

The Principle of Criminal Legality as a Safeguard for the Protection of Human Rights at the National and International Levels

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Received: 30/10/2025

Accepted: 26/11/2025

Published:22/12/2025

Abstract:

The principle of criminal legality holds fundamental importance in both national and international criminal law. This principle constitutes a safeguard for the rights and basic freedoms of individuals within democratic systems. Its absence, on the other hand, is one of the defining features of authoritarian or totalitarian regimes, in which power is concentrated in the hands of a single authority, leaving individuals vulnerable to accusation and conviction without knowing precisely the nature of the crime they are being prosecuted for.

Conversely, the existence of such a democratic principle is always associated with the rule of law, which guarantees every individual legal security in criminal matters. Therefore, all persons must regulate their behaviour in accordance with the prevailing legal rules when performing or abstaining from any act. In cases where an individual chooses to violate a criminal legal norm, the appropriate penalty prescribed by law shall be applied.

Keywords: Principle of Criminal Legality; Crime; Punishment; Strict Interpretation; Non-Retroactivity

1. INTRODUCTION

Modern legal systems are founded upon a fundamental and essential principle: the principle of criminal legality, also referred to as *the principle of “no crime and no punishment without law”* or *the principle of the legality of crimes and punishments*. This principle requires the existence of a legal rule that precisely defines the prohibited conduct and the corresponding punishment in advance. It therefore serves as a vital

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safeguard for the protection of human rights, enabling individuals to regulate their behaviour in accordance with the laws applied in the place where they are located.

The principle of criminal legality has long been established within national legal systems, as it is enshrined in most national criminal codes whose main purpose is to regulate the rules of criminalization and punishment within the framework of legality. This principle dictates that no person may be prosecuted or punished for conduct unless that conduct was defined as a crime by law at the time it was committed.

At the level of international criminal law, this principle is of equal importance, as international criminal law also upholds considerations of justice and respect for individual rights and freedoms. However, international criminal law differs from national criminal law in the nature of its rules, whose main source lies in international custom. This raises the following question: **Is the principle of criminal legality applied as a safeguard for human rights at the international level in the same manner as at the national level?** Has the establishment of international criminal courts—whether ad hoc or the permanent International Criminal Court—brought any changes to this application? And if we conclude that the principle of legality in international criminal law bears the same meaning recognized in national laws, while taking into account its distinctive features, does it produce the same legal consequences as when applied at the national level?

Accordingly, this study, entitled “**The Principle of Criminal Legality as a Safeguard for the Protection of Human Rights at the National and International Levels,**” seeks to address these questions through two main sections: **Section One:** The concept of the principle of criminal legality under national and international criminal laws, **Section Two:** The consequences arising from the application of the principle of criminal legality.

2. The Concept of the Principle of Criminal Legality under National and International Criminal Laws

It is well established that the individual constitutes the central focus of all national legal systems—including criminal law—which aim to provide the highest possible degree of protection within the framework of respect for fundamental human rights and public freedoms. Although the traditional principle holds that international law addresses only states, and international organizations as an exception, and that individuals are neither subjects of nor bound directly by its provisions, this perception has gradually evolved since the end of the First World War. Human rights have become a matter of serious and growing concern within international law, and the individual has begun to emerge, to some extent, as a subject possessing rights under its rules.

In order to guarantee the human right to know about criminal acts and refrain

from them in order to avoid the punishment associated with them, it is necessary to implement the important principle of legality at both at the national and international levels. Consequently, it is necessary to study the concept of this principle successively at both levels, as follows.

2.1 The Concept of the Principle of Criminal Legality in National Laws

Most national criminal legislations have incorporated the principle of criminal legality¹, and many have even enshrined it constitutionally², given that the failure to uphold this principle would inevitably lead to arbitrariness and authoritarianism. Moreover, this principle has been reinforced and affirmed through various international human rights instruments.

The historical roots of this principle in positive law date back to the end of the French Revolution in the eighteenth century³. The United Nations has also shown considerable interest in this subject, affirming the principle of criminal legality in **Article 11(2)** of the *Universal Declaration of Human Rights* of 1948, which states: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”⁴

Furthermore, **Article 15** of the *International Covenant on Civil and Political Rights* also enshrines this principle.⁵

Even before all these international instruments, Islamic Sharia had already recognized and affirmed this principle. Its essence is clearly expressed in the **Holy**

¹ The Algerian legislator addressed the principle of the legality of crimes and punishments in the text of Article 1 of the Penal Code issued by Order 66-156 dated June 8, 1966, which states: “There is no crime, no punishment, and no security measures without law.”

² Article 43 of the Algerian Constitution states: “No conviction shall be made except by virtue of a law issued before the commission of the criminal act.” See: Presidential Decree No. 20-243 of December 30, 2020, containing the constitutional amendment, Official Gazette No. 82, dated December 30, 2020.

³ Article 8 of the French Declaration of the Rights of Man and of the Citizen of 1789 states: “No act can be punished except by virtue of a law established and promulgated prior to the offense and legally applied.” See: Olivier DE FROUVILLE, *International Criminal Law – Sources, Incrimination and Responsibility*, Edition PEDONE, Paris, 2012, p.30.

⁴ The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948 under resolution 217 A, is available at: <http://www.un.org/ar/documents/udhr/history.shtml>

⁵ The *International Covenant on Civil and Political Rights* was adopted and opened for signature, ratification, and accession by United Nations General Assembly Resolution 2200 A (XXI) of 16 December 1966. Article 15 of the Covenant provides as follows:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, 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. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The full text of this Covenant is available on the following website: <https://www.unicef.org/arabic/crc/files/ccpr>

Qur'an, in the verse: (وَمَا كُنَّا مُعَذِّبِينَ حَتَّىٰ نَبْعَثَ رَسُولًا)

and also in His saying: (وَمَا كَانَ لَكَ الْفُرَىٰ حَتَّىٰ يَبْعَثَ فِي أُمَمٍ رَسُولًا يَلْدُوا عَلَيْهِمْ ءَايَاتِنَا¹ وَمَا كُنَّا مُهْلِكِي الْفُرَىٰ إِلَّا وَأَهْلُهَا ظَالِمُونَ)²

As for the Prophetic Sunnah, historical records show no instance in which the Prophet imposed punishment for an act committed before the revelation of the corresponding legal text. The fundamental principle in Islamic jurisprudence holds that all things are originally permissible (*al-aslu fil-ashya' al-ibahah*), and no act may be criminalized unless a specific text explicitly prohibits it.

Referring to national positive law, an act is not considered a crime unless the law explicitly defines it as such and prescribes a precise and detailed penalty for it, in accordance with the principle of the legality of crimes and punishments. Therefore, a judge may not depart from the legal text to criminalize a particular act or impose a penalty other than that stipulated by the criminal provision. This reinforces the foundations of a strong and just criminal justice system.³

Accordingly, no person may be tried for an act that, at the time of its commission, was not considered a crime under the law in force and explicitly defined as such, including all its constituent elements, conditions, and related legal aspects. In cases where the judge finds a correspondence between the offender's conduct and the incriminating provision, they are not permitted to impose any penalty differing in nature or degree from that prescribed by the legal rule.⁴

It is worth noting that the sole source of criminalization and punishment in national law lies in the *written legislative provisions* enacted by the competent legislative authority⁵. Article 1 of the Algerian Penal Code stipulates: “*No offence, no*

¹ Surah Al-Isra, verse 15

² Surah Al-Qasas, verse 59

³ Abdul Wahab Houmed, *The Detailed Explanation of the Penal Code - General Section* - New Press, Damascus, 1990, p. 313.

⁴ Hassanein Ibrahim Saleh Obeid, *International Crime: An Analytical and Applied Study*, Dar al-Nahda al-Arabiya, Cairo, 1994, p. 14.

⁵ As for the authority legally empowered to legislate in the field of criminalization and punishment, it is primarily the legislative power, represented by Parliament with its two chambers: the National People's Assembly and the Council of the Nation, in accordance with the provisions of Article 139(7) of the 2020 Constitutional Amendment mentioned earlier.

However, the executive authority may also legislate in this field by way of exception, particularly in matters of contraventions, through the issuance of regulations known as police regulations. Likewise, the President of the Republic may legislate by means of the prescriptions. See:

Abdallah Ouhaibia, *Explanation of the Algerian Penal Code - General Section* - Mufam Publishing, Algeria, 2009, pp. 102-103.

Regarding police regulations, they are the rules enacted by the executive authority to maintain public order, ensure peace and tranquility, and protect public health. Examples include regulations governing road traffic, regulations concerning establishments that cause public nuisance or pose health hazards, and regulations on food inspection, street vending, and epidemic prevention. See:

Mohamed Saïd Jaafour, *Introduction to Legal Sciences, Part One: A Brief Introduction to Legal Theory*, 19th Edition, Dar Houma for Printing, Publishing and Distribution, Algeria, 2012, p. 163.

punishment, and no security measures shall exist without a law.”, The term “law” at the end of this article refers to law in its strict sense, meaning the *written law* or *legislation* enacted by the legislative authority in accordance with the general principles of law. This is further confirmed by the French version of the same article, which uses the term “*législation*” and states: « Il n’y a pas d’infraction ni de peine ou mesures de sûreté sans loi ».

Thus, the other sources of law¹ cannot serve as a basis for establishing crimes and penalties. The judge must issue an acquittal if no legislative text exists that prohibits a specific behavior (a negative act) or requires its performance (a positive act), even if such behavior contradicts other sources of law.²

2.2 The Concept of the Principle of Legality in Criminal Law at the International Level

The principle of legality in criminal law cannot have the same clarity and formulation at the international level as it does at the national level, since most international rules are not codified in legislative texts; rather, the majority of them are customary norms. However, after the adoption of the Statute of the International Criminal Court (hereinafter referred to as the “Rome Statute”), this situation has changed to some extent.

We will therefore attempt to define the meaning of the principle of legality in criminal law during two important stages: the first, before the adoption of the Rome Statute, and the second, after its adoption, when the principle of legality was addressed explicitly and directly.

2.2.1. The Principle of Legality in Criminal Law at the International Level before the Adoption of the Rome Statute

Before the adoption of the Rome Statute on July 17, 1998, the discussion surrounding the principle of legality in criminal law raised several issues and difficulties at the level of international law compared to national law. These issues generally

As for the prescriptions, they are considered laws having the same rank as ordinary legislation, according to Article 142 of the 2020 Constitutional Amendment. They are issued exceptionally in cases of necessity—such as when the National People’s Assembly is dissolved or during its annual recess between sessions—provided that these ordinances are submitted to Parliament for approval at its next session; otherwise, they become null and void.

They may also be issued in situations of exceptional emergency, when a grave threat endangers the constitutional institutions, the independence of the state, or the integrity of its territory, as provided for in Article 107 of the same amendment. See: Abdallah Ouhaibia, op. cit, p. 94.

¹ The general sources of law are mentioned in the Algerian Civil Code issued by Order 75-58 dated September 26, 1975, Article 1, which states: “...if there is no legislative text, the judge shall rule in accordance with the principles of Islamic law, and if there is none, then in accordance with custom, and if there is none, then in accordance with the principles of natural law and the rules of justice.”

² Mohamed Abdel Moneim Abdel Ghani, *International Criminal Law: A Study in the General Theory of International Crime*, Dar Al-Jamia Al-Jadida, Alexandria, 2008, p. 62.

concerned the very concept of the international crime itself, whose main source of criminalization was found in international custom.

Therefore, the most suitable solution at that stage to overcome this problem was to reformulate the principle of “*no crime and no punishment without a law*” into “*no crime and no punishment except on the basis of an international legal rule*,” even if such a rule was unwritten. However, it was required that this rule of criminalization be one that protects significant interests — meaning that the right or interest protected by the rule must be of substantial importance to the international community.¹

In fact, most international legal rules are customary rather than written. When written rules are found in international treaties, they do not *create* international crimes but merely *reaffirm* their existence. The role of written rules is only to clarify and codify the existing custom.

Because of this customary nature of international criminal law, two main consequences arise:²

- **Difficulty in identifying international crimes:** Since their source is *customary international law*, which is itself difficult to determine with precision, recognizing such crimes is challenging. Nevertheless, there are a number of underlying principles of this custom that cannot be denied or disputed, such as justice, morality, and the general international interest. Violating these principles has formed the basis for criminalizing many acts, including *wars of aggression* and *crimes against humanity*.
- **Ambiguity of the concept of international crimes:** This ambiguity arises from the lack of written and codified rules, which makes it difficult for jurists or judges to match a committed act with the *customary model* of a criminal act. Even when such acts are included in an international treaty as international crimes, the treaty usually limits itself to stating the *illegality* of the act without defining its *elements, components, or conditions*.

It is necessary here to refer to what took place during the Nuremberg Trials³, where defence attorneys firmly invoked the principle of legality (*nullum crimen, nulla poena sine lege*) in its absolute sense ; that is, in the same manner as it is applied within national legal systems. However, the prosecution and the tribunal adopted a more flexible approach to this principle, taking into account the nature of the crimes under the Tribunal’s jurisdiction, namely international crimes whose primary source lies in international custom. Consequently, the basis of criminalization was different, and

¹ Mahmoud Naguib Hosni, *Lessons in International Criminal Law*, Dar Al Nahda Al Arabiya, Cairo, 1960, pp. 66 and following.

² Hassanein Ibrahim Saleh Obaid, *op. cit.*, p. 21.

³ The International Military Tribunal of Nuremberg was established following the Second World War under the London Agreement signed on 8 August 1945 by France, the United States of America, the Soviet Union, and the United Kingdom. It was established for the purpose of conducting fair and prompt trials of the major war criminals of the European Axis for their crimes committed in Europe. See: Abdel Wahid Mohamed Al-Far, *International Crimes and the Authority to Punish Them* (Cairo: Dar Al-Nahda Al-Arabiya, 1996), p. 59.

therefore, the implications of applying the principle of legality itself also differed, particularly with regard to the principle of non-retroactivity of criminal laws.¹

2.2.2. The Principle of Legality After the Adoption of the Rome Statute

The Rome Statute enshrined most of the fundamental principles of criminal law with the aim of ensuring justice and stability. Among these principles is the principle of legality (*nullum crimen, nulla poena sine lege*), in both its substantive and punitive aspects.

Article 22(1) of the Rome Statute explicitly establishes the principle that “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.” Furthermore, paragraph (2) of the same article requires a strict interpretation of

¹ Defence counsel sought to rely on several arguments to secure the acquittal of their clients. Among these was the claim that the application of the crimes set forth in the Nuremberg Charter conflicted with the principle of legality and the principle of non-retroactivity of criminal rules:

- Regarding **the alleged violation of the principle of legality**, the defence argued that the crimes and punishments provided for in the Nuremberg Charter had no prior existence in international criminal law before the conclusion of the London Agreement and the establishment of the Tribunal’s Charter. They maintained that the acts committed by the defendants were lawful at the time of their commission, as they took place during the Second World War—prior to the signing of the London Agreement and the adoption of the Nuremberg Charter.

In response, the prosecution countered that the principle of legality in international criminal law must be applied with flexibility, particularly since custom constitutes one of the principal sources of this branch of law, alongside treaties, conventions, and the general principles of law. Upon examining the crimes within the Tribunal’s substantive jurisdiction—crimes against peace, war crimes, and crimes against humanity—it becomes clear that both war crimes and the crime of aggressive war had already been recognized in prior international conventions. As for crimes against humanity, their roots can be traced to international custom as well as certain treaties (such as the Geneva Conventions of 1863 and 1929 and the Hague Convention of 1907), declarations (including the Paris and Moscow Declarations), and even national criminal legislation, including German law itself.

Accordingly, the Nuremberg Charter did not create these crimes *ex nihilo*; rather, they existed prior to the conclusion of the London Agreement. Therefore, the Tribunal’s application of the Charter did not contravene the principle of legality, which in the context of international criminal law is characterized by considerable flexibility.

-With regard to the **retroactive application of criminal rules**, defence counsel argued that the Charter of the Tribunal violated the principle of non-retroactivity of criminal law. They contended that the crimes enumerated in Article 6 of the Nuremberg Charter should have been punishable only in relation to future acts—that is, those committed after the Charter entered into force on 8 August 1945. Accordingly, applying it to acts committed before that date would, in their view, constitute a breach of the principle of non-retroactivity.

The prosecution responded that the Nuremberg Charter did not create new crimes but merely codified and clarified crimes that already existed under international law. Hence, there had been a prior period during which international criminal norms prohibiting and punishing such conduct were already in force. Consequently, the Tribunal’s application of these rules was lawful and did not entail any retroactive effect.

Ultimately, the Tribunal rejected all the defences raised by counsel for the accused and adopted a flexible interpretation of the principle of legality, concluding that the application of the Charter did not violate the principle of non-retroactivity of criminal law.

For further details regarding the Nuremberg Tribunal—its organs, jurisdiction, trial procedures, and practical operation—see: Ali Abdel Kader Al-Qahwaji, *International Criminal Law: The Most Serious International Crimes and International Criminal Tribunals* (Beirut: Al-Halabi Legal Publications, 2001), pp. 228–259.

the definition of crimes¹ and prohibits any extension of their scope by analogy. And Article 24 of the Statute addresses the temporal applicability of the law, reflecting the principle of immediate effect and, consequently, the non-retroactivity of criminal law. These latter provisions represent the practical consequences of applying the principle of legality in its substantive dimension.

As for the principle of punitive legality — “*no penalty without a law*” (*nulla poena sine lege*) — it is enshrined in Article 23 of the Rome Statute, which provides that: “*A person convicted by the Court may be punished only in accordance with this Statute.*”

Articles 77 and 78 of the Rome Statute set out the general rules governing the imposition of penalties. However, the Statute does not provide a detailed specification of the minimum and maximum limits of punishment for each individual crime. This may be attributed to the broad range of material elements (*actus reus*) that characterize the crimes falling within the subject-matter jurisdiction of the International Criminal Court.²

Thus, it can be observed that the Rome Statute follows the approach of national criminal laws, thereby departing from the flexibility that previously characterized the application of the principle of legality in the field of international criminal law before the adoption of the Statute.

Indeed, Article 22 of the Rome Statute does not employ the phrase proposed earlier by legal scholars—namely, “no crime and no punishment except pursuant to an international legal rule, whatever its form, even if unwritten.” Instead, the legal element of international crimes falling within the subject-matter jurisdiction of the International Criminal Court is now based directly on the strict formulation of the principle of legality: “no crime and no punishment without a law.”

Furthermore, the Statute expressly limits the jurisdiction of the Court to four specific crimes, namely: genocide, crimes against humanity, war crimes, and the crime of aggression.

3. The Consequences of Applying the Principle of Legality in Criminal Law

The legal text defines the framework of criminalization and punishment for each offense, in order to protect individuals from the risk of being prosecuted for conduct not clearly and previously defined by law. This allows individuals to regulate their

¹ Article 22(2) of the Rome Statute of the International Criminal Court provides as follows: “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in Favor of the person being investigated, prosecuted or convicted.”

² Susan Tamrkhan Bakka, *Crimes against Humanity in Light of the Provisions of the Rome Statute of the International Criminal Court*, Al-Halabi Legal Publications, Beirut, 2006, p. 140.

behaviour in accordance with the provisions established by law, in full application of the principle of legality in criminal law.

In fact, this principle itself gives rise to several derivative principles, which have been recognized by the majority of national criminal systems and have also been enshrined in the Rome Statute. Among these are the principle of strict interpretation of criminal law and the prohibition of analogy, as well as the principle of non-retroactivity of criminal law.

Accordingly, it is necessary to examine both principles in detail, as follows, in light of national legislation and the Rome Statute.

3.1 Narrow interpretation of Criminal Provisions

The definition of a crime must be interpreted strictly, and its scope may not be extended by analogy. In cases of ambiguity, the definition shall be interpreted in Favor of the person under investigation, prosecution, or conviction. This means that both analogy and broad interpretation of criminal provisions are prohibited, while doubt must always be resolved in Favor of the accused.

3.1.1 The Principle of Narrow Interpretation and the Prohibition of Analogy

The process of legal characterization (*Legal qualification*) is the first task undertaken by the criminal judge, who must align the act committed with the legally defined offense. To do so, the judge must extract certain elements from the legal text. During this process, the judge may encounter ambiguities or uncertainties requiring interpretation of the criminal provision.

The principle of legality requires that criminal provisions be interpreted in a manner that preserves the balance between individual and social interests. Moreover, the very nature of criminal law necessitates that its provisions be subject to strict and narrow interpretation, ensuring that no conduct is criminalized or punished beyond what is clearly prescribed by law.¹

Interpretation aims to remove the ambiguity inherent in the criminal text,² as the judge cannot apply the legal text to the facts presented to him unless he carries out a mental process whereby the general and abstract legal rule is matched to a specific material fact. This process is interpretation, which aims to investigate and clarify the meaning intended by the legal rule.³

¹ Barash Suleiman, *The Principle of Legality in the Algerian Penal Code*, Dar Al-Huda, Ain Mlila, Algeria, 2006, p. 18.

² *ibid*

³ Boulehia Shahira, *Constitutional Guarantees for the Accused during the Trial Stage*, PhD Thesis, Faculty of Law and Political Science, Department of Law, University of Mohamed Khider, Biskra, 2015-2016, p. 212, quoted from: Mamoun Mohamed Salama, *Penal Code, General Section, Third Edition*, Dar Al Nahda Al Arabiya, Cairo, 2001, p. 37.

The process of interpreting a criminal provision involves two fundamental stages:¹

- The first stage consists of analysing the wording of the text, that is, determining the meaning of each individual term and then identifying the overall meaning of the provision.
- The second stage involves identifying the rationale or purpose of the text, namely, understanding the legislative intent behind the legal regulation of a given matter through its protection.

A crucial and essential condition in interpretation is that the provision under examination must not be considered in isolation from the other provisions within the same legal framework. Doing so may lead to inconsistencies between interpretations of different provisions. Rather, each article must be regarded as part of a broader law and an integrated legal system.

As for the Analogy is the comparison of a non-prohibited act to another criminal act based on their common cause². However, this analogy is strictly prohibited in criminalization and punishment, as it undermines the principle of legality and thus violates human rights.

Applying analogy in this context is tantamount to creating a new crime not provided for by law. The role of the judge is to apply the law, not to create crimes. Therefore, a judge may not consider an act a crime simply by analogy with another explicitly criminalized act based on their similarity, as this constitutes a violation of the principle of legality.

The Rome Statute explicitly prohibits analogy in Article 22(2), which states: "...the definition of a crime may not be extended by analogy...".

The analogy referred to here concerns the definition of crimes. By argument from the contrary, analogy may be permitted for the interpretation of other criminal law provisions, since it is prohibited only in the context of criminalization and punishment. However, analogy is permissible in matters relating to grounds for justification or defences excluding criminal responsibility, provided that such application does not infringe upon individual freedoms.³

As an example of the prohibition of analogy, Article 6 of the Rome Statute enumerates, in an exhaustive manner, the specific forms of conduct constituting the *actus reus* of the crime of genocide. It is therefore impermissible to extend these enumerated acts by analogy to include other forms of conduct not explicitly criminalized under this article, regardless of their gravity. Doing so would undermine the principle of legality.

Accordingly, it is not lawful to criminalize political, social, or economic genocide by analogy to the common element set out in Article 6—namely, the intent to

¹ Barash Suleiman, Op.cit, p. 22.

² Boulehia Shahira, Op.cit, p. 215.

³ Abdullah Suleiman, Op.cit., p. 85.

destroy a particular group—because the protected groups are strictly limited to *national*, *ethnic*, *racial*, or *religious* groups.

3.1.2 Interpreting doubt in Favor of the accused

If the legal text is clear, it raises no difficulty in its interpretation or application to the criminal act. However, if the text contains ambiguity that makes its interpretation difficult, the judge may resort to various interpretative methods to determine the legislator's intent¹. If the judge arrives at several possible interpretations—some in Favor of the accused and others against them—the doubt must then be interpreted in Favor of the accused, and the interpretation unfavourable to them must be excluded.

In the field of criminal evidence, when the evidence of innocence and that of guilt are equal, the evidence of innocence prevails, because the fundamental principle is that a person is presumed innocent until proven guilty.²

The Rome Statute was clear in its affirmation of this principle, as stated in Article 22(2): "...In case of ambiguity, the definition shall be interpreted in Favor of the person being investigated, prosecuted, or convicted."

3.2 The principle of non-retroactivity of criminal law:

Studying the principle of non-retroactivity of criminal law requires us to address the content of the principle and its justifications, and then the exception to it.

3.2.1 The content of the principle of non-retroactivity of criminal law and its justifications

Legal provisions are not eternal; they are subject to amendment or repeal. In the latter case, the legal effect of the provision ceases, and it no longer applies to acts committed after its repeal. The applicability of a legal provision is thus limited to the period between its entry into force and its repeal. Consequently, a legal text does not apply to acts committed before its enactment or to acts occurring after its repeal. Therefore, the general rule is that the law applies with immediate effect.

Accordingly, the immediate effect of criminal law, in general, in terms of time, is based on two fundamental principles: first, the non-retroactivity of criminal provisions to include past acts; and second, the non-extension of criminal provisions to acts committed after their expiration, whether due to their repeal or expiration of their term of validity.

¹ Interpretation methods can be divided into three types according to the party performing the interpretation. There is: legislative (original) interpretation, jurisprudential interpretation, and judicial interpretation. For more details, see: Barash Suleiman, Op.cit, pp. 20-21, and Dr. Abdullah Ohaibia, Op.cit, pp. 105-107.

² The presumption of innocence is a constitutionally guaranteed right for every citizen. Article 41 of the 2020 constitutional amendment, referred to above, states: " Every person shall be presumed innocent until proven guilty by a regular judicial "

As for the Rome Statute, it explicitly states the fundamental rule governing temporal jurisdiction of the International Criminal Court under Article 11, which states: "1. The Court shall have jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after its entry into force for that State, unless that State has made a declaration under article 12, paragraph 3."

And Article 24 of the same Statute, entitled "non-retroactivity *ratione personae*," addresses the principle of non-retroactivity of criminal law. Its first paragraph expressly states: "No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute."

Accordingly, the temporal scope of application of the provisions of the Rome Statute is subject to the principle of immediate legal effect, meaning that it only applies to acts committed after its entry into force.¹

Jurists attribute the existence of the principle of non-retroactivity—that is, the immediate application of the new law—to several justifications, including the following:²

- The commission of a crime creates a legal status that produces legal effects only after a final judgment is issued concerning the crime. Therefore, a new law enacted after the commission of the crime shall apply immediately, provided that no final judgment has yet been rendered in the case. By way of exception, this new law shall not apply if it is harsher than the previous one, in accordance with the principle of legality in criminal law.
- The legal position of the accused is determined at the time of the commission of the offense, not on the date of judgment. Evidence of this lies in the fact that the law attaches certain legal effects to the occurrence of the crime even before judgment is rendered—such as determining whether the minimum legal age for criminal responsibility has been met.
- Furthermore, the objectives of the principle of legality themselves constitute a justification for the non-retroactivity of criminal laws, since this principle seeks to protect individual rights and freedoms by defining the scope of criminalization and punishment, which serves as a warning to individuals to regulate their conduct accordingly.

As an exception to this principle, the new law may be applied retroactively if it is more lenient. Conversely, it cannot be applied retroactively if it is more severe for the accused — a matter that will be addressed in the following section.

¹ The Statute entered into force on July 1, 2002. Therefore, the ICC has jurisdiction only over crimes committed after that date for states that ratified it upon its establishment. For states that accede to the Statute after that date, the Court's jurisdiction extends only to crimes committed after its entry into force for them.

² Barash Suleiman, *Op.cit*, pp.29.

3.2.2 The exception to the principle of non-retroactivity of criminal law

lies in the retroactive application of the more lenient criminal law, provided that it is more favourable to the accused. Jurists have offered several justifications for this rule:¹

The first view holds that the reduction or remission of a penalty by a new law represents a recognition by the legislator that the previous penalty is no longer in the interest of individuals or society. Therefore, it would be unjust to apply the old penalty, which has now become obsolete or excessive, to the accused.

A second view argues that the legal status of the accused is not finalized until a final judgment has been rendered. Therefore, the law in force at the time of judgment should apply if it is more favourable to the accused; conversely, if it is harsher, it should be excluded from application.

A third doctrinal approach justifies the retroactivity of the more lenient criminal law on humanitarian grounds, emphasizing the need to adopt the most humane and equitable interpretation in Favor of the accused and the presumption of innocence.

Paragraph (2) of Article 24 of the Rome Statute explicitly provides for this exception, stating: *“In the event of a change in the law applicable to a given case before a final judgment has been rendered, the law more favourable to the person being investigated, prosecuted, or convicted shall apply.”*

Accordingly, this exception applies only to cases that have not yet been finally adjudicated, that is, where no final and binding judgment has been issued. Thus, the Rome Statute adopts the principle of retroactive application of the more lenient criminal law, consistent with the practice in most national criminal systems.

However, the application of this exception — namely, the retroactivity of the more favourable law — is subject to two fundamental conditions: The new law must indeed be more favourable to the accused. And The act in question must not yet have been finally adjudicated, meaning that no final judgment has been rendered in the case.

(a) The New Law Must Be More Favourable to the Accused

It is worth noting that the Rome Statute does not expressly define what is meant by *“the law more favourable to the accused,”* nor does it establish a specific criterion for determining when a new law is considered more lenient or beneficial. Therefore, it is necessary to refer to the general principles in legal doctrine and jurisprudence to identify the criteria used in assessing whether a new law is indeed more favourable to the accused.

¹ Abdel Fattah Bayoumi Hegazy, *The International Criminal Court, Dar Al Fikr Al Jami'i, Alexandria, 2004* p. 47, And Barash Suleiman, *Op.cit*, p. 33.

The question — “*When can the new law be regarded as more favourable to the accused?*” — poses practical and interpretative difficulties¹. Nevertheless, Jurists and courts have endeavoured to formulate a set of Jurists that may assist in determining whether the new law is, in fact, more advantageous to the accused. These criteria can be summarized as follows:²

- **First Case: When the new criminal provision is *simple***, the distinction concerns criminalization and punishment. Regarding criminalization, the new law is considered *more favourable to the accused* if it decriminalizes conduct that was previously prohibited, abolishes an aggravating circumstance, introduces a new ground for justification or exemption from criminal responsibility, or narrows the elements of the offense. As for punishment, the new law is deemed more favourable if it reduces the penalty, abolishes a supplementary punishment, or replaces imprisonment with a monetary fine, among other mitigating changes.
- **Second Case: When the new criminal provision is *complex***, meaning it is harsher in one respect and more lenient in another, two scenarios must be distinguished.

If the provisions of the new law are **divisible**, only the *more favourable part* may be applied retroactively. However, if the provisions are **indivisible**, the judge must consider the law as a whole and determine whether, on balance, it is more favourable to the accused.

In all cases, the application of the principle of the more favourable law to the accused must be guided by objectivity and abstraction, excluding consideration of the specific circumstances of the offense or the personal character of the accused. This ensures that the judge does not exercise discretionary power in matters of criminalization or punishment, thereby preserving the principle of legality in criminal law.

¹ A doctrinal view — as noted by Dr. Barsh Suleiman in his previously cited reference — proposes that the criterion for determining the *law more favourable to the accused* should be established on a case-by-case basis. According to this view, the judge should compare the provisions of the **former law** and the **new law** when examining a specific case, taking into account the elements of the offense, the circumstances surrounding it, and the personal characteristics of the accused. Thus, the judge would exercise discretionary authority in selecting the law most favourable to the accused. However, this opinion has been criticized on the grounds that it allows the judge to interfere in the domain of criminalization and punishment, thereby undermining the principle of legality in criminal law. See: Barsh Suleiman, Op.cit, pp. 34–35.

² See: Barsh Suleiman, Op.cit, pp. 34–35.

(b) The enactment of the new law prior to the issuance of a final judgment in the criminal proceedings arising from the offense:

The rationale behind this condition lies in the fundamental legal principle of *res judicata*, which requires respect for the authority of final judgments. Once a judgment becomes final with respect to the accused, it constitutes the ultimate truth and may not be altered or challenged. A final judgment is one that is no longer subject to any form of appeal or review.

However, if a new law is enacted *after* the issuance of a final judgment and it decriminalizes the act for which the accused was convicted—meaning the act is no longer punishable—the execution of the sentence is suspended, and all its criminal effects are extinguished.¹

Referring back to Article 24(2) of the Rome Statute, it is evident that, for the principle of *retroactive application of the more lenient criminal law* to apply, no final judgment must have been rendered against the accused. In other words, the case must still be at the investigation², trial, or conviction stage, where the judgment has not yet become enforceable.

This is particularly relevant since Articles 81, 82, and 83 of the Rome Statute expressly provide for the appeal of judgments imposing penalties³. Therefore, if a new law—in this context, an amendment to the Rome Statute—is enacted before the judgment becomes final, the more lenient legal provision shall apply to the accused to the exclusion of all others.

It is essential to note, in conclusion, the opinion expressed by Dr. Abdel Fattah Bayoumi Hegazy⁴ regarding the difference between the principle of retroactive application of the more lenient criminal law as provided for in the Rome Statute and as established in national criminal legislation. He argues that Article 24(2) of the Rome Statute limits the accused's right to benefit from the more lenient law to cases in which the new law is enacted before the issuance of a final judgment.

This means that when a judgment becomes final, it must be implemented exclusively, even if a new law revokes the criminal characterization of the act attributed to the convict serving his sentence, as the convict will not benefit from the new law. The

¹ brahim Al-Shabasi, A Brief Explanation of Algerian Law - General Section - Dar Al-Kitab Al-Lubnani, Beirut, 1981, pp. 34-35.

² The Prosecutor of the International Criminal Court (ICC) is the competent authority responsible for conducting investigations. Therefore, if an investigation has been initiated against an accused person and, during the course of such investigation, an amendment to the Rome Statute enters into force that is more favourable to the accused, the Prosecutor may issue a decision to discontinue the proceedings—for instance, if the effect of the amendment is to decriminalize the act attributed to the accused.

³ Judgments may be appealed either through ordinary means of appeal, namely appeal, as provided for in Articles 81 to 83 of the Rome Statute, or through extraordinary means of appeal, namely a request for revision, in accordance with Article 84 of the Rome Statute.

⁴ Abdel Fattah Bayoumi Hegazy, Op.cit, pp 70- 71

reason for this is that the relevant article does not explicitly address such a situation.

In fact, we disagree with the opinion of Dr. Abdel Fattah Bayoumi Hegazy on this issue, as he used the phrase “provisions of national criminal laws” in a general sense, as if all national legislation explicitly stipulates that a person convicted by a final and binding judgment may benefit from a new law that decriminalizes the act by annulling the criminal judgment. It is true that Egyptian¹, Moroccan, Italian, Kuwaiti, and Syrian legislators have explicitly included such a provision; however, other legislation, such as French² and Algerian, does not refer to this matter. The basis for this omission is based on the principle of stability of criminal judgments and non-infringement of their conclusiveness.

It is worth noting that, according to certain Jurists, it would have been preferable for the Algerian legislature to expressly provide, within the provisions of any new law that decriminalizes an act and renders it lawful, for the suspension of the execution of previous judgments, even if such judgments had become final, and consequently to allow for the release of the convicted person who is serving the imposed sentence. Moreover, both the legislative and executive authorities may issue a general amnesty in this regard, in order to safeguard the interests of individuals convicted of acts that have subsequently been legalized, thereby exercising their constitutionally guaranteed rights.

Accordingly, it cannot be affirmed with certainty that, in the event of an amendment to the Rome Statute that decriminalizes certain acts, a convicted person serving a final sentence would not benefit from the new law merely because the Statute does not explicitly provide for such a situation. Indeed, such an amendment could stipulate the suspension of the execution of penalties, or the Court itself could issue a general amnesty in Favor of those affected by the decriminalization.

4- Conclusion

Through this research, it has been demonstrated that the principle of criminal legality constitutes one of the most essential pillars of a fair legal system, whether in national legislations or in international criminal law. It is the principle that guarantees that no individual shall be convicted except on the basis of a prior and clear legal text that criminalizes the act and determines its penalty. In essence, it embodies the protection of human rights and the safeguarding of individual freedom against the

¹ Article 5(3) of the **Egyptian Penal Code** provides that: “If a law is enacted after a final judgment which renders the act for which the offender was convicted no longer punishable, the execution of the sentence shall be suspended, and its criminal effects shall cease.

² The **French Penal Code** does not expressly regulate the principle of *non-retroactivity of criminal law*, as this principle is not explicitly stated in its provisions. Likewise, it does not formally establish the exception to that principle — namely, the *retroactive application of the more lenient criminal law*. However, both principles are well established in judicial practice and legal doctrine, as they are considered a necessary consequence of the principle of *legality in criminal matters* as enshrined in law. See: Abdallah Ouhabia, Op.cit, note 175, p. 126.

arbitrariness of authority.

The Rome Statute of the International Criminal Court has shown a clear commitment to enshrining this principle through its various provisions, particularly Articles (22) and (24), which affirm the principle of non-retroactivity of criminal law and the necessity of interpreting any doubt in favor of the accused. It also recognizes the exception of applying the more lenient law to the accused, reflecting a balance between justice and fairness. However, the practical application of this principle still raises some challenges, especially in cases where amendments to the Statute occur after final judgments have been issued. This situation calls for future reforms to ensure consistency between the Statute's provisions and the universal humanitarian principles of law.

At the national level, the study has shown that the principle of legality is strongly embedded in various Arab legislations. Nevertheless, some systems—such as the Algerian and French ones—have not clearly addressed the issue of suspending the execution of a sentence in the event of decriminalization, highlighting the need for explicit legislative intervention to guarantee justice for those convicted under previous laws.

In conclusion, respect for the principle of criminal legality is not merely a legal matter; it is an expression of the international community's commitment to the rule of law and its desire to establish a humane system of criminal justice that protects individuals from arbitrariness and ensures the stability of the legal order. The more firmly and clearly this principle is entrenched in legislation, the stronger the state's commitment to upholding the values of justice, freedom, and equality before the law.

Suggestions

- The principle of legality in criminal law must be strengthened through the development of national legislation and constitutional oversight of penal laws.
- Legal awareness regarding criminal rights and guarantees must be intensified.
- International cooperation on protecting legal security and exchanging expertise on fair trials and preventing abuse must be activated.
- Public dialogue on democratic security must be broadened, and a balance must be struck between combating crime and protecting fundamental freedoms and rights in the state.

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