 355 of the CPC to respond.

7. Finally, the principle "no crime without law" cannot be complied with if the same approach is not valid for the rules on the territorial applicability of criminalizing provisions. In practice, the problem may concern the extraterritorial applicability of Iraqi penal law to crimes.

Iraq has not accepted the passive personality principle as a legal basis for the extraterritorial application of its penal law to crimes of foreigners committed abroad against Iraqi nationals, as no rule in this sense exists in Articles 9-12 of the Iraqi Penal Code, which govern its extraterritorial applicability[23]. If, following other countries' examples and, say, the recommendation outlined in Article 7.2(a)(ii) of the 2002 International Convention for the Suppression of the Financing of Terrorism (ratified by this country on 16 Nov 2012), Iraq introduces the passive personality principle or any other principle[24] for extension of the extraterritorial applicability of its penal law, this principle shall not be retroactively used. Otherwise, if retroactively used for crimes of foreigners already committed abroad against Iraqi nationals, the negative result for actors would be the same – a surprising criminal responsibility for the conduct that was not possible at the time of its perpetration. This would, likewise, completely undermine the "no crime without law" principle. To prevent such a result from occurring, the prohibition on retroactivity of detrimental laws should refer to all legal provisions that substantiate criminal responsibility: not only the criminalizing ones but also the rules expanding their extraterritorial application[25].

Lastly, because the ultimate aim of such penal rules is the same as the one of the criminalizing provisions – actual responsibility for crime – they may pertain to national law only. International conventions in the penal field solely require from the parliaments of their parties domestic

22 See also Maghlakelidze, Lavrenti. The Problem of non-retroactivity of substantive criminal law, p. 126. Available at: 1/2022(ENG), accessed on 31 May 2025.

23 Unlike Iraq, Romania, for example, has such a rule. It is Article 10(1) (ii) of its Penal Code: "Romanian criminal law applies to offences committed outside the country by a foreign citizen or a person without citizenship against ... a Romanian citizen." Likewise, Article 16(a)(iii) of the Penal Code of Oman, stipulates that this Code shall apply abroad when "the victim is an Omani national.".

24 Such as on the grounds of denied extradition in respect of crimes of foreigners committed abroad against persons who are not necessarily nationals of the requested country, e.g. Article 8(2)(d) of the Somali Penal Code and Article 5(1) of the Swiss Penal Code.

25 Article 46(3) of the Bulgarian Law for Normative Acts is such a generalizing rule. It prohibits the application by analogy of provisions that substantiate criminal liability.

implementation of such expansions[26]. This is why if the international requirement is not implemented in one or more national rules, no territorial expansion of the Penal Code would actually occur.

THE NO PUNISHMENT WITHOUT LAW PRINCIPLE

8. The principle of "no punishment without law" is similar to the previous one under Article 15.1 of the ICCPR – the 'no crime without law principle'. This second principle also means that non-state rules are not in a position to introduce any criminal punishments. It is only the Parliament that is authorized to produce laws on such punishments.

Secondly, the principle that there is "no punishment without law" means that no legal provision introducing punishment for a given crime shall be applied by analogy to another crime that does not carry this punishment by law. For example, the death penalty, prescribed for some crimes, shall never be applied to other criminal offences for which it has not been contemplated, e.g. with the argument that they are equally harmful.

Thirdly, the retroactive application of a provision prescribing a more severe punishment would also violate the "no punishment without law" principle, as the provision stipulating the punishment did not exist at the time of the commission of the crime. However, not any new law providing for punishment falls within the prohibition of retroactive applicability. Because this principle is, like the previous one, established in favour of actors, it might be violated only if a harsher punishment is retroactively introduced.

This is why 'the no punishment without law' principle does not disallow the application of favourable laws even after the conviction of the offender. According to Article 2(3) of the Iraqi Penal Code and unlike some foreign codes (e.g. the German, French, and Hungarian)[27], if a law after final judgment decriminalizes the act or omission for which the defendant has been convicted, the sentence shall be quashed and the penal consequences of the sentence shall become void, *ex nunc* (Lat.: from now on). However, this does not affect the punishment *ex tunc* (Lat.: from the outset). The previously served part remains as long as the new law does not stipulate to the contrary. It means that decriminalization is possible after the conviction, but its legal effect is not retroactive, being generally applicable only to the unexecuted part of the punishment imposed.

At the same time, when it comes solely to the reduction of the punishment, actual retroactivity occurs because the innovation concerns the whole sentence rather than its unexecuted part only. Thus, according to Article 2(4) of the Iraqi Penal Code, and again, unlike some foreign codes[28], the court that originally passed the sentence may, on the petition of the convict or the public prosecutor, review the sentence imposed in the light of the provisions of the new law.

9. Article 15.1(ii) of the ICCPR and Article 19(2) of the Iraqi Constitution mention only criminal punishments and prohibit their harshening after the commission of the crime. The two provisions do not refer to the other type of sanctions, namely: the precautionary measures (personal or property) or any other legal issues beyond the content of the punishment, e.g. the running lapse of time [statute of limitations] periods – where and to the extent they exist in Iraq (for customs crimes[29] and crimes committed by juveniles[30], mainly), or the regime of rehabilitation[31] – also if and to the extent it exists in Iraq[32]. These issues are beyond the scope of Article 15.1(ii) of the ICCPR Article 19(2) of the Iraqi Constitution.

Nevertheless, Article 19(10)(i) of the Iraqi Constitution expands the prohibition under Article 15.1(ii) of the ICCPR and Article 19(2) of the Iraqi Constitution by postulating that "*Criminal laws shall not have retroactive effect.*" As a result, Iraq, like many other countries, has a general rule prohibiting retroactivity of all new penal provisions (on both sanctions and other issues) that are detrimental to actors[33]. Such a legislative policy supplements the 'no punishment without law' principle and particularly its implications in terms of time and can never contradict it.

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26 Thus, according to Article 7 of the International Convention for the Suppression of the Financing of Terrorism, "1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 when: (a) The offence is committed in the territory of that State; (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed; (c) The offence is committed by a national of that State.
2. A State Party may also establish its jurisdiction over any such offence ...

27 No such rules applicable after the judgment exist, for example, in Section 2 of the German Penal Code, Article 112 of the French Penal Code, Section 2 of the Hungarian Penal Code, etc.

28 See the texts of the provisions in the previous footnote (27).

29 See Article 253 of the Customs Law.

30 See Article 70 of the Juveniles Welfare Law.

31 This is why it might be worsened after the crime in some countries. In view thereof, Section 2(6) of the German Penal Code stipulates that "measures of rehabilitation ... shall be determined according to the law in force at the time of the decision."

32 Iraq deleted the rules on rehabilitation under Articles 342-351 of the CPC along with its Rehabilitation Law No. 3 of 1967.

33 E.g. Article 10(2)(ii) of the Russian Penal Code: "A criminal law that establishes the criminality of a deed and increases punishment or in any other way worsens the position of a person shall have no retroactive force." Also, Article 10.3 of the Azeri Penal Code and Article 6(2) of the Turkmen Penal Code.

A discrepancy in Article 19 of the Iraqi Constitution has occurred, however. If para. 10 reads that "*Criminal laws shall not have retroactive effect*", then para. 2(ii) and (iii) should not reproduce it in part only by addressing, along with crimes, punishments only: "*The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher punishment than the applicable punishment at the time of the offence may not be imposed.*" This discrepancy should be removed by deleting as redundant the text of Paragraph 2 included in Paragraph 10, for example.

10. The prohibition for retroactive application of new laws under the quoted Article 19(2)(iii) of the Iraqi Constitution concerns, as explained, criminal punishments only. Additionally, Article 5 of the Iraqi Penal Code expands this restriction to the other types of sanctions. It reads, "*Provisions relating to penalties apply to precautionary measures.*" Thus, new rules that introduce such measures or contemplate a more severe regime shall not be applied retroactively either. This conclusive prohibition does not contradict any of the international standards. On the contrary, it supplements them.

In particular, the additional prohibition concerning precautionaly measures is in line with Article 15.1(ii) of the ICCPR. This is because, generally, restrictions to criminal punishments are valid for precautionary measures (the other types of sanctions) as well. This is why even countries that do not have an explicit provision, such as Article 5 of the Iraqi Penal Code, also prohibit, referring to international standards, retroactive introduction of new precautionary measures and eventually worsening their regime[34].

The Iraqi general policy of prohibiting the retroactivity of all possible new penal provisions detrimental to actors is implemented best through Article 19(10) of the Constitution: "*Criminal laws shall not have retroactive effect unless it is to the benefit of the accused.*" This constitutional prohibition invalidates as unconstitutional not only new laws that criminalize some conduct (acts or omissions) or introduce harsher criminal punishments. It prohibits and eventually invalidates as unconstitutional all other penal laws whose effect is detrimental to offenders. Other laws of this type are such as Article 253 of the Customs Law and Article 70 of the Juveniles Welfare Law. Each of them prescribes some lapse of time periods. At the same time, astonishingly, none of these Iraqi laws contemplates any ground for interruption or suspension of the periods. If such grounds are provided for (a normal and expected legislative step), this legal innovation would be detrimental to offenders, as it would delay the expiry of the periods running in their favour and eventually hinder the extinction of the legal consequences of their crimes. This is why no introduction of grounds for the interruption or suspension of lapse of time periods shall apply to running periods, let alone periods that have already expired. Any law introducing such interruption or suspension is retroactive and would, as a result, be unconstitutional and inapplicable[35].

It is to be taken into account – for a better understanding of the second part of Article 19(10) of the Constitution about laws benefiting the offender – that Article 15.1(iii) of the ICCPR obligates the application of any new criminal law that prescribes a lighter punishment: "*If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*" Article 2(2) of the Penal Code prescribes the same: "*If one or more laws are enacted after an offence has been committed and before final judgment is given, then the law that is most favourable to the convicted person is applied.*"

It is not always easy to determine when the new provision benefiting the actor is to be applied at all. According to the general concept, it is not necessary for the application of the new provision that it should contemplate better results for actors in all situations that it envisages. It is sufficient that in the investigated situation the actor concerned would benefit from its application. Thus, the application of such a new provision shall not be ruled out on the ground that other actors in the envisaged situation may not benefit.

If a new law prescribes some benefits to the actor whose alleged crime is being investigated, it does not mean they are necessarily the sole result. The law might bring some disadvantages to him/her simultaneously. In view thereof, the favourable and the unfavourable consequences of the potential application of the new law should be compared to find which of them outweighs the others. The criteria for comparison are unlimited. In any case, only if the ultimate balance is positive, as the favourable consequences prevail over the unfavourable ones, shall the new law be applied.

11. Similarly to Iraqi law, the laws of almost all countries in the world also contain rules for the retroactive application of more lenient provisions[36]. This is a global issue.

National laws prescribe the retroactive application of new and more lenient provisions to the period outlined in Article 2(2) of the Iraqi Penal Code, namely, the one after the commission of the crime and before the imposition of the punishment for it (pending situation "*before final judgment is given*"). Yet, it is not the only situation where the issue of retroactivity favouring the offender is raisable. This issue might also be raised afterwards until the execution of the punishment has not been completed.

34 The European Court of Human Rights, concluding that confiscation amounts to punishment, rejected its retroactive introduction into the legal system of the UK. This was the so-called Welch case of the European Court of Human Rights [ECtHR, Welch vs the United Kingdom, 9 February 1995, ser. A, no 307-A, § 33, 34].

35 Officially, this is establishable by the Federal Supreme Court in accordance with Articles 93(1) and 94 of the Constitution.

36 See Article 2 of the Brazilian Penal Code, Section 2(3) of the German Penal Code, Article 5 of the Romanian Penal Code, Article 7(2) of the Turkish Penal Code, Article 13(1) of the UAE Penal Code, etc.

It is the time when the convicted offender serves his/her punishment. It is another pending situation following the conviction where favourable laws are subject to retroactive application in Iraq. According to Article 2(4) of the Iraqi Penal Code, "*If the new law merely reduces the severity of the punishment, the court which originally passed the sentence may, on the petition of the convicted person or the public prosecutor, review the sentence imposed in the light of the provisions of the new law.*"

This is a pending situation after the conviction where only new laws are retroactively applicable to punishments not served in full. However, there are other pending situations after the conviction where also established (existing) favourable laws might be considered for retroactive application to punishments not served in full. Situations of this sort are likely to create difficulties.

Such a situation, raising the issue of possibly benefiting sentenced offenders, is likely to occur in cases of international transfer of prisoners to their home countries where they shall serve the remaining part of their imprisonment punishment, e.g. Articles 58-63 of the Riyadh Arab Agreement for Judicial Cooperation[37]. Understandably, after the transfer, the country of the transferee's nationality (the administering country) shall always apply its law to the execution of the unserved part of the punishment. But in doing this, that country is expected to honour the prior applicability of the sentencing country's law to the part of the punishment already served in its territory before the transfer.

Even if the law of the executing country is more lenient, it shall not be applied retroactively (and "transborderly") to this previous part of the execution to benefit its transferee. The administering country may reduce his/her imprisonment punishment on grounds contemplated in its law only if they exist also in the sentencing country's law and the corresponding reduction has not already been performed there. Although the executing country is the one of the person's nationality, it is not in the position to retroactively grant any reduction of the punishment, for example, by reason of work s/he carried out during the period of his/her detention in the sentencing country if no such reduction is contemplated by its country's law[38].

Therefore, the executing country is precluded from retroactively applying its domestic provisions, such as these at issue, to benefit the surrendered person. So, the penal status of the person shall not be worsened. At the same time, it shall not be improved either as a result of some derogation of the sentencing country's law for what has already occurred in its territory. The law of the administering country shall be applied ***ex nunc*** (Lat.: from now on) rather than ***ex tunc*** (Lat.: from the outset).

It follows, after all, as a necessary conclusion that the retroactivity of more favourable laws is not an absolute mandatory rule. In view thereof, state authorities shall not blindly abide by it in all possible situations, without any exception at all. It is good to know that exceptions are not ruled out in cases where the retroactivity of laws benefiting offenders is under consideration.

12. The general considerations regarding punishment apply to the death penalty in Iraq also. For its lawful imposition and execution Iraq, it is necessary and sufficient that this punishment was provided for in Iraqi law before the conduct that carries it. Neither the ICCPR nor any other international legal instrument to which Iraq is a party requires the abolition of the death penalty.

Nevertheless, the interests of Iraq dictate that, in contrast to other existing punishments, the death penalty should be avoided. This is particularly true in cases where Iraq tries to obtain extradition from another country for a crime that carries the death penalty or for which this penalty has already been imposed under Iraqi law. Normally, such extradition is denied if the requested country has no death penalty at all or if the crime in respect of which extradition is sought does not simultaneously carry the death penalty under its law.

The death penalty is popular in Iraq. However, if this country does want to obtain extradition under the conditions described, it must produce some "concession" at the expense of its death penalty. To this end, the Iraqi authorities can commute it to some imprisonment[39] but not a life-long one (Article 25.2 of the Iraqi Penal Code), though[40]. Thirty years, for example, would always be sufficient. Such a commutation would be the lesser evil for Iraq, as this would pave the way to obtaining the extradition of a wanted person who would eventually be imprisoned for a time sufficiently long for his/her neutralization. Otherwise, this person would walk free abroad and, often, work against the interests of the Iraqi state.

37 See also the 1983 Convention on the Transfer of Sentenced Persons (Council of Europe, Strasbourg) and the 1985 UN Model Agreement on the Transfer of Foreign Prisoners.

38 There was a case on this issue before the Court of Justice of the European Union [the Grand Chamber]. It was case No. C-554/14. The dispute in it was as to whether the executing country is permitted to grant a reduction in the punishment of an already sentenced person by virtue of the work carried out during his/her stay in detention in the sentencing country if the latter country's law did not contemplate any such a reduction at all. The EU Court of Justice ruled that the executing country is precluded from retroactively applying its domestic provisions to benefit the surrendered convict.

39 See, for example, Articles 269(1) and 274 (iii)(2) of the Brazilian Decree № 9.199/20 Nov. 2017 and Article 11(1)(d)(i) and (3) of the Turkish Law on International Judicial Cooperation in Criminal Matters.

40 This is because some countries do not extradite in respect of crimes which carry life-long imprisonment either, e.g. Article 274(iii)(2) of the Brazilian Decree № 9.199/20 Nov. 2017 and Article 6(1)(f)(ii) of the Law of Portugal on international judicial cooperation in criminal matters.

In turn, Iraq may require the same commutation of the foreign death penalty from requesting countries. Iraqi law should stipulate that when extradition is requested for a crime that carries the death penalty, the foreign request shall be denied if this crime does not carry the same punishment under Iraqi law. In this way, Iraq would fulfil its obligation under **Article 7 of the ICCPR** that all persons, including those wanted for extradition, shall be protected from torture. The following deprivation of life is considered a typical form of torture[41].

The Iraqi obligation under Article 7 of the ICCPR for measures against torture in all cases, including extradition proceedings, is valid not only for relations with other parties of the International Covenant. It applies to third countries as well. As the UN Human Rights Committee noted, '*if a state party extradites a person ..., and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant*' (Communication No. 469/1991, United Nations Doc: CCPR/C/49/D/ 469/1991, Paragraph 14.2).

A key issue is the legal mechanism of the commutation of the death penalty to some imprisonment punishment. In any case, it must be reliable to the requested country. Not any assurance is acceptable, though. Thus, if the requesting country, incl. Iraq declares that its authorities would, at their discretion, commute the death penalty to some imprisonment afterwards, this is not likely to be accepted by the requested country. Such was the unsuccessful policy of neighbouring Turkey in this regard. A Turkish reservation of 1957 to the European Convention on Extradition before that country abolished the death penalty clarified, "Once the offender is surrendered to Turkey, the Turkish court will impose the death penalty on him/her, but thereafter, the Parliament is likely to commute it to life imprisonment." This explanation was not deemed satisfactory, and other parties to the Convention rejected Turkish requests for extradition[42]. Therefore, the Turkish reservation is not an appropriate example of any reliable assurance of ruling out the death penalty. The reliable assurances sought and accepted by requested countries are usually of two types:

A. The first is a legislative (normative) one where the law of the requesting country envisages an automatic conversion of the death penalty upon the demand of the requested country. For example, there may be a provision in the law of the requesting country that "*capital punishment shall not be imposed, and if already imposed, shall not be put into effect on a person extradited by a foreign country under such a condition. In this case, the capital punishment stipulated in the law or imposed shall be replaced by 30 years imprisonment.*"

Bulgaria had such a provision in its Penal Code (Article 38, para. 3) before the abolition of the death penalty. The demand of the requested country was sufficient to automatically exclude the death penalty for the extraditee. The necessary effect is achieved: even if the surrendered person does not die in prison, s/he would inevitably be neutralized both physically and morally.

B. The second type of assurance from the requesting country for exclusion of the death penalty might be an individual (*ad hoc*) one, namely, a declaration by a high state official that the death penalty will inevitably be commuted in all cases. It would also be sufficient that the death penalty, although imposed after the extradition, remains unexecuted later. The purpose of the assurance is only to rule out the carrying out of that punishment. Such assurance could come from the President of the requesting country, the Vice President, the Prime Minister, the Minister of Justice, the Minister of Foreign Affairs or another high state official.

In this case, it is not the level of the state official that is relevant for the evaluation of the assurance. The decisive issue is whether the domestic law of the requesting country gives this official the judicial power to commute the death penalty. It follows that it is never sufficient to receive a promise that the death penalty is ruled out. It is also necessary to have the legal provision of the requesting country that makes it possible for the given official to keep his/her promise.

BASIC CONCLUSIONS

13. Two are the key guarantees in Iraq that the "*No crime or punishment without law"* standard is complied with: (i) the prohibition of retroactive criminalization and retroactive harshening of punishment, and (ii) the prohibition of analogical application of provisions that criminalize conducts and contemplate punishment.

The prohibition of retroactive criminalization and retroactive harshening of punishment has been expressly postulated by the Iraqi Constitution. Article 2 of the Iraqi Penal Code confirms this prohibition. It prescribes that the applicable criminalizing provision is the one of the time of the conduct's commission, particularly the time of the action/inaction, rather than the one of the consequences (para. 1) and posterior laws might be applied only if they decriminalize the conduct or reduce the punishment (para. 2-4). Thererore, unless the new criminal law is beneficial to the offender, it shall not be retroactive even if it does not violate Article 15.1 of the ICCPR by affecting crimes and/or punishments. New criminal law shall not be retroactive either if applicable to other issues not covered by Article 15.1 of the ICCPR, such

41 Méndez, Juan E. The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment. Human Rights Brief 20, no. 1 (2012), p. 4.

42 The reservation red: "In the event of extradition to Turkey of an individual under sentence of death or accused of an offence punishable by death, any requested Party whose law does not provide for capital punishment shall be authorized to transmit a request for commutation of the death sentence to life imprisonment. Such request shall be transmitted by the Turkish Government to the Grand National Assembly, which is the final instance for confirming a death sentence..."

as lapse of time peroods by prolonging them or conditions of rehabilitation, if any in Iraq, by worsening them.

Yet, the problem of retroactivity is not sufficiently solved when it comes to complicated criminal activities lasting more than a day. This is because, on the one hand, Article 4 of the Iraqi Penal Code does not envisage all types of such activities. On the other hand, it does not specify that laws criminalizing any such activity would be applicable if entered into force before its completion. This is the prevailing understanding of the issue. Iraq might borrow it.

14. The solution to the problem of analogy needs some further effort. It is true that, according to Article 19(2)(i) of the Iraqi Constitution, "*There is no crime or punishment except by law*". Hence, it follows that no crime or punishment might be created by making use of a provision that envisages another conduct.

At the same time, all other issues not relating to crime or punishment are grey areas. Obviously, the prohibition deriving from the quoted constitutional text of analogical application would be supported by some text that regulates the adversarial situation. It may allow for the application of provisions that do not envisage crime and/or punishment. Most often, such a permissive text is a bit narrower in scope. It prescribes that criminal law provisions beneficial to the actor are applicable by analogy (such as those on justifications for crimes) whereas criminal law provisions detrimental to the actor shall not be applied by analogy. This text embodies the Latin maxim: The law may be applied *in bonam partem* ("in a good sense, with a positive connotation"), while it shall not be applied *in malam partem* ("in a bad sense, with a negative connotation").

Therefore, it would be recommended to have a text that clarifies the scope of analogical application. The text is expected to determine whether all provisions that do not affect crimes or punishments (favourable and detrimental to the actor) are applicable by analogy, or this is valid only for provisions that are favourable to the actor. Such an official text might be, for example, by some interpretative decision of the Federal Supreme Court of Iraq (actually, the Constitutional Court of the country).

15. The dual criminality issue of the crime in respect of which extradition is sought from Iraq should also be clarified in full. Usually, the law of the requesting country is studied first. If the extradition is for trial, the conduct for which extradition is sought shall constitute a crime under the law of the requesting country all the time. This is from the moment of its alleged commission to the moment of the Iraqi decision on the extradition request. If the extradition sought is for the execution of punishment and the conduct does not still constitute a crime any more under the law of the requesting country because it was decriminalized, in the meantime, then the request of that country shall be rejected unless other rules between the two countries exist.

It is even more important to determine when the crime shall be punishable also under the criminal law of Iraq as a requested country. The first option is that the crime shall be punishable all the time, incl. the moment of its alleged commission. The second possible option is that the crime shall be punishable from the moment of the receipt of the extradition request to the moment of the decision on it. The third one would be that it is sufficient that the crime shall be punishable by the time of the decision on the extradition request only. Iraq needs to make a clear choice. It might be taken into consideration that the first option seems to be the most popular in Europe – see the Council of Europe material set forth in footnote № 17.

Finally, it would be appropriate to take into account Article 8 of the Arab Convention on the Suppression of Terrorism (1999, ratif. by Iraq on 16 Nov 2012). It reads as follows:

"*For purposes of the extradition of offenders under this Convention, no account shall be taken of any difference there may be in the domestic legislation of Contracting States in the legal designation of the offence as a felony or a misdemeanour or in the penalty assigned to it, provided that it is punishable under the laws of both States...*".

Therefore, it would be sufficient that the constitutive facts of the criminal offence in respect of which extradition is sought amount to a crime also under the law of the requested state. It is not necessary that the legal descriptions coincide or the name of the crime be the same. This specification might be a good example to extradition legislation in Iraq, esp. regarding export (passive) extradition cases.

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