

# The Grounds for Excluding the Criminal Responsibility of the Offenders Committing an International Offense

## موانع المسؤولية الجنائية للجريمة الدولية

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### Abstract

*The international community has been exerting much effort to set an effective mechanism for prosecuting and punishing the offenders who violate the international human rights law and other international laws. Eventually, after the United Nation exerted much effort, the Statute of the International Criminal Court was adopted in 1998. The latter statute came into force in 2002. Since 2002, the offenders who commit genocides, crimes against humanity, and war crimes have been held criminally liable for their crime. Due to such statute, they are not exempted from punishment any more. In other words, there is not any immunity nor any kind of protection that may prevent the enforcement of punishment on those offenders. Establishing the Permanent International Criminal Court is a high significant step throughout human history to ensure that those offenders are prosecuted and punished. The significance of the present study arises from seeking to identify the reasons for excluding the criminal responsibility of offenders who committed international offenses requirements in accordance with the Statute of the Permanent International Criminal Court. This study also aimed at identifying the legal requirements that must be fulfilled to be implemented to set the legal effects and comparing them with those stated in the national criminal law.*

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**Keywords:** International offense, The criminal responsibility, Contraindications of criminal liability.

## المخلص

بذل المجتمع الدولي جهوداً كبيرة في سبيل إيجاد آلية يمكن من خلالها ملاحقة الأشخاص المسؤولين ومعاقبتهم عن ارتكاب الانتهاكات الجسيمة لحقوق الإنسان والقانون الدولي، وقد أثمرت جهود الأمم المتحدة في نهاية المطاف في التوقيع على النظام الأساسي للمحكمة الجنائية الدولية عام 1998م، ودخوله حيز التنفيذ عام 2002م، فمنذ ذلك التاريخ لم يعد الأشخاص ممن يرتكبون جرائم الإبادة الجماعية والجرائم ضد الإنسانية وجرائم الحرب في معزل عن المساءلة الجنائية ودائرة العقاب، دون الاعتداد بأي نوع من الحصانة أو الحماية. فإنشاء المحكمة الجنائية الدولية الدائمة يعتبر حدثاً بالغ الأهمية في تاريخ الإنسانية. ومن هنا تأتي أهمية الدراسة بأنها محاولة بحثية للكشف عن أسباب استبعاد المسؤولية الجنائية للجنة الذين ارتكبوا جرائم دولية طبقاً للنظام الأساسي للمحكمة الجنائية الدولية الدائمة، ومعرفة الشروط القانونية الواجب توافرها للاعتداد بها في ترتيب آثارها القانونية، ومقارنتها بتلك المنصوص عليها في القانون الجنائي الوطني.

**الكلمات المفتاحية:** الجرائم الدولية، المسؤولية الجنائية، موانع المسؤولية الجنائية.

## Introduction

An international offense is defined as an act that involves a violation of any right of the rights granted by the law. In this context, the term (law) refers to the international criminal law. The latter law is responsible for protecting a right that is worth protection through enacting criminal provisions. Protecting such rights is a pillar that supports the stability and security of the international community<sup>(1)</sup>.

Prosecuting the ones who committed an international offense must be carried out by the International Criminal Court. An international offense is defined as an act or failure of an act that matches the offense description that is mentioned in articles 8, 7 and 6 of the Statute of the International Criminal Court. Such offenses may include genocides, crimes against humanity, and war crimes. However, such an offense must be committed by someone of sound mind. It must be committed in the international setting whether it is carried out as being part of the policy of a state or a non-governmental organization<sup>(2)</sup>.

The international offense is a serious violation of any right of the fundamental and protected rights of a state that is a member of the international community. Such a violation threatens the security and safety of people. The international offense is considered as an outrageous violation of any right of the human rights regardless of the type and nature of the violated rights. Therefore, it is necessary to prosecute

the ones who committed international offenses and make sure that they are punished. Hence, the International Criminal Court was established. The latter court is responsible for prosecuting, and punishing the ones who committed international offenses. It is responsible for promoting justice and equality among the members of the international community. It is responsible for deterring any one from committing an offense that may threaten the security and safety of people.

The Rome Statute of the International Criminal Court was adopted in 1998. The International criminal court was formally established in 2002. This led to the completion of the structure of the international judiciary. Through the latter statute, it became possible to prosecute the offenders who committed genocides, crimes against humanity, and war crimes after 1 / 7 / 2002 (i.e. after the latter Statute was enforced).

It was necessary to list in the Statute of the International Criminal Court the acts that are considered as international offenses and fall under the jurisdiction of the International Criminal Court. It was also necessary to list the punishments of the ones who committed such offenses. Listing the offenses and their punishments is necessary to enable the latter court to prosecute the ones who committed international offenses. That is based on the following principle of legality: (No one can be held liable for a

crime nor punished without having a legal text that was enacted prior to the commitment of the crime and prohibits the concern crime). Therefore, it was necessary to have a legal text that prohibits the commitment of international offenses without stipulating a reason that may permit the commitment of such acts or prevent the enforcement of punishment on the ones who committed them.

The exclusion of the criminal responsibility refers to cases in which the offender is not held liable for because he lacks cognition, freedom to choose or both at the time of committing the actus reus element of the offense. In such cases, the offender's free will shall be legally negated and he/she shall not be held criminally liable for his offense. Exclusion of the criminal responsibility does not mean that the committed offense is considered permissible. Exclusion is not considered as a justification for the committed offense.

In the cases of justification or permissibility, the mental elements of the offense shall be negated under the exceptions stipulated in the law prohibiting the act. Such exceptions shall make the act deemed as permissible or justified<sup>(3)</sup>. Under these items, those acts shall be decriminalized and the doer shall be acquitted. That shall apply even if the other elements of the international offense are present. Therefore, the doer shall not be held criminally liable.

## **The Study's Significance**

The significance of the present study arises from seeking to identify the reasons of excluding the criminal responsibility of offenders who committed international offenses. This study also aimed at identifying the legal requirements that must be fulfilled to be implemented to set the legal effects. The researchers aimed at identifying these reasons and requirements in accordance with the Statute of the Permanent International Criminal Court. The researchers also aimed at conducting a comparison in this regard between the latter statute and the national criminal law.

## **Statement of the Problem**

In order to achieve the objectives of the study, the researchers begin by identifying the problem of the study and by explaining the scientific methodology the study adopts. The problem of the study can be represented in the following questions: What are the reasons behind the exclusion of the criminal responsibility of the offenders who commit international offenses? In other words, does the Statute of the International Criminal Court specify such reasons like the national criminal law does?

## **The Objectives of the Study**

### **The present study aims at:**

1. Shedding a light on the reasons behind the exclusion of the criminal responsibility of the offenders who commit an international offense in accordance with the Statute of the International Criminal Court. The study also aims to compare these reasons with the ones specified in the national criminal law.
2. Identifying the reasons of the exclusion of the criminal responsibility of the offenders who commit an international offense in accordance with the Statute of the International Criminal Court. The Study also aims to identify the extent of conformity of these reasons with the ones specified in the national criminal law.
3. Identifying the legal requirements that must be met to exclude the criminal responsibility of the offenders who commit an international offense in accordance with the rules adopted by the International Criminal Court.
4. Identifying the legal implications resulting from the presence of a reason that excludes the criminal responsibility of the offenders who commit an international offense in ac-

cordance with the rules adopted by the International Criminal Court.

## Methodology

Due to the nature of the study, the researchers adopt several approaches to fulfill the objectives of the study. These approaches are the descriptive analytical approach and the comparative approach. The researchers have reviewed the Rome Statute of the International Criminal Court which was adopted in 1998, the Jordanian and Egyptian criminal laws, several international agreements, the relevant judicial rulings, and the relevant legal books and references. The above reviews help to identify the opinions of jurists and intellectualist who are specialized in laws.

## The Parts of the Study

The present study is divided into the following: the background of the study, part one, part two, and the conclusion. Part one deals with the reasons behind the exclusion of the criminal responsibility of offenders who commit international offenses which are attributed to the offender's lack of capacity. Part two deals with the reasons behind the exclusion of the criminal responsibility of offenders who commit international offenses which are attributed to the offender's lack of free will.

## Background of the Study

The international offense is an act that involves a violation of the International Criminal Law. It is an illegitimate act that violates the international rights of a state. When all the elements of the international offense are present, one shall be held liable for committing the international offense and shall be punished for committing it. These elements are: the moral element (*Mens rea*), external element (*actus reus*), and the unlawfulness of the act under the law. If all the elements are present, the one who commits the international offense shall be held criminally liable and punished for committing it<sup>(4)</sup>.

To consider the mental element present, it

is not enough to have the criminal capacity present only. In fact, the offender must have his free will when deciding to commit the offense. If the offender has his/her free will, it shall enable the judiciary to hold the offender accountable for his/her failure to comply with the orders or prohibitions specified through legal texts. In case there are circumstances that affect the normal function of the offender's will, the mental element shall be negated. This applies in case the circumstances prevent the offender from assimilating the consequences of his offense. It also applies to the circumstances that eliminate the offender's ability to decide willingly<sup>(5)</sup>.

The reasons behind the exclusion of the criminal responsibility of the offender who commits an international offense involve the reasons and circumstances that affect the offender's will leading it to be legally negated. If the offender's will fulfills two conditions, it shall be considered legally valid. These two conditions are: cognition, and freedom to choose. If one of those conditions is not met, the offender shall not be held criminally liable for his offense. In case the responsibility is excluded due to the negation of the criminal intent, the act he/she commits is still illegitimate<sup>(6)</sup>.

The Rome Statute of the International Criminal Court does not limit the reasons of excluding the criminal responsibility to specific reasons. Therefore, the judge can rule in each case involving exclusion at his/her own discretion. In case, he/she finds that the offender's will is negated, he/she must exclude the offender's responsibility. The judge is also entitled to base the ruling on the national criminal legislations. He/she is also entitled to base the ruling on the dominant opinions issued by jurists at their own discretion about criminal matters. Article 31 / paragraph 1 of the latter statute identifies the reasons behind the exclusion of the criminal responsibility of the offender who commits an international offense. Paragraph No. 3 of the latter article states that the court is entitled to consider any other reason for excluding the offender's criminal responsibility other than the ones specified in paragraph No.1. That can be done in case the reason is specified in the chosen applicable law as it is

stated in article 21<sup>(7)</sup>.

The Statute of the International Criminal Court identifies the cases in which the criminal responsibility is excluded in a manner that is similar to the national criminal law. Such cases include the self-defense case. The latter statute considers self-defense as a reason for deeming the act as permissible and excluding the offender's criminal responsibility. In this regard, the latter statute is influenced by the approach adopted by the Anglo Saxon law. The same approach was adopted by the new French criminal law of 1992. Article 122-1 of the latter law identifies the reasons of permissibility and the reasons of exclusion of the criminal responsibility without distinguishing one from another<sup>(8)</sup>. This differs from the Egyptian and Jordanian criminal laws that adopt the Latin law approach<sup>(9)</sup>.

Under the Statute of the International Criminal Court, there shall be no liability nor punishment, unless the mental element is present. In other words, the offender commits the act with a criminal intent and knowledge. The intent is considered present if the offender decides to commit the actus reus (i.e. the conduct) willingly<sup>(10)</sup>.

Under the Rome Statute of the International Criminal Court, there are reasons for negating the mental element of the crime. Negating this element shall lead to excluding the criminal responsibility of the offender who commits an international offense. These reasons are the following:<sup>(11)</sup>

1. Having a mental illness
2. Involuntary intoxication by alcohol
3. Immaturity
4. Duress
5. Mistake of fact or mistake of law
6. Obedience of superior's orders
7. Self-defense

Through the parts listed below, the researchers aim at dealing with each of the reasons mentioned above. These reasons can be classified into two categories. The first category includes the

reasons attributed to the lack of capacity. Such reasons include: having a mental illness, immaturity and involuntary intoxication by alcohol. The second category includes the reasons that are attributed to the absence of the offender's free will. Part one deals with the reasons of the first category while part two deals with the reasons of the second category. This is illustrated below:

## Part One:

This part deals with three reasons for the exclusion of criminal responsibility of the offender who commits international offenses which can be attributed to the lack of capacity. Such reasons prevent holding the offender accountable for his offense. This shall make the offender unfit for punishment enforcement. These reasons are listed below:

### Section One: Mental illness:

The national legislator considers insanity and mental disability as reasons that affect and negate one's capacity due to their influence on one's cognition and freedom to choose. Article No. 62 of the Egyptian criminal law states the following: *(No penalty shall be imposed on one losing consciousness or the faculty of choice in his work at the time of committing the deed: either due to insanity or mental disability, or to unconsciousness resulting from drugs whatever their kind if he takes them forcibly or unknowingly).*

In the latter context, insanity and mental disability refer to any disease that affects the mental functions leading to deprive one from awareness and cognition. Such mental functions involve one's ability to carry out simple and complex mental processes. Such processes involve knowledge, attention, memory, imagination, evaluation and any other mental process. One shall be considered as lacking capacity, if he/she suffers from a mental disability that deprives him/her from acting upon his/her free will with controlling his various drives. That is because the offender in such a case is under the influence of one actual drive that he/she cannot get rid of. This applies to the offenders who suffer from paranoia. The legisla-

tor does not categorize the psychopathic disorders as mental disorders that affect one's legal capacity.

Under the Statute of the International Criminal Court, if a person suffers from a mental disorder that eliminates cognition, the criminal responsibility shall be excluded. For example, article 31 (1) (a) of the latter statute states the following:

"A person shall not be criminally responsible if, at the time of that person's conduct:

a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law".

Under the latter article, in order to exclude one's criminal responsibility, one must be suffering from a mental disorder or defect that destroys his capacity to understand or control his/her conduct at the time of committing the crime.

The same was stated explicitly through article No. (62) of the Egyptian criminal law. The latter article states the following: (No punishment shall be enforced on the offender who lacks awareness, or freedom to choose at the time of committing the offense due to insanity or mental defect).

In case the offender suffers from an intermittent mental disorder and is aware at the time of committing the offense, the offender's criminal responsibility shall not be excluded. This applies even if the disorder affects the offender's psychological state during the concerned period of time<sup>(12)</sup>.

The Egyptian legislator deals in general with the case of full insanity through using the following expressions (insanity or mental defect). However, Egyptian legislator does not deal with partial insanity. Thus, the Egyptian legislator deals with the criminal capacity either as fully present or fully absent. The latter legislator entitles the judge to rule and decide the punishments at his/her own discretion in accordance

with the offender's personal circumstances. Under the Egyptian criminal law, providing a proof of having a mental defect shall negate one's criminal capacity. Thus, the offender's criminal responsibility shall be excluded. However, this mental defect should be that deprives the offender from cognition, or freedom to choose at the time of committing the offense due to insanity or mental disorder.

The same approach is adopted by the Jordanian legislator. For instance, paragraphs 1 and 2 of article 92 of the Jordanian criminal law states the following: ((1) Whoever commits an act while he / she is unable to realize the nature of his/her acts or is unable to realize that it is prohibited to commit such an act due to mental disorder, shall be exempt from punishment.(2) Whoever is exempt from punishment based on the previous paragraph shall be admitted to a mental illnesses hospital until he/she is proven to be cured by a medical committee report and he/she no longer represent danger to public safe).<sup>(13)</sup>

One of the judgments of the Jordanian Court of Cassation states that the police court shall exclude the offender's criminal responsibility in accordance with provisions of the law in case it received proofs indicating the offender was suffering from a mental disorder and deprived from free will at the time of committing the crime<sup>(14)</sup>.

### **Section two: Involuntary intoxication by alcohol**

Article 31 (1) (b) of the Statute of the Permanent International Criminal Court states the one of the reasons for excluding the criminal responsibility is the involuntary intoxication by alcohol. Under the latter article, the offender shall not be held criminally liable for his offense, if at the time of that conduct:

"The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a re-

sult of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court"

Under the general rules of the criminal law, the effects resulting from alcohol or drugs include the effects influencing cognition, and freedom to choose. For instance, drinking alcohol shall seriously affect the one's mental state leading him to lose ability to appreciate the implications of his conduct. Drinking alcohol also affects one's free will through eliminating one's ability to control his drives, or reducing the effectiveness of such a control.

Article 62 of the Egyptian criminal law deals with two kinds of intoxication by alcohol. The first kind is represented in the voluntary intoxication by alcohol, whereas the second one is represented in the involuntary intoxication by alcohol. The latter article states the following: (No penalty shall be imposed on one losing consciousness or the faculty of choice in his work at the time of committing the deed: either due to insanity or mental disability or to unconsciousness resulting from drugs whatever their kind if he takes them forcibly or unknowingly).

The same approach is applied by the Jordanian Court of Cassation. One of the judgments of the latter court states that the criminal responsibility shall not be excluded in case the one pulls out the gun in public claiming that he is drunk. That is because article No. (93) of the Jordanian criminal law states the following:

"Whoever loses his/her volition or reason when committing an act due to alcohol or drugs, regardless of its nature or type, shall be exempt from punishment; provided that he / she consumed such substance against his/her will or without his / her knowledge"<sup>(15)</sup>.

One of the reasons of excluding the criminal responsibility include the involuntary intoxication by alcohol or drug that leads one to lose awareness. This applies to the acts committed while one is unaware due to such an involuntary intoxication<sup>(16)</sup>.

Involuntary intoxication by alcohol often occurs under coercion or without one's knowledge. This applies to the drugs offered to the offenders through deception and hence makes the offender lose awareness. In such a case, the offender has a good intent.

There are certain conditions that must be met to exclude the offender's criminal responsibility in the case he/she is intoxicated by alcohol involuntarily. These conditions are<sup>(17)</sup>:

1. The offender must be fully unaware due to involuntarily intoxication by alcohol and represented as lacking cognition or freedom to choose.
2. The act is committed when the offender is unaware due to involuntarily intoxication by alcohol.
3. The intoxication by alcohol must have occurred against the offender's will, whether he/she has taken the alcohol purposefully or by a mistake.

When deciding to hold (or not hold) the offender voluntarily intoxicated by alcohol, the Egyptian Court of Cassation requires ruling based on the kind of the committed purposeful offenses. For instance, there are offenses that require the presence of the specific criminal intent. Other offenses require the presence of the general criminal intent only. The latter court decides that the intoxicated offender shall not be held liable for the specific criminal intent due to its negation. It is negated because the intoxicated offender lacks awareness. However, he/she shall be held liable for the general criminal intent only.

Therefore, the intoxicated offender shall not be held liable for a murder. However, he/she shall be held liable for beating someone to death. In the latter offense, the intoxicated offender shall be held liable because the general criminal intent is present which is represented in the depriving someone from his/her life. However, there are offenses that require the presence of both intents, rather than requiring the presence of the general intent. Such offenses include forgery. If the intoxicated offender committed such an

offense, he/she shall not be held liable<sup>(18)</sup>.

That is inconsistent with article 62. For instance, the latter article confirms that the alcohol intoxication affecting capacity and excluding criminal responsibility is restricted only to the involuntary intoxication by alcohol. As for the voluntary intoxication by alcohol, it shall not exclude the criminal responsibility nor shall be considered as affecting capacity.

Thus, the legislator decides to hold the offender intoxicated voluntarily liable for all the offenses he/she commits while he is drunk. In the latter case, that shall apply to the offenses committed purposefully and the ones committed non-purposefully. In case the offense is committed purposefully, there shall be no difference between the offenses that require a specific intent and the ones that require a general intent since the legislator considers the offender intoxicated voluntarily as a person who has a legal capacity like any other normal person who is not intoxicated by alcohol. It should be noted that holding such an offender liable violates the general rules. However, this rule is based on the legislator's decision that is represented through article 62 of the Egyptian criminal law. The latter article prevents the enforcement of a punishment on the offender intoxicated involuntarily. That means that the latter offender shall not be held liable due to being involuntary intoxicated. Thus, if the offender is voluntary intoxicated, the rule of article 62 shall not apply. Therefore, there is no reason to exclude the offender's criminal responsibility<sup>(19)</sup>.

### Section three: Immaturity

Most legislators are keen to specify a specific age after which one shall be held legally liable for his/her acts. That is because before the specified age, one's cognitive functions are not considered fully developed and that shall not enable one to distinguish the right acts from the bad acts. In such a case, the offender shall be considered unfit to be held accountable for his lack of compliance with the provisions of the criminal law<sup>(20)</sup>. This age differs from one country to another due to the differences between countries

in terms of the geographical setting, climate, and cultural conditions<sup>(21)</sup>.

The Egyptian legislator has set rules that deal with the juvenile who commits one of the offenses prohibited under the criminal law or committed any act that is considered as a threat to society. The latter legislator deals with that through the Egyptian juvenile law No. 31 of 1974. Article 1 of the latter law states that the term juvenile applies to the ones who are under 18 years old at the time of committing the offense or the deviant behavior.

### Differences between the juvenile's offenses and deviant acts:

The juvenile's deviant acts refer to the behaviors that are committed by a juvenile and are not necessarily considered as crimes. However, they represent a threat to society. In this regard, the legislator did not differentiate between juveniles in terms of their age at the time of committing the deviance act. However, they must be under 18 years old to exclude their responsibility for the deviance act. That applies even if they are under 7 years old.

The juvenile's offenses refer to the cases in which the juvenile commits an offense prohibited under the law and he shall be punished for. However, the juvenile, must be under 7 years old. In this regard, the legislator differentiates between the following two categories<sup>(22)</sup>:

- The first category involves the juveniles who are under 15 years old. The legislator considers them fully deprived from their criminal capacity for any criminal act that is prohibited under the law. Thus, there shall be no punishment enforced on them for any offense they commit except for the confiscation punishment and closing their shops. If the juvenile who is under 15 years old commits two crimes or more, there shall be one legal procedure taken against him/her. The same applies in case the authorities found that such a juvenile commits another

offense previously or commits another offense after issuing the legal action against him/her. That is because the preventive action shall prevent the juvenile from repeating the same offense.

- The second category involves the juveniles whose ages are more than 15 years old and less than 18 years old. The Egyptian legislator considers them as having a criminal capacity. However, in case the offense is criminal, it is mandatory to consider his/her age as an excuse to mitigate the punishment. That is decided under the national criminal law of Egypt (i.e. the Egyptian Criminal Law).

As for the Statute of the International Criminal Court, it states that its provisions are enforced on the ones who reach 18 years old and commits one of the offenses prohibited under article 5 of this statute. In other words, the latter court is not authorized to prosecute the ones who are under 18 years old<sup>(23)</sup>.

This means that the latter statute adopts a principle that is recognized by the major criminal laws in the world. This principle is represented in the illegality of prosecuting children by the ordinary courts of adults because they should be prosecuted by the juvenile's court<sup>(24)</sup>.

Excluding the criminal responsibility of the recruited children is considered problematic. That is because recruiting the juveniles who are under 15 years old is considered one of the war crimes under the aforementioned statute. Thus, recruiting the juveniles whose ages are above 15 and approving to recruit them are not considered as international offenses. For instance, if a state recruits combatants whose ages are above 15 years old and less than 18 years old, it shall not be considered as a crime that falls under the latter court's jurisdiction. However, during the recent period, most of the terrible crimes committed in armed conflicts are committed by such combatants<sup>(25)</sup>.

Thus, prosecuting the juvenile who does not reach 18 years old at the time of committing the international offense does not fall under the International Criminal Court's jurisdiction. However, how shall such a juvenile be prosecuted in case his offense is not prohibited under the national legislations of the state he belongs to? In such a case, his state shall not be able to prosecute him due to the following principle of legality: (No crime without law and no punishment without law). In such a case, the juvenile shall keep fighting as being a state's combatant who fights in obedience of the order of his leaders and superiors. In this way, there shall be no punishment enforced on him/her, especially in case the state's judiciary is corrupted or collapsed. Therefore, the juvenile shall not be held liable for the offense even if it is an international offense<sup>(26)</sup>.

Therefore, to have coherence between articles, the legal age specified in the statute must be changed to prosecute the juveniles whose ages are above 15 years old. In addition, the statute must enforce punishment on the ones who recruit the juveniles whose ages are above 15 years old and less than 18 years old. In addition, the enforced punishment on the juveniles whose ages are above 15 years old must be less harsh than the one enforced on adults. This should be done in pursuant to the juvenile laws that are recognized internationally<sup>(27)</sup>.

## Part two:

The reasons of the exclusion of the criminal responsibility of the offenders who commits international offenses that are attributed to the lack of free will. The researchers shed a light on the significance of the free will in holding one criminally liable for an international offense. The present part deals with the reasons of excluding the criminal responsibility of the offenders who commit international offenses that are attributed to the absence of free will. These reasons are presented below:

### Section One: Duress:

Under national and international legisla-

tions, if a person is subjected to any form of duress, the free will shall be negated and hence be considered a reason for excluding the criminal responsibility.

Duress refers to the act of pressuring someone's will to make another perform an act that fulfills the will of the person exerting the pressure<sup>(28)</sup>. This pressure involves causing fear. Duress is categorized into two types: physical and moral duress:

1. If the person is subjected to a physical duress, it means that this person has acted against his/her will since he/she has been compelled by force to perform a specific act or behavior. One shall not be held liable for such an act or behavior because one has performed it under a compulsion by force serving as a tool that fulfills the will of the person compelling that one<sup>(29)</sup>. In such a case, the one who has performed the act of completion is considered the actor and shall be prosecuted<sup>(30)</sup>.
2. If the person is subjected to a moral duress, it means that he has been forced by a threat to commit a criminal act in the aim of fulfilling the will of the person compelling him/her. In such a case, there is no compulsion by physical force. However, the free will of the actor is affected leading him/her to commit a criminal act<sup>(31)</sup>.

One is considered committing an offense under duress if one has committed it against his/her will and under the effect of a compulsion that causes fear from an imminent harm or damage<sup>(32)</sup>. That is considered one of the forms of the compelling circumstances. Moral compulsion may be represented in a behavior that presses someone's will. It may be also performed through employing the force of nature to press someone's will<sup>(33)</sup>.

Thus, the physical duress shall fully negate the actor's free will. The person compelled by physical force does not have any choice but to carry out the behavior requested by the compeller. As for the

moral duress, it does not fully negate the free will of the compelled person since it provides the compelled person with a choice. Such a choice is represented in either to commit the criminal act requested by the compeller or to refrain from committing it. In other words, the moral duress affects the psychological state of the compelled person. As for the physical duress, it affects the compelled person physically by using physical force against him/her.

After WW II, duress has become a reason for excluding the criminal responsibility. This applies in case the offender proves that he/she has committed the offense to avoid a serious threat that cannot be avoided by any other means. The concerned judiciary shall decide whether the circumstances are compelling or not based on subjective standards rather than objective ones. In other words, it depends on the compelled person's state at the time of committing the act and the existing circumstance at that time.

The international criminal judiciary is entitled to decide whether there is a moral duress or not to exclude the offender's criminal responsibility. In Krupp trial, the Nuremberg tribunal rejected the defense argument claiming that the defendant acted under duress. The latter tribunal decided that it is difficult to identify whether there is duress or not to negate the criminal intent<sup>(34)</sup>.

Article No. 31 of the Rome Statute of the International Criminal Court states the following:

(The person shall not be criminally responsible if: the conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control).

Based on the aforementioned article, it can be concluded that the following conditions must be met to exclude the criminal responsibility due to the presence of duress:

1. The offense must be within the jurisdiction of the International Criminal Court. It must be one of the offenses prohibited under article 5 of the latter statute. These offenses are: a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression
2. The offender's conduct must be committed under duress. This duress must encompass a threat of imminent death or continuing or imminent bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat.
3. The offender's conduct is committed necessarily and reasonably to avoid this threat that is posed on him/her or someone else.
4. The offender did not have any intent to cause a greater harm than the one sought to be avoided. In other words, the offender who is under duress must have a good intent.
5. The duress must be imposed by another person or resulting from circumstances.

Under article 31 / 2 of the statute, the latter court shall determine the applicability of the grounds for excluding the criminal responsibility in accordance with the provisions of this statute to the case before it.

The same was adopted by the Egyptian Court of Cassation. For instance, through one of its judgment, the latter court states that the court has the authority to determine whether there is a substantive coercion or not<sup>(35)</sup>.

**Section Two:** Mistake of fact or mistake of law:

Under the general rule of the law, a mistake of fact or law shall be a ground for excluding the offender's criminal responsibility only if it negates the mental element required. This applies only if certain conditions are met.

Sometimes, the mistake shall negate the criminal intent, but may be considered as an unintentional wrongdoing. The mistake shall not have any legal value in case the conditions required for negating the mental element or the criminal intent at least are not met<sup>(36)</sup>.

This section deals with mistake of fact and mistake of law in accordance with the national and international laws:

**\* Mistake of the facts constituting part of the offense:**

The mistake refers to a mental state through which the person fails to recognize something as it actually is and perceived by people. A mistake differs from ignorance. Ignorance refers to the lack of knowledge or information about something. The ignorance that excludes liability is the one that leads one to commit an offense. Most jurists believe that mistakes and ignorance should be treated similarly when examining the mental elements of an offense<sup>(37)</sup>.

Committing a mistake in identifying the facts constituting part of the offense may be a substantial or insubstantial mistake. The substantial mistake refers to a mistake committed in one or more of the facts constituting part of the crime which shall lead to the negating one or more of the offense elements that are legally required<sup>(38)</sup>.

Such a substantial mistake arises due to a misassumption about an event which leads the offender to commit an offense. In such a case, the offender's state of mind is negated and the result of the offender's act shall be considered unintentional. An example to that may include the one who takes over another person's money assuming that it is the offender's own money. Another example may include

the one who takes over money handed to him/her as a deposit because he/she assumed that it is an offering<sup>(39)</sup>.

In order to exclude the criminal responsibility due to a mistake, the facts must be misunderstood by the offender prior to the conduct alleged in order to negate the criminal intent. That is required because committing a mistake shall negate the element of knowledge constituting part of the mens rea. In such a case, the offender's free will is negated.

Negating the criminal intent due to a mistake shall negate the element of knowledge constituting part of the mens rea. However, that shall not fully exclude the offender's criminal responsibility. That shall apply in case the criminal responsibility can be attributed to an unintentional wrongdoing. An example to that can be represented in the offense resulting from negligence and forgetting to take precautionary measures which the offender could have taken to avoid the offense. In such a case, the offender shall be partially liable for his/her unintentional wrongdoing.

Based on the general rule of the criminal law, the mistake is not considered substantial nor negates the criminal intent. For instance, a person may shoot another person with the intention to kill because he/she thought that this is his/her foe and realize later that he/she is not his foe. In such a case, the offender shall be held criminally liable for intentional murder. That shall apply except in case the relationship between the offender and the victim or the disputed issue between them constitutes one of the required legal elements of the crime. In such exceptions, the offender shall be deemed as if he/she has committed a substantial mistake that negates the offender's criminal intent.

Creating misleading conditions that shall direct the offender to commit the offense voluntarily is considered a reason for excluding the offender's responsibility. Such conditions may be represented in providing misleading information about the cause leading to the offense or about the nature of the offense. Such conditions may include those affecting

the offender's state of mind.

Similar to the national criminal law, under the International Criminal Law, the offender must have prior knowledge of the actual facts that led him/her to commit the crime to consider the criminal intent negated. The Nuremberg tribunal was strict in applying this rule. The latter court required having valid knowledge about all the elements constituting the crime in order to consider the criminal intent present. The latter court confirmed that lack of knowledge about facts and mistake of facts shall negate the criminal intent. When examining most of its judgments, it can be concluded that the latter court considers the potential (indirect) intent insufficient to hold one as intentionally liable for the effects of the criminal act that he did not expect.

Due to such strictness, the Nuremberg tribunal acquitted Schacht of the accusation of committing war preparation conducts. That is because there was no proofs confirming his ill intention towards peace. The latter court also acquitted Von Papendue to absence of a proof that confirms his criminal intent. In addition, the court acquitted the NATO forces for attacking the Chinese embassy by a mistake. The criminal responsibility of the European Union was excluded. An apology was officially stated and the Chinese government accepted the apology<sup>(40)</sup>.

Under the Statute of the International Criminal Court, in order to exclude the criminal responsibility, the mistake must negate the mental element required. Article 32 /1 of the latter Statute states the following:

(A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime).

#### **\*Mistake of Law:**

Under the general rules of the international criminal law, ignorance of the criminal law shall not serve as a reason for excluding the criminal responsibility because it is merely an assumption. Thus, no

one can prove that he has committed a mistake of law. If not knowing the law is considered as a reason to exclude criminal responsibility, enforcement of all the criminal legislations and punishments shall be prevented. This rule applies to the misinterpretation and ignorance of criminal rules that permit certain acts<sup>(41)</sup>.

Article (85) of the Jordanian criminal law states the following: (Ignorance of the law shall not be an excuse for any person who commits a crime). The same was mentioned in one of the judgments of the Jordanian court of cassation. The latter court states that if the offender is one of the Bedouins who live in the desert and ignorant about the laws, his/her criminal responsibility shall not be excluded. That is because ignorance of the law that is enforced on Bedouin and urban population shall not serve as a reason for excluding the offender's criminal responsibility<sup>(42)</sup>.

A mistake of a law other than the criminal law does not always exclude responsibility. To be specific, it excludes responsibility when it negates one element or more of the required offense elements. This applies to the complementary criminal laws<sup>(43)</sup>.

Refusing to exclude the responsibility of the ones who violated that law is debated. That is because no one can have knowledge of all the international legislations. In addition, it can be noticed that international legislations are enacted constantly and their complexity is increasing, which shall prevent people from having knowledge about the provisions of the International Criminal Law.

Therefore, many jurists tend to avoid being strict in applying the rule of article 85. For instance, many jurists suggest that the criminal intent is negated when it is definitely impossible to have knowledge of the provisions of the law. They also suggest that ignorance can serve as an excuse in case ignorance or misunderstanding is related to a clause of a law other than the criminal law. They also believe that the criminal intent can be negated due to a mistake, in case there is no wrongdoing.

In the light of the aforementioned, the following rule, ignorance of law does not negate the criminal responsibility, must be adopted by the international criminal law in a way that is more flexible than the national criminal law. This matter requires making decisions at the court's own discretion, showing more tolerance. That is because ignorance or mistake of law is a broad area when dealing with it<sup>(44)</sup>. For instance, it is difficult to prove that the offender is ignorant of the criminal national law or misunderstands it. It is considered so because the law is written and published and any one can have access to it.

However, it is different when it comes to the international criminal law. For instance, the latter law is a vague customary law that keeps changing constantly. It is also difficult to have access to it. In addition, most of the international offenses are carried out based on the superior's orders. Therefore, having the criminal intent by the actor shall be questionable.

The International Criminal Court does not consider the mistake of law as a reason for excluding the criminal responsibility in case the offense is within the jurisdiction of the court. However, if the mistake negates the mental element required by the offense, the court shall consider the mistake as a reason for excluding the criminal responsibility. For instance, article 32 / 2 of the Statute of the International Criminal Court states the following:

(A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33).

### **Section three: Obedience of superior's orders:**

Obedience of superior's orders is considered a reason for deeming the act permissible. For instance, article 63 of the Egyptian criminal law states the following: (No penalty shall be imposed if the deed occurs by a government employee, in the fol-

lowing cases: First: If he/she perpetrates the deed in execution of an order issued to him/her by a superior he must obey, or he believes he must do it).

Article 61 of the Jordanian criminal law states the following: (A person is not criminally liable for acts committed in one of the following instances: (1) While implementing the law. (2) Obeying an order commanded by a lawful authority, unless the action is manifestly unlawful)<sup>(45)</sup>

The legislator considers obedience of superior's orders as a reason for permissibility because it is assumed that the subordinate is under moral duress. In other words, the legislator assumes that the order issued by the superior represents a pressure enforced on the actor's free will leading to deprive him/her from his/her free will. In such a case, he/she shall be considered as deprived from his/her free will at the time of committing the act<sup>(46)</sup>.

This matter is discussed clearly in the national criminal laws. However, this does not apply to the intentional criminal law. In fact, all the international offenses are usually implemented in obedience of orders issued by the government or the superior. In other words, they are not carried out based on the doer's own decision<sup>(47)</sup>.

Can legislators consider the superior's orders as a reason for excluding the offender's criminal responsibility or not? Can such orders be used as a defense argument or not?

The London Conferences was held on 26, June 1945 and delegates from the United States, United Kingdom, France and Soviet Union participated in it. The aforementioned questions were raised in the latter conferences when the delegates discussed the things they agreed about in Moscow Conference in 1943 about holding trials to prosecute the ones who committed war crimes in WW II.

In the latter conference, the following question was raised: (Can the superior's orders serve as a reason for deeming the act permissible under the

international criminal law?<sup>(48)</sup>

Most of the delegates showed similar opinions. For instance, most of them believe that superior's orders should not serve as a reason for excluding the offender's criminal responsibility. However, they believe that it should be considered as an excuse for mitigating the punishment.

Article (8) of the Nuremberg charter states the following: (The fact that the Defendant acted pursuant to order of his/her Government or of a superior shall not free him/her from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires<sup>(49)</sup>).

The Nuremberg tribunal applied this principle in Keitel's case. At this case, Keitel held on to his claim that he acted as a soldier in order to obey his superior's orders. In this case, the court stated that the order given to a soldier to kill or commit a terrorist act which violates the international criminal law shall not exclude the doer from criminal responsibility. However, it shall serve as an excuse for mitigating punishment under the Nuremberg charter.

The International Law Commission was assigned to examine the wording of principles of the Nuremberg Charter and the judgments of the latter court. Some of the committee's members believe that the obedience of superior's order should serve as an excuse for mitigating punishment rather than serving as a reason for exclusion. Other committee's members disagreed<sup>(50)</sup>.

Some members believe that the obedience of superior's orders shall not exclude the doer's criminal responsibility, but shall serve only as an excuse for mitigating punishment. They based their opinion on the following:

1. Article 40 of the International Committee of the Red Cross states the following:

(The fact that the accused acted in obedience to the orders of a superior or in pursuance of a

law or regulation shall not constitute a valid defense, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify)

As for the superior giving the order, he/she shall be considered fully liable for the offense, even if he/she issued the order while he/she was holding his/her office.

2. Article 2 / paragraph 4 of the of the control board law No. 10 states that the superior's order shall not serve as an excuse that excludes the criminal responsibility. The latter law was applied by the local English, American and French military courts in the areas occupied by Germany(51). As for the ones who disagreed, they based their opinions on the following:

1. Refusing to consider the obedience of superior's orders as a reason for excluding responsibility shall violate the legal rules indicating that one should enjoy his right to choose freely. That is because one's will is pressed by compulsion in case of obedience.

2. This violates ethical principles. That is because the doer does not actually enjoy his/her full free will to refuse performing the act.

- a. The person was under a legal obligation to obey orders of the Government or the superior in question;

- b. The person did not know that the order was unlawful. However, in case he knew that it is unlawful, he shall be held liable for his offense. That is because in such a case, the mens rea is present.

- c. The order was not manifestly unlawful. Under the latter statute, orders to commit genocide or crimes against humanity are manifestly unlawful. As for the war crime, the court shall decide whether it is manifestly unlawful or not at its own discretion)<sup>(55)</sup>.

Thus, the soldiers who committed genocides at Bosnia and Herzegovina, Kosovo and Rwandan obedience of their superior's orders cannot claim for exclusion of their criminal responsibility arguing that the unlawfulness is not manifested because these crimes are manifestly unlawful <sup>(56)</sup>.

In addition, a soldier may rape and kill a young girl or old women and deform her dead body in obedience of his superior's orders. In such a case, he cannot appeal for exclusion from criminal responsibility arguing that the unlawfulness is not manifested because his offense is manifestly unlawful and considered as an international offense<sup>(57)</sup>.

#### **Section Four: Self-defense:**

Self-defense<sup>(58)</sup> is a right given for every one under the law in order to protect human's survival. It is required to recognize this right under the law to protect people's rights including their right to life. One is entitled to use his right in self-defense only to protect one's self from a violent crime that requires using the necessary means to protect one's self <sup>(59)</sup>.

Under the general rules of the criminal law<sup>(60)</sup>, self-defense is considered as a reason for deeming the act permissible. A self-defense act also negates the illegitimate nature of such an act. In the case of self-defense, the damage caused to the one initiating the attack is considered legitimate and does not violate the provisions of the criminal law that seek protecting people. In the self-defense case, these provisions shall not be in effect because the defender has priority over the attacker to protect his/her rights. Thus, the law authorized the defender to strike back at the attacker through using the necessary means that shall cause harm to the attacker. In other words, the self-defense act is considered permissible be-

cause it is carried out to avoid a social harm.

The Egyptian legislator set rules that govern the use of self-defense right through article 246 that states the following: (The right of lawful self-defense allows a person, in other than the exceptional cases defined hereinafter, to use the power necessary to obviate any act considered as a crime on one's life prescribed as prescribed in this law. The lawful right of defending one's property and funds allows using the power necessary to fend off any act considered as a crime of those prescribed in parts (2), (8), (13), and (14) of this book and in clause 4 of Article 279).

The Jordanian legislator considers the self-defense act a legal right. For instance, article 60/1 of the Jordanian criminal law states the following: (Execution of one's right is considered as any act deemed necessary due to an imminent need to prevent an illegal and unprovoked offence against his / her person or property or the property or person of others)(61). Based on those two articles, the law required meeting the following conditions to legitimize the self-defense act: (i.e. regarding the defense and attack acts):

1. Regarding the attack act, it must encompass a present imminent threat of using force in an unlawful manner. In other words, this act must involve a threat of violating any of the rights protected by the law, provided that it is imminent. Therefore, the defense act is deemed as unlawful in case it was carried out against someone exercising his/her right or carrying out his duty. To be specific, the defense act is lawful in case it was carried out against someone misusing his/her right of self-defense or crossed the limits in using it.
2. Regarding the defense act, it must be necessary. This means that there is no way to obviate the act considered as a threat except by striking back through using force. In case there is another way to obviate the act considered a threat, the defense act shall not be deemed a lawful self-defense act.

The defense act must be proportionate to the threat posed by the attacker. Thus, the defender shall be held liable for his/her defense acts that exceed what is considered proportionate<sup>(62)</sup>.

Similar to the national law, the international law recognizes the self-defense right<sup>(63)</sup>. The international law granted the members of the international community the self-defense right to be used when necessary. Such a right is represented in using force to fend off an armed aggression, provided that it is necessary to use force in such a case. It must be proportionate to the threat being posed. The use of force for defense in such a case must cease when the UN Security Council takes the required procedures to maintain security and peace in the international community<sup>(64)</sup>.

Article 51 of the UN charter has set conditions for carrying out the self-defense acts that are represented in the following<sup>(65)</sup>:

**First: The conditions that must be met in the attack act:**

- a. The unlawful armed aggression must have occurred already. The UN Security Council dealt with the definition of armed aggression in details. For instance, it states that such an aggression includes the preventive measures taken against a state which encompasses the use of force. The Security Council applied that through approving the report submitted by the Atomic Energy Commission. A criminal intent must be present in the unlawful armed attack. Act of aggression may include the actual use of armed force against a state or training armed gangs in the aim of stirring up sedition. It also applies to the act of overthrowing the government and carrying out crimes against humanity on any of the groups of a state and etc. All these acts are considered acts of aggression that entitle the attacked state to carry out the defense act<sup>(66)</sup>.
- b. The act of aggression must be direct and have actually occurred, rather than being immi-

ment. To be specific, the attack must have been already launched by the attacking forces against the attacked state or part of the attacked state in a direct manner<sup>(67)</sup>.

The latter condition was set. However, some jurists permit the defense act even if the aggression act did not actually occur. They base their opinion on the lawful preventive self-defense rule. This rule entitles states to use armed force against its enemy state and demilitarize it as a preventive procedure. This applies even if the threat has not occurred yet. For instance, the United States claimed that its attacks on Afghanistan and Iraq is based on the latter rule (i.e. lawful preventive self-defense rule).

Adopting the lawful preventive self-defense rule shall lead to spreading chaos in the international community and increasing international conflicts. It shall represent a threat to the international peace and security. That is because each state shall entitle itself to initiate an attack with claiming that it is a preventive self-defense act. It shall entitle each state to decide the military procedure that is considered proportionate to the threat that shall be faced in the future<sup>(68)</sup>.

c. Under article 51 of the UN charter, the armed aggression must be launched against a member of the United Nations member states to have the right to strike back. However, there is a dispute among jurists about the fact whether the non-member state should enjoy this right or not. For instance, some jurists believe the non-member states must not enjoy this right due to the existence of a legal text that restrict this right to the UN member states only. Other jurists believe that this right must be granted to non-member states in pursuant to the International Law<sup>(69)</sup>. The researchers of the present study believe that the self-defense right is a legal right that all member and non-member states must enjoy to protect their sovereignty. The researchers also believe that this right cannot be restricted to certain states while excluding others.

d. The aggression must encompass a breach

of any right of the state's substantive rights. The United Nations General Assembly issued a decision on 14/12/1974. Through this decision, it states that such rights include the sovereignty, territorial integrity or political independence rights<sup>(70)</sup>.

**Second: The conditions that must be met in the defense acts:**

\*The necessity condition: The defense act must be necessary to fend off the aggression. This requires the following:

1. The defense act must be the only method for fending off the aggression act. In case there was another method to fend off the aggression without using force and the state did not use it, the defense act shall not be considered legitimate. This shall entitle the country initiating the aggression to exercise its self-defense right<sup>(71)</sup>.
2. The defense act must be launched against the source of aggression (i.e. against the state initiating the aggression act). Thus, the defense cannot be launched against any of the allied states of the latter state nor the neutral states since violating the rights of the neutral states is considered as an unjustifiable international offense<sup>(72)</sup>. For instance, the treaty of 1839 confirmed that Belgium is a neutral territory. However, France violated Belgium's neutrality. In addition, the treaty of 1867 confirmed that Luxembourg is a neutral territory. However, Luxembourg's neutrality was violated. These acts are unjustifiable and are not considered as legitimate self-defense acts<sup>(73)</sup>.
3. The state that launched the defense act must cease when the Security Council has taken measures necessary to maintain international peace and security

\*The proportionality condition: The de-

fense act must be proportionate to the threat being posed. In case the state exaggerated in exercising its self-defense right, its acts shall be considered as an act of aggression.

The proportionality requirements mentioned in the international law do not differ much from the ones mentioned in the national law. Under both laws, the defense act must involve the same degree of force that was used in the act of aggression<sup>(74)</sup>.

There is a debate over the degree of force that should be used to fend off the aggression act. In case it was proved that the attacked state used a degree of force that is equivalent to the force used in the aggression or used a lower degree of force, the proportionality condition shall be met. Otherwise, the proportionality condition is not met. In other words, meeting this condition requires achieving equivalence between the force used in the defense act and the force used in the aggression act. For instance, if a limited war is initiated against a state, the attacked state is not entitled to initiate a total war.

An aggression may be launched through using conventional weapons. In such a case, there is a debate over whether the attacked state has the right to fend off the attack through using nuclear weapons or not. In this case, most jurists do not believe that the attacked state has the right to use nuclear weapons<sup>(75)</sup>.

One of the legitimate types of self-defense is called collective self-defense. For instance, if there is a regional agreement or alienation, the allied states are entitled to help each other to fend off an armed aggression act. The collective self-defense shall be considered legitimate only if there is an international agreement issued by a regional alienation and give the allied states the right to defend each other from any act of aggression<sup>(76)</sup>. However, this agreement must be signed prior to the occurrence of the armed aggression act. Examples of this may include the League of Arab States, North Atlantic Treaty Organization, Warsaw Pact, and Western European Union<sup>(77)</sup>.

Based on the aforementioned, it is concluded that a state has the right to defend itself separately or jointly with its allies. A state is entitled to do that to protect its rights or the rights of its allies. However, the question arising here is the following: (Do individuals have the right to defend themselves?).

To answer this questions, it should be noted that the international legal personality of the individual has been recognized. It has been recognized in response to the international official and non-official efforts that have been exerted. It has been also recognized in response to the developments that the international community has witnessed, especially after the Nuremberg trials were held. Due to such developments and efforts, an individual is given international rights and is held liable on the international level. In other words, an individual has become treated in a way that is similar to the way of treating countries.

Recognizing the international legal personality of an individual requires recognizing the individual's self-defense right on the international level. Based on the principle of the individual criminal responsibility, individuals are held liable for their non-compliance with the rules of the international law. Under this principle, individuals must also obey the orders specified in the latter law. They are also held liable for committing any of the acts prohibited under the latter law. Therefore, the rules of permissibility stipulated in the latter law are also enforced on them. That is because the rules of prohibition cannot be enforced unless the rules of permissibility are enforced too. Due to granting individuals such rights under the International Law, they must be granted the right to defend themselves against international offenses.

The International Law is considered as a part of the state's law. Therefore, individuals have the right to use their self-defense right against all the offenses that pose a threat on them. Individuals are also held liable for violating any rule of the International Law<sup>(78)</sup>.

The International Law entitles individuals to exercise their self-defense right during peace and

war. It grants them this right to protect themselves and their money and honor from inhumane act. For instance, it is difficult to resort to the concerned authorities during war. Therefore, individuals have the right to obviate any offense or any act considered a threat through using means that don't violate the rules of the international law rules. However, the attacked individuals should not cross the limits in using this right.

The legitimate self-defense act refers to the act of obviating any aggression or attack that may be imminent or occurring at the time. The legitimate self-defense act is taken by the defender only against an attacker. This applies whether the attacker is an individual or a state. In this context, obviating the aggression or attack must be carried out against armies rather than civilians. It should be noted that obviating the aggression or the attack through committing international offenses against innocent civilians shall not be considered as legitimate acts of self-defense.

Therefore, no country is entitled to strike cities full of innocent civilians or exterminate them with claiming that it is an act of self-defense<sup>(79)</sup>. In other words, striking places of civilians does not fall under legitimate act of self-defense. The same applies to killing, torturing, and exterminating innocent civilians. This applies even if such acts are committed to avenge. To be more specific, all these acts are prohibited.

The same is adopted by article (31) of the Statute of the Permanent International Criminal Court. This article states the following: (In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:...c). The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact

that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph)<sup>(80)</sup>.

## Conclusion

After shedding a light on the problem of the present study, the researchers concluded several results and suggested several recommendations. As for the results, they are presented below:

## Results

1. The Rome Statute of the International Criminal Court does not limit the reasons of excluding the criminal responsibility to specific reasons. Therefore, the judge can rule in each case involving exclusion at his own discretion. In case, he found that the offender's will is negated, he must exclude the offender's responsibility. He is also entitled to base his ruling on the dominant opinions issued by jurists at their own discretion about criminal matters.
2. It is necessary to have an effective and permanent international system that protects people from any serious violation of their rights and freedoms during peace and war. Such a system is considered as a guarantee to ensure the protection of people's rights and freedoms because such a system shall ensure that punishments are enforced on the ones who violate people's rights and freedoms. However, the role of the national criminal laws and legislation in protecting people's rights and freedoms should not be underestimated.
3. Excluding the criminal responsibility of the recruited children is considered problematic. That is because recruiting the juveniles who are under 15 years old is considered one of the war crimes under the aforementioned statute. Thus, recruiting the juveniles

whose ages are above 15 and approving to recruit them are not considered as international offenses. For instance, if a state recruits combatants whose ages are above 15 years old and less than 18 years old, it shall not be considered as a crime that falls under the latter court's jurisdiction. However, during the recent period, most of the terrible crimes committed in armed conflicts are committed by such combatants.

4. The International Criminal Court does not exclude criminal responsibility due to a mistake of law as this shall apply in case the conduct is a crime that falls under the jurisdiction of the latter court. However, the mistake of law can be a ground for excluding criminal responsibility, in case it negates the mental element required by the concerned crime.
5. The Permanent International Criminal Court does not exclude criminal responsibility in case the offender commits his/her act in obedience of the order of his/her government or of a superior. This applies to civilians and military offenders. However, there are exceptions for this rule that are stated in article 33 of the Statute of the International Criminal Court. The latter article states the following.

(The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- a. The person is under a legal obligation to obey orders of the Government or the superior in question;
- b. The person does not know that the order was unlawful.
- c. The order is not manifestly unlawful.

Under the latter statute, orders to commit genocide or crimes against humanity are manifestly unlawful. As for the war crime, the court shall decide whether it is manifestly unlawful or not at its own discretion.

Thus, the soldiers who committed genocides in obedience of their superior's orders cannot claim for exclusion of their criminal responsibility arguing that the unlawfulness is not manifested. That is because these crimes are manifestly unlawful.

6. Obviating the threat of a continuing or serious harm is a right granted for all countries that apply whether they are member-states in the United Nations or not. It should be noted that no country is entitled to strike cities full of innocent civilians or exterminate them with claiming that it is a self-defense act. In other words, striking places of civilians does not fall under legitimate self-defense acts. The same applies to killing, torturing, and exterminating innocent civilians. This applies even if such acts are committed to avenge. To be more specific, all these acts are prohibited.
7. Adopting the lawful preventive self-defense rule shall lead to spreading chaos in the international community and to increasing international conflicts. It shall threaten the international peace and security since adopting such a rule shall entitle states to use force even if the aggression has not actually occurred yet. It shall entitle the state to decide by itself the military procedure that is considered proportionate to the future threat being faced
8. The international community has witnessed several developments in the field of international law. Due to such development, individuals have been granted an international legal personality. Thus, countries are not the only ones today who have an international

legal personality. Therefore, the International Law started to protect people rather than protecting countries only. The same applies to the International Criminal Law. There are several manifestations of the recognition individual's international legal personality. Such manifestations include holding one liable for the offenses and violations he may commit. The individual's responsibility for an international offense shall not be excluded due to his/her legal immunity as being a president, or a prime minister. This applies despite the fact that such an immunity shall not hold one liable under the national law. Such manifestations also include granting one the self-defense right during peace and war. He/she is granted this right to protect himself/herself, and his money and honor from any inhumane act.

9. The international law entitles individuals to exercise their self-defense right during peace and war. It grants them this right to protect themselves, and their money and honor from inhumane act. For instance, it is difficult to resort to the concerned authorities during war. Therefore, individuals have the right to obviate any offense or any act considered a threat in a way that does not violate the rules of the international law. However, the attacked individuals should not cross the limits in using this right.

## Recommendations

The researchers of the present study recommend the following

1. Making adjustments to the Rome Statute of the International Criminal Court. Such adjustments should involve the reasons for excluding the criminal responsibility. Through such adjustments, the legislator should limit such reasons to specific reasons that are identified clearly and comprehensively with separating them from the reasons of permissibility.

2. To have coherence between articles, the legal age specified in the statute must be changed to prosecute the juveniles whose ages are above 15 years old. In addition, the statute must enforce punishment on the ones who recruit the juveniles whose ages are above 15 years old and less than 18 years old. In addition, the enforced punishment on the juveniles whose ages are above 15 years old must be less harsh than the one enforced on adults. That should be done in pursuant to the juvenile laws that are recognized internationally.

3. Article 33 / paragraph 2 must be changed. That is because all the offenses that are within the jurisdiction of the Court and committed in obedience of superior must be considered as manifestly unlawful under the Katter statute. Adopting that shall ensure that all offenders are punished for their offenses because they won't claim that the lawfulness of their acts are not manifested.

4. The following rule: (ignorance of law does not negate the criminal responsibility) must be adopted by the international criminal law in a way that is more flexible than the national criminal law. This matter requires making decisions at the court's own discretion with showing more tolerance. That is because ignorance or mistake of law is a broad area when dealing with it. For instance, it is difficult to prove that the offender is ignorant of the criminal national law or misunderstood it. It is considered so because the law is written and published and any one can have access to it.

However, it is different when it comes to the international criminal law. For instance, the latter law is a vague customary law that keeps changing constantly. It is also difficult to access. In addition, most of the international offenses are carried out based on the superior's orders. Therefore, having the criminal intent by the actor shall be questionable.

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