The Kingdom of Norway
NDLH

The Right Of Living For All Humans

International Criminal Law and The Way TO Abolish The Death Penalty

Network Of International
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Contents

Introduction

Since the most important ancient civilization, human societies are established on the shores of the Mediterranean in Eastside and Westside. The first civilizations in the Middle East were (Babylonian and Egyptian (Pharaonic). However, they were the Roman, Anglo-Saxon and Greek civilizations, in the West. The Babylonian civilization has established an integrated judicial system to regulate life and the necessary laws to punish persons who commit any kind of crimes and according to the nature of the crime. In this period, penal system was cruel and severe, the criminal purpose was entered, and also death penalty is set according to the crimes in which there were distinction between the homicide (willful murders) and manslaughter (involuntary manslaughter), in addition to economic and social crimes such as; adultery, bandits, etc.

In the Era of Egyptian Empire and exclusively in the era of the kings of 25th family, death sanction was replaced by cutting noses and exiling to Eastern deserts.

The Era of Roman Empire went through three phases: royal era, republican era and empirical era. In fact, the roman governor is the judge, military commander and high priest, in other words he has an ultimate power. Criminals were sentenced to death in case they carried out crimes affecting the security of the State from the outside and inside, as well as crimes of aggression against Gods, and offenses against persons. Death penalty varies according to the crime committed and the victim does not have the right of making grievance, till the age of the republic in front of People's Assembly.

Still, in the age of the Anglo-Saxon empire, the Old English law was known by its cruelty, frivolity and foolhardiness and indifference in the application of the death penalty as it did not distinguish between children or adults, crimes of stealing for the sake of living, even marrying gypsies are sentenced to death and this shows that there is no proportionality between crime and severe punishment of death.

After the development of human societies and the emergence of three monotheistic religions in different time stages, as the Jewish religion is the first it referred to Babylonian Talmud and magic. Yet, the Jews adopt the Babylonian Talmud till today. Accordingly, criminals are sentenced to death for crimes of murders, adultery, disbelief in God (Atheism), murders attempt treacherously, hitting

parents and beaten to death crimes. There were four methods of death: stoning, burning, beheading/ guillotine or hanging. Hence, the offender must confess his guilt publically before the execution of the death sentence, and he would not be buried in the grave of his fathers.

However, the Christian religion which brings the bible to establish the Law of God in the earth as well as social justice, compassion, tolerance, freedom and equality. This religion actually built the idea of spirit immortality and emphasizing the dignity of each individual and how important he is. Besides, it interests in the liberalization of the individual more than the liberation of people or nations. And the transfiguration of Jesus Christ (Peace Be upon Him) on the mountain: The deprived in the ground will find shelter from God the Creator of all human beings biblical text. Whereas, what concerns women there have been many texts which gave her rights and defended her even that one who had been committing adultery. This is clarified in Jesus' statement "If any one of you is without sin, let him be the first to throw a stone at her" ^{John8}. This statement shows that the Christian religion prohibits murder as punishment against the humans. And, that if any has committed a crime it's only because of anger. Furthermore, even the penalty for adultery is stoning. In conclusion, original Christian is lacking a clear system for criminalization and punishment.

For the Islamic religion retaliation is the punishment and it does not mean the death penalty in particular. Penalties in Islamic Sharia in border crimes and retribution has proved its root, and has been shown properly in the Holy Quran and Sunnahs of Prophet Muhammad. There were distinction between the so-called border crimes (Hudud) and retaliation (Qisas) in the sense of "equality". Accordingly, within the justice system, the border crime penalties submit to Almighty Allah- made laws, and the law of retaliation (Qisas) is man-made laws but that refers to the religious legislations. There is a third type of punishment which is called discretionary punishment (Ta'zir) applied to offenses for which no punishment is specified in the Quran or the Hadith.

If the crime is covered under the laws of Qisas, the victim's guardians has the option to avenge their son if willing, if not they might ask for a 'fair' (Diyat) blood money or forgive in the name of Allah (forgiving diyat as well).

As mentioned in the Holy Quran:

O you who believe! Al-Qisas (the Law of Equality in punishment) is prescribed for you in case of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives, etc.) of the killed against blood money, then adhering to it with fairness and payment of the blood money, to the heir should be made in fairness. This is an alleviation and a mercy from your Lord. So after this whoever transgresses the limits (i.e. kills the killer after taking the blood money), he shall have a painful torment. $^{Al-Baqarah2:178}$. Mushin Khan

Also, as said the messenger of Allah (SAW): "If a person's relative is killed, he has the choice of two

things: He may either have the killer killed, or he may demand the blood money."

On the other hand, if the crime is covered under the laws of Hudud set by Allah in this case its implementation could not be stopped, or replaced by another, or lightened, or even pardoned. There are plenty evidences according to the Prophet Muhammad, peace be upon him: "It prevented his intercession without the limits of God, he is anti-God in his command,"

The divine laws; prescribed punishment (Hadd) and retaliation (Qisas) both aim at establishing and protecting the public interest where the welfare of the society is considered. Furthermore, the prescribed punishment (hadd) protects the general nature so the following crime falls under the jurisdiction of the fixed punishment i.e. it cannot be waived or counteracted in any way. While the essence of the principle of (Qisas) is blood matter that allows the victim's guardians to avenge his killing. Eventually, the legality of the death penalty is derived from the sources of Islamic law (Sharia).

The historical development of the war crimes in the International Criminal Court, after which emerged the trials of the era (League of Nations) in the period after the First World War, left behind huge human and material losses as there was a use of newly weapons that the world did not know at that time. Thus, the victorious Powers in the war had only the desire to take revenge on the pretext of achieving the concept of international justice against the perpetrators of war crimes.

After the First World War, in 1919, the allies were calling to convene peace conference in Paris. It resulted in articulating the compromise reached at the conference by signing an agreement with Germany which is the treaty of Versailles, as well as prosecuting the German Emperor Wilhelm II and the German major war criminals. Hence, it was the first attempt to apply the international criminal justice.

By 1923, the Leipzig court was established to try the German war criminals as part of the penalties for their crimes. Although the criticisms had been made to the treaty of Versailles and Leipzig court with the legal flaws, foibles and taints, there were many positive aspects on both of them that contributed in the establishment of new rules in international criminal law.

The United Nations courts in the period after the Second World War, and especially after the surrender of Germany on March 8, 1945, the allies (France, Britain, USA and the Soviet Union) who took over the control and "The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany."as mentioned in the declaration held on 5 June, 1945. Accordingly, this period had witnessed the establishment of international criminal courts such as; the International Military

Tribunal at Nuremberg in 1945 to try war criminals especially the Nazi leaders, and the International Military Tribunal for the Far East at Tokyo, in 1946, to try the Japanese criminals for their war crimes. Eventually, the courts play an important role in the development of international criminal justice.

Following the first attempts of the prosecutions and the war trials, the International Security Council formed temporary international tribunals - in the period of the cold war between socialists and capitalists- the first was held in Yugoslavia, in 1993, over the outbreak of the war between their territories for Bosnia and Herzegovina, on the one hand and the Serbs on the other, in order to prosecute and try the Serbs perpetrators of brutal crimes committed against the Muslims of Bosnia and Herzegovina of unarmed innocent citizens. Then, the second in Ruanda over the conflict between the Hutu and Tutsi tribes to war of genocide and massacres that frightened humanity over time.Consequently, these two tribunals had contributed to deter political leaders and develop the individual responsibility i.e. each perpetrator should assume his own responsibility of war crimes, as well as developing the concept of the confinement of international crime by the codification of the rules of international humanitarian law, and international criminal law. It had noticeable effect on the creation of international community to promote the general good to establish permanent international criminal jurisdiction.

Actually, the role of international criminal law and Islamic Sharia their standpoint culminated in the death penalty, it was different. As for the framework of international criminal law was the evolution of; war crimes, the concept of international crime and the legal responsibility to protect international community. In addition to the nature and elements of the international crimes which distinguish them from the national crimes and according to the persistent efforts made by the international community and the United Nations, permanent international jurisdiction has been established with the adoption of the Rome Statute of the International Criminal Court, on 17 July 1998, which sets its substantive competence and its personal and temporal validity and asses the responsibility only to natural persons -as defined in article 25 of the Rome Statute- and morally excludes persons under the age of eighteen -as defined in article 26- of the Rome Statute - and persons from international countries and organizations (governmental and non-governmental). In a matter of fact, the law applied by the Court (ICC) is the Rome statute, in addition to the Elements of Crimes and the Rules of Procedure and Evidence of the applicable treaties, the principles and rules of international law, and the general principles of law derived by the Court of the national laws of States, all with the previous decisions of the Court. Yet, the assignment of jurisdiction to the Court displays that the Court would exercise its jurisdiction according to the conditions for the referral to crime and mandate for consideration and the admissibility of the case. The reference points of the Court were defined as follows:

1. A referral by a State party to the Statute.

2. Assignment of the International Security Council on the basis of Chapter VII of the Charter of the United Nations.

3. 'The Prosecutor may initiate investigations on the basis of information on crimes within the jurisdiction of the Court' (article 15 of the Rome Statute).

To sum up, in the Islamic Sharia death penalty is prescribed according to the three types recognized by Islamic law; border crimes (Hudud), retaliation (Qisas) and discretionary punishment (ta'zir). These punishments were derived from the holy Quran and the noble prophetic Sunnah. Accordingly, the offenses that are punished with Hadd and Qisas penalties are mainly; apostasy (ridda), adultery (zina), banditry (highway robbery) and homicide, further, insurrection (baghy) is considered to be punished under ta'zir standards which do not reach the extent of death as it is considered a political crime in modern penalty standards.

By the time, executions were implemented differently; however, death penalty according to the criminal law adopts the coming after methods: hanging, guillotine execution, electric chair (ELECTROCUTION), firing squad, gas chamber and lethal injection. Many Arab and Western countries re-examine the law that legislate death penalty, some canceled the sentence and the revocation was either in part or in whole, while others took the text but no action is been taken pursuant to the decisions that intend to abolish the death penalty in order to take into account of the humanity which is been grabbed by this penalty and to provide respect to the human being which has honored by God Almighty.

In this research will deal with three main articles:

Article one: the legal regime during the Empire Era and the monotheistic religions and their perception of Death Penalty

Article two: Historical development of war crimes in international criminal justice

Article three: International Criminal Law and Islamic Sharia and their perception of death penalty

Article one :

The legal regime during the Empire Era and the monotheistic religions and their perception of Death Penalty

In this chapter we will deal and study the legal regulations, namely, the systems of sanctions which include death penalty, in the most important ancient civilizations which has been established near or on the shores of the Mediterranean among which some belongs to the East - which includes the first civilizations; Babylonian, ancient Mesopotamia and Pharaonic civilizations - , while the others to the West - which includes; Roman, Anglo-Saxon and the Athenian Greek civilizations. Then, we will deal with the divine laws (Jewish, Christian and Islamic) whereby we recognize the law inspired by God Almighty and that human beings could nothing but formulate and prescribe God?s revelation. In other words, we will acquaint ourselves with the viewpoint of the religious laws and provisions about death penalty as well as the devastation on human lives.

In this article we will deal with two issues:

Topic 1: the legal regime during the empire era

Topic 2: The evolution of human societies and the emergence of divine religions and its perception of Death Penalty

Topic 1: the legal regime during the empire era

The study of ancient legal and social systems as well as its philosophy helps researchers and legal experts to possess legal information that help reaching development and progress, through their knowledge of and familiarity with the past history. Thus, what was related to links and relations between people, rights and duties, which have the effect of the Authority which is organized and implemented according to the realities of the past history and singled out by History of Law[1] gradually until the prevailing laws and its future, which is now called Science of Legislation [2].

Therefore, the research in the history and the philosophy of law, or in the history of the legal and social systems do not stop on monitoring and proving the developments and changes in this or that society, or even the conditions experienced by peoples in different stages, but it (this matter) goes beyond that, the matter is affected by the need to know the depth and its data dimensions which led to it, based on the rule of law which is the reflective mirror of the overall social conditions existing still the harmony with it if not was not, there is no need for it[3].

As a matter of fact, the system of justice is an essential part of the legal systems of societies as it plays a key role in maintaining the community and deters criminals and so making societies enjoy security, stability and tranquility, equality and social justice. At the same time, it reflects the State sovereignty and hegemony.

In this issue, we will deal with three themes, as follows:

Theme 1: Death penalty during the Era of the Eastern Empire

Theme 2: Death penalty during the Egyptian (Pharaonic) Empire

Theme 3: Death penalty in the Roman Empire and in Anglo-Saxon era

[1] Dr. Walid El-Nunu, Social and legal systems, Sana'a, 2010, 2nd edition, legal center of lawyers, p7.

[2] Omar Mamduh, The Origin of Law History, Alexandria, 1963, p7.

[3] Dr. Sufi Abu Taleb, History of Legal Procedures and Social Systems, Cairo, 1972, p 8.

Theme 1: Death penalty during the Era of the Middle East Empire

The old empires which are affiliated to the Middle East represent the ancient civilizations, whereby Babylonian - Mesopotamia - occupies the first place, because it is a gathering of more than one Empire. They are the Sumer, Akkadian, Babylon, Assyria and Neo-Babylonian Empire. Actually, they were called Babylonian Empires, because they are all carried out on the land of Babylon. Though, the features and advantages of these empires differ from each other with there are lot of similarities amongst them.

The Empire of Sumer was the first of empires in Babylon, because the Sumerians were the first who settled down in the south of Babylon - Mesopotamian area - and established the most important cities, namely; Uruk and Larsa. The Sumer prevailing system cares about civilization, hence, on this basis; they made commercial relations, and some legal definitions of brokerage and banking, also the measures related to writing contracts. As a consequence, the legal procedures/systems emerged[4].

Coming after, the Akkadian Empire, they are people who came from Syria conquered and settled down in the Southern region of Mesopotamia. Due to Sargon the Akkad who had subdued and vanquished the neighboring areas, a new advanced civilization has been built and established under the rein of/ led by the queen Atumikal.

Then came the Babylonian Empire to serve as nucleus for a royal regime in the era of the king Hammurabi who achieved wide military victories as well as legal and social prosperity flourishing throughout the period of his rule. However, after his death (Hammurabi) the empire collapsed, and the Babylonian capital was taken under control by group of people coming from central Asia called the Hittites who were renowned by their legal systems and prosperous civilization. And then, after the Hittites, the Kassites gained control over Babylon and reigned over about four centuries.

Next, emerges the Assyrian empire which ruled the region and laid to an essential significant groundwork for the development of subsequent culture as well as for the legal procedures thanks to its kings; among which Ashurbanipal is considered the most important king. He established the empire of Assyria in the north of Mesopotamia whereby the capital was Nineveh. After his death, the Assyro-Chaldeans who came from Syria, conquered the region and established their state on the land between rivers - known also as "Mesopotamia"/ (Beth Nahrain), west Asia and Palestine. Actually, they had not reigned for long until the overwhelming conquest of the Persian people to the Mesopotamian region until Islam came and release the country of Persian occupation.

In all these Babylonian Empires that draw its civilization, the system of justice was carried out by the priests. In that time the king and the lords engaged in the decision of the priests, but in the period

[4]Dr. Sufi Abu Taleb, History of Legal Procedures and Social Systems, Cairo, 1986, p 8.

ruled by Hammurabi the judiciary evenly distributed between dignitaries and priests. In other words, the king Hammurabi was the justice guard and he himself authorized their judgments; that is why there were the Plenipotentiary judiciary and the pending judiciary i.e. it is for the king to adjudicate and decide on [5].

Furthermore, the Babylonian sanction system was an essential part of the system of justice and passed different stages starting in force coming to religious pattern and the documents show the rigors of penal systems, in particular the code of Hammurabi in which he distinguished between crimes against persons and that against properties, and so, enact the appropriate sanctions for each crime. Well, the code of Hammurabi has developed in the point that the criminal purpose set to be considered in crimes. And so, the law distinguishes between murder and manslaughter, between wounding or shooting, and others. Also, the law makes distinction between freemen and slaves.

Almost the death penalty is the applicable penalty when there are economic or social crimes such as; adultery, or crimes that affect the social or economic stability [6].

Hence, this sanction is applied to the brigand and the defrauder (who gives less in measure and weight) and also that who manipulates the prices [7].

Though the code of Hammurabi did not make any distinction between the civil and criminal liability, as it is the actual situation, he interested in dealing with and handling the negligence leading to death or damages, for instance; the responsibility of the doctor and that of the construction worker.

[5] Dr. Walid El-Nunu, the above mentioned reference, p 29.

[6] Code of Hammurabi, sections (196 - 200).

[7] Code of Hammurabi, section (108).

Theme 2: Death penalty during the Egyptian (Pharaonic) Empire

The history of ancient Egypt has been associated with pharaohs, and it is considered one of the oldest civilizations like Mesopotamian, Roman, Indian and Chinese.

The history of the Pharaohs dates back to about 22 centuries BC in Egypt which has been ruled then by the Assyrians (671- 663 BC), until the conquest of the Persian Empire about 525 BC, coming to the last dynasty of the ancient Egypt known as Ptolemaic (Greek) period from 332 BC to 30 BC, ending up with the Islamic conquest in 640 by Amr Ibn Al-Aas [8].

At that time, Egypt had passed by three Pharaohs epochs. They are, firstly, the ancient Egypt which began in 3000 BC and lasted for nearly the eight century - which coincides with the end of the reign of the tenth dynasty - existed in Memphis, the first Nome of Lower Egypt and sanctified Ra (God of the Sun)[9]. Secondly, the Middle Kingdom of Egypt was stretching from the establishment of the eleventh Dynasty about 2100 BC to the end of seventeenth Dynasty. The Pharaohs period ends with the New Kingdom of Egypt starting with the reign of the eighteenth Dynasty along which the empire has been rich especially in the period ruled by "the great" Ramses II.

During the period pharaohs, the governmental authority were unjust and oppressive, the pharaoh was exercising his power tyrannically as he considered himself living God who ruled with absolute power, thereupon codifications were almost non-existent, especially in the old kingdom era unlike the Babylonians who legal legislations from antiquity. Yet, in the reign of the eleventh Dynasty, pharaohs started to pay attention to records; accordingly they left records of enacting legislations and codifications in order to realize legislative reform. Even if we have checked penal code system over the Pharaohs period then we believe that the idea of the special Revenge [10] was the prevailing penalty amongst the ancient Egyptians.

Historically, it is proved that death penalty was applied since the era of the old kingdom. Therefore, that there were attempts to cancel the latter penalty in the New Kingdom era [11], and that the crimes that were sentenced by death in Ancient Egypt are divided into three categories:

[8] According to Dr. Walid El-Nunu, Abdel Majid Hefnawi, History of Legal Procedures and Social Systems, p 96 - 97

[9] Dr. Sufi Abu Taleb, History of Law Principles, Cairo, 1965, p 441 ? 443.

[10] Refer to the old Egyptian legend, which tells of a dispute between the God Osiris and his brother Set on Egypt's rule which ended with Osiris? murder by his brother Set and Horus? revenge to his father?s death. The legend shows significantly the idea of revenge and retaliation. Review: Leonardo Cote rail, (life in the era of the pharaohs), translated into Shafiq Asaad, cultural books series, July 1960, p 14.

[11] Omar Mamduh, The Origin of Law History, the previous source, p 138

- Section 1: Offenses against the security of the State.
- Section 2: Crimes of aggression against God.
- Section 3: Crimes of aggression against persons.

Section 1 : Offenses against the security of the State

The point of offenses against the state security is, the king in the ancient Egyptian system is the supreme ruler of the country and he founder of the State. And so, the concept of the state is been mingled with the image of the king, this means that the security of the State is the security of the Pharaoh. Still, the state and the nation both were considered to be the pharaoh's property/ belongings. As consequence, death penalty[12] was the punishment for rebellion against the pharaoh.

In general, it is noticeable that the idea of the divinity of the king is linked to the ancient Egyptian dogma. As a matter of fact, the king i.e. the pharaoh was tantamount to God's sovereignty over any disturbance or natural disequilibrium; also, he can curse the people. Consequently, this idea was representing a number of constraints and restrictions that would make the ruler exercise his power away from his ego. For instance, in many cases he resorted to judges appointed by him to take decisions without referring to him and he was committed to strict neutrality towards the provisions of the courts. The divine ruler made the judges sworn and put them upon oath that they do not obey his orders in case they do not stand with the laws of the state.

[12] Dr. Muhammed Abd-Ellatif Abd-Elâl, Death penalty: Comparative study in positive law and Sharia law, Dar El Nahda El-Ârabia, Cairo, 1989, p 14.

Section 2 : Crimes of aggression against God

As for the crimes of aggression against Gods, death penalty was generally decided to old civilizations. For them, the objective of the execution works mainly on the safety and security of society, where the prevailing belief of the ancient Egyptians is that the constancy of nature security and its manifestations is conditional on God's consent or on the Gods who take the reins of nature. Hence, the reason behind death penalty, for those who have committed an offense against Gods, was to gratify and please Gods in order not to make the nature revolt against all of them.
Among the religious crimes which were sentenced by death in ancient Egypt we mention the following:

1. Killing any of the Holy animals or birds intentionally or by error may have led to the dismay and despond of the audience/ public and so the immediate killing of the offender without awaiting trial[13].

2. Breaking an oath or lying about the avowal related to means of his life, because this crime is considered as an offense against God being sworn by, and a breach with due respect for the faith and religion[14].

3. Infringing on the graves and stealing its contents, if the offender went beyond the pale to touch the mummy, in this case, he was executed by impalement. In fact, this cruelty was due to the offender's breach of resurrection and afterlife doctrine and the mummy's need for the buried objects[15].

4. Doctor's involuntary manslaughter while exercising his profession, as there were therapeutic recipes for different diseases attributed to Amun (the king of Gods), and all of this must be taken into account when treating patients and must not be violated because the patient's death would be the doctor's responsibility [16].

5. Magic and sorcery crimes if it caused any further harm to anyone of the individuals.

[13]Dr. Mahmmed El Sakka, (Philosophy and history of Legal Procedures and Social Systems), Modern library Cairo, Cairo, p 356.
[14]Abdel Rahim Sedki, (Criminal law in ancient Egypt), General Egyptian Book Organization, Cairo, p 38.
[15]Pahor Labib, (Glimpses of?ancient Egyptian?studies), an article published in the magazine Law and Economics, first Edition, July 1942.
[16]Dr. Muhammed Abd-Ellatif Abd-Elâl, the pervious reference, p 16.

Section 3 : Crimes of aggression against persons

In crimes of aggression against the people, death penalty is the punishment for intentional murder, without any distinction between free and slave perhaps the meaning of this equality is due to the fact of considering people equal before the justice of the Gods, all of whom would be judged for their deeds in the Hereafter without distinction.

As long as people were judged to their intentions not deeds, it was accepted to execute every person watching another person to be murdered and hide even though he is able to act and protect him. Also, the false witness whose testimony lead to the execution of an innocent person[17].

Yet, for the crime of adultery, the views differed on the punishment related to it [18].

The scientists deduced that women who had committed adultery in ancient Egypt were burned alive. At later stage, and after the development of the Criminal Code, death penalty has been replaced by the amputation of nose [19]. In fact, the commutation of sentence of death to mutilating the nose was due to the moral turpitude at the end of the Pharaonic era [20].

Abolition of Death Penalty, and bring it back:

Some have gone so far, that during the twenty fifth dynasty, the king/ Pharaoh had made a decree which punished all the guilty and the accused people in the kingdom with deportation and amputation of the nose, and then exiled them to Eastern Desert, where their own city had been established, thus death penalty was replaced with this just punishment.

Indeed, he frankly abolished the death penalty and substituted it for the penalty of hard labor, and then taking the convicted persons putting fetters to work in public works [21].

Consequently, in this way, many important projects and a lot of arches had been established and constructed. But, after the king's death, the penalty of death had been reiterated and lasted until the end the pharaohs' era.

The implementation of the death penalty:

Ancient Egypt knew several ways to implement the death penalty, depending on the type of crime punishable by death depending also on the social prestige of the person. The diversity was not related only to Egypt, but also to ancient civilization then.

[17] Abdel Rahim Sedki, Criminal law in ancient Egypt, General Egyptian Book Organization, Cairo, p 37 ? 38.

[18] Abdel Rahim Sedki, Criminal law in ancient Egypt, General Egyptian Book Organization, Cairo, p 44 - 50.

[19] Rauf Obeid, Search in criminal justice at the Pharaohs era, An article published National Criminal magazine, Cario, 1st bookbinder, 3rd Edition, November 1958.

[20] Abdel Rahim Sedki, Criminal law in ancient Egypt, General Egyptian Book Organization, Cairo, p 51.

[21] Mahmmed Essaka, Features of the history of the Pharaonic Egyptian law, the previous reference, p 115.

1. Amputating the offender's fingers and then burned him alive, this was the penalty of killing his father or mother [22].

2. Giving choice to the sentenced person to decide in which way to be killed this is pertained to noble if sentenced to death [23].

3. Hanging or decapitating this penalties are related to offenses against religion like witchcraft, violation of holies and offenses against the security of the pharaoh as well as homicide.

4. Burning is the punishment for adulterous woman which was replaced then by nose amputation.

5. Crucifying was taken from the Persians trial and it was the punishment of the traitors and rebels, even if the offender dies before the execution of the judgment [24].

6. Burning (in the ash room) was taken from the Asian Countries which were under the Egyptian control. The punishment is to put the sentenced person in the ash room without food and then pour in him flaming ashes from above for several days until he dies [25].

7. Impalement, as a method of execution was used for grave robbery crimes especially when the perpetrator touched the mummy. In this case, four strong men were holding the offender: two men by his arms and two others by his feet as there were also two men responsible to penetrate the stake into his anus, after putting the stake in a hole in the ground that was prepared for this purpose [26].

According to studies, ancient Egyptians brought to the convicted person a drugged drink so that he does not feel the pain before the execution. These mitigating procedures were associated with the notion of justice in order to remain linked to Mercy [27]. In addition, this very notion required to postpone the execution of pregnant until she gives birth because the unborn child is not guilty to her crime as well as the fact of depriving the father of his son who belongs to it, which goes against justice [28].

[22] Dr. Mahmud Essaka, Features of the history of the Pharaonic Egyptian law, the previous reference, p 507.

[23] Dr. Muhammed Abd-Ellatif Abd-Elâl, Death penalty, the pervious reference, p 20.

[24] It is noted that the crucifixion in ancient Egypt was mentioned in many verses in the Qur'an in the words of Moses? Pharaoh as well as in the words of Prophet Yusuf (Joseph) (peace be upon him), in the holy Quran: **"O my two companions of the prison! As to one of you, he will pour out the wine for his lord to drink: as for the other, he will hang from the cross, and the birds will eat from off his head. (so) hath been decreed that matter whereof ye twain do enquire"**. Surat Yusuf: Verse 41.

[25] Abdel Rahim Sedki, Criminal law in ancient Egypt, the previous reference, p 39.

[26] Alan Shorter, Daily life in ancient Egypt, translated by Dr. Mikhail Ibrahim, (Thousand book series), Anglo-Egyptian bookshop, Cairo, 1956, p 214.

[27] Mahmmed Essaka, Features of the history of the Pharaonic Egyptian law, the previous reference, p 510.

[28] Abdel Rahim Sedki, Criminal law in ancient Egypt, the previous reference, p 39.

Theme 3: Death penalty in the Roman Empire and in Sharia

Documents confirm that the legal knowledge began in Rome since the sixth century (BC). Accordingly, jurists divided the Romanian Empire into three stages, as follows:

- Section I - Royal Era
- Section II - Republican Era
- Section III - Imperial era

Section I - Royal Era

Royal era is considered as the most important era since the foundation of the city of Rome after that several different minorities were united which make big differences between jurists and scholars to determine the origin of the Roman people. Actually, perhaps the most important is the (India European) army who came from Asia Minor, and set their systems as well as their civilization with them. Romanian mythology asserts that the founder of the city of Rome is king (Romulus) [29] after him five verdicts ruled the Empire and the last one was the King (Tarkan), after whom the Republic was established.

Royal era rulers were privileged with the absolute power which was known as Imperium. In fact, the imperator is the judge, the military commander and the greatest priest all in the same time. Consequently, some have expressed this power by saying (the Roman governor was acting as he wants and when he wants)[30]. Yet, this made it difficult to differentiate what exactly his authority would it be ruling as a legislator or a judge or an outlet.

All along the royal era, the ruler was acting by virtue of his absolute sovereignty or through his commissioners without appeal, as under the custom and conditions governing the criminal justice instead of laws and procedures[31]. In addition, along with this peculiar authority granted to the royal era rulers, the patriarch, also, had an absolute power over his followers and subordinates. However, this situation changed only after the emergence of the Republic Era.

The following are crimes sentenced by death in the royal era:

[29] Dr. Walid El-Nunu, Date of legal and social systems, the above mentioned reference, p110 - 119.

[30] Dr. Muhammed Abd-Ellatif Abd-Elâl, Death penalty, the pervious source, p 33.

[31] J-Ortolan , The History of Roman Law, Paris : Plon library, E.Plon , Nourriicie , Printers Edlieurs , 2 ed 1884 , Tome, i. , p 223.

1 - The crimes that damage the Group (Perduellio):

They are the crimes referred to as political crimes or offenses against the security of the State from outside or inside. In other words, it referred to the capital offense of high treason by conspiring with its enemies [32]. Under the terms of the Roman law, as those convicted of perduellio were considered enemies for the Roman State, they were subject to death. Firstly, the offender was flogged, and then he was guillotined as well as the demolition of his home and the deprivation of his family from mourning him or carrying his name.

As Romans relied on this stricter punishment related to the treasonable act of "abandonment of duty", this continued to have effect on the Crimes against the state by emerging the concept of national sovereignty until the last era of the Romanian state.

2 - Offenses against gods:

The Roman governor in his capacity as High Priest ordered the death penalty for any person who commits an offense against gods, and this remained at the royal era until the transfer of state legislation in the Republican era over religious matters to the clergy. Some of these crimes: perjury that lead to serious harm to the defendant, aggression and apostasy of any of the priestesses of the god Vesta (goddess of the hearth), as she has to maintain the purity and chastity which was made as a vow to the Lord and the punishment for this crime is to burry alive the sinner as well as beating her partner in debauchery with stick to death, also killing an ox or any other animal dedicated to fields goddess deem necessary punishing by death the murderer[33].

3 - Offenses against people:

Romanian state has subjected the murder to public punishment early, because it was found that if abandoning it, private revenge will emerge which threatens security and public order.

Death penalty was sentenced for the murder of first-degree family, or the murder of any citizen. The offender of first the crime was placed in a leather bag and thrown into the water.

Section II - Republican Era

The Republican era was founded, in 27 BC, after the regime change due to the tyranny of the monarchy .In this era, Rome widened to the extent that it has been able to include Italy and then to expand over the Mediterranean by conquering Sardinia, Sicily and also over Africa. In its invasion Rome had faced many long wars and the most recognizable ones were its wars against Carthage.

[32] Dr. Ramses Behnam, The general theory of criminal law, Knowledge facility in Alexandria, 1968, p 34.

[33] Joseph Viaud, The death penalty in political matters, Paris , 1902, p 100.

Actually, in this era, death penalty has witnessed evolution where the twelve tables Act was issued in (449 BC), including the text on the citizen's right to appeal for grievance against the ruling before the (People's Assembly). If a death sentence issued against him, again this right is ascertained in Valeria Law in (200 BC), until the Romans established, in the late of the Republican era, the permanent judicial committees whose judges were chosen by the (people's Assembly), what make them be the people's voice and representatives. The judicial authority has been moved to these committees to conduct investigations and sentencing.

Resorting to the work of death penalty diminished, in this era, and it was linked to its political conditions experienced by the country. In fact, in the times of stability, the laws of the republic allow citizens to avoid the death penalty[34], either through binding the convict or his family to pay a large sum of money to the state or through binding them to leave the country, as every citizen accused with a serious punishment has the right to provisional release. There was a tacit acknowledgment by the State of the citizens' right to get rid of the death penalty that awaits him and to exile himself out of the country. Aside from the laws in Russia, in 194 BC, was providing and dictating some of the safeguards and guarantees relating to arresting the convicts to be sentenced to death.

According to some historians of the Republic era, there was no case of implementing death penalty in the period between (384 BC and 132 BC). With the beginning of the Republic era, the establishment of democratic systems, and the fact that the pomegranate - in general, get rid of the impact of religious ideas on crimes and penalties there was no distinct forms to execute the death penalty, but we have noticed providing guarantees for the safety of the death penalty [35].

Some argue that these laws were only applicable in the right of the upper class, while the massive classes of ordinary people, slaves, and foreigners who were under the Romanian control were all deprived of these guarantees, and even the Romanian state has worked to confirm its security and its greatness at the expense of their freedom and their lives.

Section III - Imperial era

Imperial Age is divided into two periods. The first era of the Supreme Empire, which began (27 BC), and the mandate of the emperor (Augustus) and ended with Emperor (Diokulaian) (284 AC). The second period is of the Lower Empire which ended with the death of Emperor (Justinian) (565 AC) who is the owner of the famous code and legal set in Rome. In the era of the Lower Empire, Rome deteriorated in various fields and spread chaos and instability which led to its division into two parts:

[34]Dr. Mohamed Abdelaal, death penalty, the previous source, p. 36.

[35]The laws of Prussia (porcia) year 149 BC, the death sentence must be issued after the scrutiny of the facts of the indictment, and should be implemented without being accompanied by torture of the convicted.

The eastern, its capital is Byzantium and the western one, its capital is Rome.

In regards to what characterizes death penalty in the imperial era as the voice of the Roman people is expressed through the Emperor not through its democratic institutions. This has resulted in a death penalty acts in urgent crimes (greatness of the Empire) and this was so vast that it included just the verbal assault against the emperor, insulting its statues, or neglecting the expected mutual respect.

Then, appeared another crime (converting to Christianity) which leads the Roman emperors to use all the means that might come to someone's mind to eradicate Christians as there was no way in front of those emperors who have inherited the greatness of the Roman people and its representatives but to beat with an iron fist to face the risk of new ideas brought by Christianity for mankind.

Still, the immoderation existed for death penalty has remained even after the entry of Christianity to the Romanian Empire. This change did not succeed in pushing the rigid system toward moderation in the work of the death penalty, but lead to the execution of new crimes such as adultery, homosexuality, and counterfeit currency.

The implementation of death penalty, in Rome, reflects, in general, the Roman society situation as well its development from age to age, whereas there was strict religious morality during the royal era, which entailed the implementation of this penalty on a degree of cruelty, and it has been associated with certain religious rites, as noted previously [36].

As the democratic regimes were inherited in the imperial era, the emperor became the god idol. Rome knew harsh means to carry out death sentence which was used depending on the social status of the offender. Therefore, there were so many different penalties of death such as; crucifixion, burning, being thrown off to predators, and being dropped above the Trepeian Rock, in addition to the means mentioned previously [37].

We will address the Anglo-Saxon law [38] to know somewhat its legal system and its view of the death penalty, as its beginnings goes back to the period of time when the British Isles were invaded in the ancient history by some Indian tribes of Germanic origin, which is, indeed, the Celtic tribes and these tribes migrated to different parts of Europe. But these tribes have become extinct with Norman control of Europe [39] in the while they maintained their language and variety, in the British Isles and Ireland.

[36] Dr. Mohamed Abd Elatif, death penalty, the previous source, p. 39.

[37] Maceel Normand , la peine De Mort ,paris , 1980 , p, 14.

[38] Name of tribes entered Britain, the islands, and their name is derived from its name (Anglo - Saxons) and which is united under the name of (England).

[39] Altorman is a tribes coming from North Scandinavian which occupied parts of France and called it Normania, then occupied the British Isles, and brought with them a lot of legal systems, some of which was the first of its kind in the history of the British Isles and called by scholars beginning knowledge of English law or the original law (Common Law).

It was, in 55 BC, when the Roman invaded the British Islands to occupy it for a period that lasted nearly four centuries, fairly sufficient to be affected by the Roman civilization in various spheres, especially in the legal side, where the customs and traditions of Rome became frequent familiar practices that replaced the previous Celtic rules, moreover, it contributed in various fields. Hence, the situation continued in that way until the Christian entry to the British Isles, which in its turn continued until the fifth century (A.C) where the Anglo-Saxon tribes that ruled the British Isles triumphed over the Roman conquest until it united the British Isles in the ninth century (A.C).

Since then, it was called England which is the current name for the total British Isles known as Great Britain. As it is the habit of the victorious invader, it imposes his systems, customs and traditions on the defeated people. Yet, these systems which were brought by the Anglo-Saxon tribes and imposed on the British Isles which was itself influenced by the Roman systems that prevailed France during its occupation [40].

The English community has lived like every ancient society, a primitive life based on instinct, a life without system or law, far from the influences of civilization but customs and traditions were not formed. To the extent that, there was no difference between women, slave or even animal with the exception of some cities that knew Agriculture, breeding some animals and grazing. Such rules were not known originally due to laws in European countries, including England that did not know well its sources only after converting to Christianity with the Roman. So, it mixed with what came before and has evolved automatically as a result of cross-fertilization of civilizations and the beginning of the town in England and it was due to the lack of opportunity or civilization role.

Along with the entry of Christianity, the canon law has spread and its beginning did not go beyond Religious affairs and clergy. In those stages, the law was only implemented and applied over the area where it is promulgated, or over the followers of the king who issued it [41]. Furthermore, with these beginnings, the society was divided into two classes: Liberals and slaves. The Liberals is compound of two types: the first one consists of Lords and nobles whereas the second consists of their followers who were responsible for the performance of military service and tax. Each member of the group could be protected by one of the nobles, and is called the (homeless/stray).

The old English law was sentencing by death certain crimes that we will discuss later, but it was not reluctant to join any other crime to the list of crimes punishable by death if its object requires death penalty in its view, which has led to the widening scope of the death penalty to three times or four times higher than the what was determined by the texts [42].

[40] Dr. Walid Nunu, Legal and social systems, the previous source, P 151- 152?-153

[41] Jamil Charkaoui, Lessons in civil Law, Arab Renaissance, Cairo, 1986-1987 p. 133.

[42] CJames- B Christoph, The death penalty in British politics, translation Hamdi Hafez, National house for printing and publishing, 1964, p. 12, p. 13

Some were right when saying (there is no country in the world where there are such a large number of different crimes sentenced by death, just like in England). Such a law was described by some people as (the legislation more reckless, more indifferent and crueler to a point never experienced before in a civilized country).

Notably, among the criticism and reprehensible points against this law was the fact that it does not differentiate in the implementation of death penalty between young and old. Though the English law was not subjecting people under the age of fourteen to death penalty because they are too young for such punishment especially execution, this Law legitimated the execution juveniles who were aged between seven and fourteen years, in case they have the intention and tendency to harm or to bane.

On the basis of this reality, the English judiciary replete with the execution of children under the age of fourteen years[43].

There are examples of simple tiny crimes but sentenced by death according to the English Law, such as stealing tuberous plant which is eaten, marrying a gipsy, damaging fishes of ponds, sending threatening letters, and being armed or get hidden in a dense area of trees.

Almost always, death penalty is implemented by hanging the offender, except the case of a wife who kills her husband whose execution is done by burning her after being dragged to the place of the execution on the mat of Willow instead of carrying her in the carriage.

Until 1828, hanging was the execution associated with this previous procedure for certain crimes such as murder committed by a server against his master, and piracy that were accompanied by exposing human life at risk, or setting fire to a shed or store from the warehouse property. Accordingly, sentencing by death anyone committing the crimes of treason coupled with exceptional cruelty, as it is used to (crucify the offender alive, then lowered him alive and then slit his stomach grab his gut and burned it) [44].

The day of death penalty, in England, is considered a holiday for craftsmen and others from different social classes. The unemployed youth was moving from one town to another in order to witness the execution scenes.

[43]In 1784, the child William York was sentenced to death when he was ten years old for committing a murder crime. In 1800 death sentence on a child at the age of ten years for the crime of forgery of post office accounts, and in 1832 a nine-years old boy was sentenced to death for stealing colors box from a broken storefront. The explanation and excuses of the judiciary with their provisions set for the children referred to is the following: the first crime verdict is to deter every child in this age of committing crimes and finding young age an access to escape the punishment. However, for the second crime verdict the judges refused to commute the sentence due to the offender's degree of ingenuity and intelligence comparing to his age.

[44]Dr. Mohamed Abdelaal, (death penalty), the previous source,p. 59.

On this day the public was flocking to the place of execution since the early morning, and it was Haves of individuals paying the prices high in order to get anywhere close to the scene of execution, these scenes - according to some - were more than a national shame - it was the scene of the occurrence of various crimes and painful incidents [45].

Overall, we have noticed how the old Law of England was expanding in the implementation of death penalty, even in trivial irregularities, as this cruel punishment did not exclude minors who had the age of seven and above, which is really cruel for us, yet, for the public opinion in England this cruelty is realized later on, especially with the development of civilization witnessed in English society. However, the judiciary old Englishmen did not consider it cruel as it is sought to be, but they consider it as a way to address the evil desires of the human soul, even in young people.

The other way around, thanks to the efforts of a number of thinkers and intellectuals in Europe in the sixteenth century like (Thomas Moore) (1478 - 1525), in England and (Voltaire), in France in the eighteenth century, where the question of death penalty emerged and began necessary in the fight against crime as a tool within the framework of ??reform and humanity, due to the separation of the divine laws and human laws, and the rejection of the religious basis of the penalty as a means of atonement contributing in humans purification and salvation. Thus, some veered by preferring and supporting the idea of ??punitive actions against the offender or offenders who have committed serious crimes. Inasmuch as, robbing one's freedom and assigning them to the work of slavery for the benefit of society, based on the belief that the restriction and the deprivation of freedom and liberty is more burdensome than the termination of life ; in other words it is a way that makes the offender a vivid lesson to deter the others.

However, death penalty remained an essential punishment for those who do not prove the signs of reformation, or any ability to change, and for those who represent a high danger to the extent that no one feels secure in their survival. For this reason, Thomas[46] considers execution a necessary concern for those criminals who cannot be rehabilitated, according to him they should be killed without pity or fierce mercy they should be treated like feral untamed animals.

It is almost the same idea advocated by most thinkers of the modern era, particularly (Voltaire), in the eighteenth century, when they expressed their advocacy to retain death penalty for unforgivable crimes in order to purify the community from dangerous criminals[47].

[45] In 1807, he attended the execution in the city of Holloway which leads to the immigration of a large gathering of people reached forty thousand, has led to the death of the public rampage nearly a hundred people at the moment the executioner finished the implementation of the hanging. Koestler , Camas , Refleyions sur la peine capital , paris , 1957 , p. , 36 .

[46] Thomas More, Utopia or Treat From The best from Government, Latin text edited by Marie Delcourt, Paris, 1974 P 164.

[47] Dr. Mohamed Abdelaal, (death penalty), the previous source, p. 61

Topic 2: The evolution of human societies and the emergence of divine religions and its perception of death penalty

Human societies went through many stages moving from primitive tribal society strolling to the semi-stable civil society, and the impact of the emergence of the three monotheistic religions was clear as we find that many of the laws of various kinds adopted the heavenly will, and what was revealed in the Scriptures (the Torah, the Bible, and the holy Quran). Also, they had the biggest role in the penalty system where they arranged the needed perpetrators of crimes and punishments with some differences that we will learn about it and go into it in the following three requirements:

Theme 1: Sanctions regime in the Jewish law and Death Penalty

Theme 2: Sanctions regime in the Christian law and Death Penalty

Theme 3: Sanctions regime in Islam and Death Penalty

Theme 1: Sanctions regime in the Jewish law and Death Penalty

As a religious group, Jews lived throughout the historical period within the confines of other countries and the religious character was a landmark in all its affairs including the penalty side which was the prevailing principle concerning avenging the individuals. In fact, its impact and pressure was abated only during the era of the judges that followed the tribal times - as a result of the influence of the Torah with regard to the mentioned penalty system in it [48].

The regime of sanctions in Jewish Law has several characteristics [49] the most important ones are as follows:

1. Crime is an act that causes God's anger whether it is a violation of his orders and prohibitions, or a dereliction of his imposed duties, or even an assault against the individuals' rights.

2. The Jewish Law kept some of the individual revenge effects and proofs such as; retaliation (Qisas), cutting sanction, and more some vengeance penalties that were signing to be implemented over animals. Much longer, the rule had decreed that if anyone had witnessed a commission of offenses punishable by death, he/she would have killed the criminal immediately without waiting for his/her trial. If the person did not do it, the judicial authorities would assume the responsibility to take over adjudging the guilty, such examples include: red-handed adulterer, thief especially when committing the robbery at night.

3. The corporal punishment is less powerful than the sanctions contained in the Code of Hammurabi, for example the flogging punishment is limited to forty lashes and death penalty is applied only in serious crimes such as; murder, adultery and deeds which infringed the Lord?s rights and limits like atheism.

4. Later on, Personal responsibility was replaced by collective responsibility that prevailed during the tribunal period of time. As, since the era of the Prophet (Ezekiel) the principle of personal responsibility had emerged, and nothing was left regarding the collective responsibility but some few applications of which its most important one is to resort to a system similar to the compurgation system which was known by the Arabs and endorsed by the Islamic Law[50]. The sanctions are divided into the afterlife sanctions and penalties mundane, and this latter are applied in some of the crimes which are against the Lord and in all the crimes affecting individuals. Penalties in Jewish Law are: Murder, flogging, fine, great deprivation, and little deprivation (discontent).

[48] Dr. Walid Nunu, The date of the legal and social systems, the previous source, P.82.
[49] Dr. Walid Nunu, The date of the legal and social systems, the previous source, P.84.

A - The sanctions penalty and retaliation (Qisas):

This penalty is applied in some of the crimes stipulated in the Torah and the most important ones are murder, assault leading to death, attempted murder of a man perfidiously, hitting the mother or the father, atheism, and in the very act of adultery.

B - The flogging:

This penalty is applied in rape crimes, crimes of cutting off the penis or testicle, intentional abort of pregnancy, induction and incitement of boys to commit the wrong deeds such as immorality and debauchery, adultery with unmarried Jewish woman, the person who returns to the violation of the provisions if he/she was not deterred by the legal legislation of deprivation.

C - The fine:

It is usually sentenced by a fine in most of the crimes that the judge seeks for crime mitigation through the non-application of one of the prescribed penalties by Law. The fine is not paid to the state; it is rather paid to the victim who is entitled to get also compensations for the suffered damage in addition along with the fine.

D - The great deprivation:

Crimes where the great deprivation is the penalty, are: infringement of a widow or an orphan - untruthful oath - Judge's refusal to decide on case without an excuse - accusing of adultery or insulting others - gambling, witching and conjuring demons, and interpreting of dreams and claiming to foresee the unseen (Al-Ghaib) and palpate bellies to see what is in the wombs - a Jewish bribe - infringement and violation with beats and wounds - , actually, in these last two crimes the penalty would be punished by compensation rather than by the great deprivation as it was mentioned previously that the infringement beat and wound are to be panelized by the retaliation according to the Torah.

E - The little deprivation (discontent/wrath):

This penalty is applied in the following offenses: abusing a Jews, disobeying the rulers, resisting the judges, the court officers and non-complying to its provisions, mistreating the parents unless being forgiven by the victim him/herself, mistreating worshipers or rabbis, counterfeiting seals and coins, going wrong and stealing homes, etc.

In reality, the Jewish law, with all its vocabulary and its meanings, is God's messages revealed through his prophets and apostles sent to the Israeli people. Despite the texts were collected in the Torah, it does not negate its distortion because the codification of Torah did not happen during the revelation of its provisions.

[50] Abu Talib, The date of the legal and social systems, the previous source, P. 226.

Rather, it was done, in the subsequent ages, at the hands of the rabbis and their various Jewish schools. In addition to the Torah, there are several books on the history of the kings of the Jews. Some scientists have compiled the Torah, all the manuscripts of the biblical texts, in one book called the Talmud [51].

At the beginning of the third century, one of the rabbis decide, to assemble properly all the elements of legislation in a book called Mishnah; a word that means "repetition" or "education", as an initiative to interpret analytically the Torah or Moses' revealed Law and make adjustments and reconciling to things sought contradictory regarding the interpretations of jurisprudence and judicial regulations and there were many explanations for this book conducted by rabbis in Palestine and Babylon schools, known as Gemara which in its turn includes the conditions of Halacha _known as the "Code of Jewish Law"_ as well as some of the myths that discuses ideas about natural history, medicine and reality of history.

The subsequent Mishnah and rabbinic law and the customs and traditions were framing the so-called Talmud. Due to the duplicity of Jurisprudential schools, two types of Talmud with various explanations, they are: the Babylonian (Bavli) Talmud and the Jerusalem (Yerushamli) Talmud. In fact, there are significant differences between the two Talmud compilations the former (i.e. Babylonian Talmud) is considered more authoritative than the latter (i.e. Jerusalem Talmud) as it dealt with penalties and its provisions, in particular that of criminal offenses. For instance, a case of murder that occurred surely may end up with two provisions: the exile, if the killing was unintentional and attributed to the negligence, « Speak to the people of Israel and say to them, When you pass over the Jordan into the land of Canaan, then you shall select cities to be cities of refuge for you, that the manslayer who kills any person without intent may flee there. The cities shall be for you a refuge from the avenger, that the manslayer may not die until he stands before the congregation for judgment » (Numbers 35: 10-11-12).[1]

Whereas, if the murder was inadvertently and did not stand for a criminal act, here is a description for such prospect; if a man is repairing the soil roof of his house and the stone roller _ he uses _ fell and killed someone, or if he is about to put down a barrel or a ladder and accidentally drop it causing the death of a passenger, all the previous mentioned mishaps imply deportation, and as a general rule:

If death occurred while dropping, the convict would be exiled, yet it is not applied if the death was due to a dropping ladder. Apart from this, if the head of the guillotine/cutter dropped and killed someone, according to Rabbi Judah, the man who holds the cutter should not be exiled. In such matters, opinions vary from one rabbi to another, as it is the example of the drop of a large branch while cutting it to cause the death of someone, here Rabbi Judah supports the verdict of exile, while some rabbis

[51] Abu Talib, the previous source, P 251-252.

tolerate the accident.

If someone threw a stone on the road and caused the death of a man, he/she would be exiled. Rabbi Eliezer Ben Jacob says: "If he/she had dropped the stone has from his/her hand with the passing of the victim, no offensive responsibility would have been considered". But, if a person threw a stone within a property and killed someone, he/she would be sentenced by the deportation. In other words, all is related to the victim's right to be available in the place. It was said: (It went with its owner in the forest for gathering sticks, so I rushed his ax to cut firewood, and escaped from the iron wood and hit the owner died; he flees to one of these cities and live.)[2]

Obviously, the condition relates to whether the victim has the right to be present in the place or not. It was said that: going to cut wood is a voluntary action, assuming this the exile is the punishment. Besides, the reaction of the father who hits his son, the instructor who disciplines his student and the men who works as a Savior, the father will be sentenced by exile because he killed his son unintentionally. Anyone who kills a Jew would be banished as is the case with a Jewish that killed someone unless the victim is a heathen or a pagan, residing in Palestine, who abandoned idolatry to get the right of residence. The offender would not be banished if the victim condemns idolatry like him/her. Rabbi Judah says: The blind cannot be exiled, while Rabbi Meir corroborates the notion of the exile. Worst still, the enemy should not be exiled but executed because he/she has motives for damage.

Rabbi Simon says: the implementation of exile sometimes is applied over the enemy, other times it is not. The general rule: If the guilty says he killed deliberately he is not exiled, and vice versa.

The killer who commits the crime accidentally should stay in the city of refuge until the death of the High Priest (and save the killer group from the hand of the avenger of blood, and he receives the group to the city of his refuge where he fled he shall set there to the death of the high priest who survey the holy oil)[3] .

If the high priest died after the verdict, the accused would not be exiled, and if it happened before starting of the second high priest's tasks and before adjudging him/her, the exiled would not be back from his refuge unless the latter dies. If the verdict was announced, in the absence of a high priest, or supposing if the unwitting killer or the victim was the high priest himself, in this situation, the accused never leaves the city of his refuge (the place of his exile). If the Court found that the killing is intended and predetermined, the offender would be adjudged a murderer and executed, but Courts never resort to the immediate implementation of execution "The court which sentenced to death eleven cases during seven years is considered to be a devastating destructive ruling."

In this concern, Rabbi Elazar Ben Azaria says: Once every 70years (Eleven persons were sentenced to death along 70 years). While, Rabbis Tarfon and 'Akiva say: If we were Sanhedrin (=high court of Jewish Law) we would never have killed anyone. However, according to Rabbi Shimon: the increase

of population of Israel leads naturally to the increase of criminal offenses as well as bloodshed, that is why there should be harsh provisions to deter criminals (?And they all put diadems on themselves after his death, and their sons after them, for many years; and evils were multiplied on the earth)

The death sentence was implemented according to one of the following four forms: stoning, death with fire (burning), cutting the head, and hanging.

Here the explanation of stoning method applied then: after pronouncing the verdict, the prisoner is led outside the court, then to the place wherein he/she would be executed, as it is said in the Talmud: ?And the LORD spoke unto Moses, saying: Bring forth him that hath cursed without the camp; and let all that heard him lay their hands upon his head, and let all the congregation stone him.[4]

A man stands in front of the door of the court, another man holding a signboard with the banner of his hand, standing on a Horse on the range of eyes of the first one, if one of the judges says: "I have something to say in favor of the sentenced person",Then the flag carrier moves it, and the horseman precipitates to the place of implementing the provision and stops it, even if the suspect declared that he wanted to defend himself he/she was returned to stand before the court four or five times, if what he/she says has no importance, the judges accept the supreme pleading,then release the man. In the other way around, the accused would be taken to the lieu of torture, along their heading for the place runs in front of a herald declaring "Who knows anything about that one, come to the Court and declare that," before reaching the scene of the torture along ten cubits, the associates accompanying him scream: "confess!", because usually the accused confess their crimes before their death, and he/she who pleads guilty would have a share in the other world. As congruent with Joshua's words to comfort Achan: "My son, I beg you, give glory to the LORD God of Israel, and make confession to Him, and tell me now what you have done; do not hide it from me." 5 Does confessing his guilt atone for his sin? And Joshua said, " Why have you troubled us? The?LORD will trouble you this day." And Achan answered Joshua and said, "Indeed I have sinned against the LORD God of Israel, and this is what I have done ..."6 If the convicted person did not confess properly, he/she would be asked to plead and beseech the LORD loudly: (shall my death remit all my sins!). After four cubits from the place of torture, his/her clothes are taken off except what covers the genitalia forward if it is a man and from behind if it is a woman, according to the viewpoint of Rabbi Judas, however most rabbis declare: that all the sentenced man or woman would be stoned naked.

The scene of torture had ascended around two men's stature, from that altitude one of the witnesses push the convicted to the ground and on his/her back in an attempt to break his neck, if the latter tried to turn, he/she would be brought back to the required position. Once dying because of falling, justice is sought to be fulfilled, if not, the second witness will throw a stone _ pointed towards his/her Heart_ over the sentenced person (NB! A very heavy stone that requires the force of two men to be

carried, and then, one of them throw it with all its strength over the accused person), once the hit is deadly, justice is sought to be fulfilled, otherwise the responsibility for stoning is for all Jews because it is written in the Torah:" The hand of the witnesses shall be first against him to put him to death, and afterward the hand of all the people. So you shall purge the evil from your midst"[7]. And later, the dead stoned bodies are hanged, says Rabbi Eliezer, but others deny it as referring to the inspired text: " We have said that the Jews did not sentence criminals to be hanged after death unless they are pronounced to be idolaters".The criminal is hanged with the face directed towards the temple, and if she is a woman, her face will be directed towards the gallows, some rabbis say that women should not be hanged. Thus, Rabbi Eliezer explains this by saying: "Rabbi Shimon Ben Shteki has not executed women pursuing sorcery in Ashkelon". The answer of some was: "a case is discussed of 80 women hanged for witchcraft, there should not be a trial of two people in one day, and how hanging is performed? The gallows is fixed on the ground, the criminal's hands are brought together, one over the other to hang him [thereby], as Rabbi Joshua/Jose says: (THE POST IS LEANED AGAINST THE WALL), it looks like gallows structured for animals by butchers, after the execution, the dead body is putted down immediately, because it should not transgress the law that says: "If a man has committed a sin worthy of death and he is put to death, and you hang him on a tree, his corpse shall not hang all night on the tree, but you shall surely bury him on the same day (for he who is hanged is accursed of God), so that you do not defile your land which the LORD your God gives you as an inheritance."[8] Why he/she is hanged? - Because he cursed the LORD, indeed violating against the heavenly name and status of the LORD leads to death (claimed by everyone seeing the body). Moreover, they did not bury the executed in his ancestral tomb, as the court had two devoted burial places, one for those who were decapitated or strangled, and the other for those who were stoned or burned, once the bodies and the flesh completely decomposed, bones are gathered to be buried in their place. Then the relatives of the convicted came and greeted the members of the Court and the witnesses saying: (We have no ill-feelings against you in our hearts! Be sure we do not covet hatred against you in our hearts, we recognize that your judging is equitable), in such case the rituals of the usual mourning are not applied.

Crimes punishable by stoning were: committing taboo with his mother, or with his step-mother, or with his mother-in-law (mother of his wife), also in cases of homosexuality and lesbianism,in other words any abnormal relationship that opposes to the nature for example sexual relation between a human being with an animal, further, canoeing, idolatry, a ritualistic killing of children in order to please the worshipped Moloch God of sacrifice, necromancy, augury, Sabbath desecration, insulting the parents, sexual relations with an engaged girl, spreading idolatry over region and people, sorcery, familial disobedience.

Here are some other methods applied for the implementation of death penalty: a person sentenced to death by burning is compelled to stand amid garbage, into his knees, in order to prevent his movement, surrounding his neck by two pieces of cloth his body by light shroud, the two witnesses tighten the pieces each from his side and they drag it strongly, till he/she opens his/her mouth and then the executioner sparks a wick (as said in Gemara: The death penalty of 'burning' was executed by pouring molten lead through the condemned man's mouth into his body, thus burning his internal organs). Rabbi Goda Judah says: "if he died at the hands of witnesses by strangulation, the law of burning will not be implemented", another method is to open the criminal's mouth with tweezers to throw into his mouth the burning wick. The beheading was done by the sword, in the Romanian way. Rabbi Judah says: THIS IS A HIDEOUS DISFIGUREMENT; the head should be assigned to wooden furniture like a tree trunk for example and cut with a cutter. Rabbis replied, NO DEATH IS MORE DISFIGURING THAN THIS. The strangulation, repeats the same first stage of the death with iron, in which the witnesses press and stretch the neck to Death.

Who are sentenced by burning to death are: any man takes a mother and her daughter, a priest's daughter or a criminal's daughter, debauchery with granddaughter, sinning with the son's wife, daughter or mother-in-law, further with his own mother-in-law and her mother.

They who are doomed to beheading also are: murderers and idol-worshippers.

Asphyxiation is sentenced over: every person beating his parents, or kidnapped a Jew to sell in the market of slave trade, the elderly who did not respect the decision of the supreme authority, Prophet of false promises of gods of pagans, the adulterer, false witness against a priest's daughter, exercise debauchery with the Priest's daughter. If a person is sentenced by two penalties, the severest one is the one to apply. The arrangement followed: stoning, burning, beheading, strangulation, in order to alleviate the death of the convicted person, he/she is offered a drink with drug pills, and the one who will undergo the judgment of death, is given a grain of incense in a glass of wine, as it was said: (Give strong drink to him who is perishing, And wine to him whose life is bitter) (Let him drink and forget his poverty And remember his trouble no more)9. It was also said: (The women of the Jerusalem provide this drink, but when they refuse the price is devoted to collect funds for the group).

We got to know, from what mentioned above, the sanctions regime in the Jewish law and its dealing with murdering (killing) a human being including the Holy Book and their religious Sharia.

Theme 2: Sanctions regime in the Christian law and Death Penalty

Talking never ends about the subject of the system of criminalization and punishment in Christianity and about the legislation in general, what ratified is also true of the criminalization and punishment, we note at the outset that Christianity considers the Torah and the travels of former prophets, holy books called (the old), as it take all divine laws stipulated by the Torah but not what was inconsistent with Christ (peace be upon him).It seems that Christians continued the same way of about twenty-two years after Christ, in this were walking on the platform that he drew, the way he clarified, but students met after twenty-two years of leaving them ,and Jacob made a speech for them in suggesting to limit taboos on nations in four, adultery, and eating Strangulation, and blood, and the slaughters for idols.[10]
The text of Christ himself hinted that he came to complete the law of Moses not to repeal it, saying (I have not come to abolish but to fulfill)[11].The concept of this phrase goes with the Christian belief that they are included in the Torah, and they therefore follow the Ten Commandments Bill of Jews in their early times, and for this even Jesus peace be upon him did not come new legislation,(all I care about is preaching and wills and tolerance).[12]
And Jesus had eased a lot of legislation in Judaism, moved from merely discourage to discourage what is less but did not provide for a specific punishment for what he inhibited. If the Law of Moses inhibited murder, Jesus Christ forbids just thinking of offending in general, he said: (I have heard that it was said Colin?does not kill?the killing requires judgment. But I say to you that all?of the anger of?his brother requires judgment)[13].In another location he said: (I have heard?that?it was said?eye for an eye?and tooth for a tooth. But I tell you not to resist evil, but whosoever?shall smite thee?on the right cheek,?turn to him?the other)[14].
With these models we scrutinize the system of criminalization and punishment in Christianity because crimes in these early stages, which coincided with the presence of Jesus (Peace Be Upon Him)are many, even more than Jewish times, but these crimes are not matched by punishment, we must understand that not mentioning punishment in Christianity means that the Jewish legislation about punishment is applied on Christians also, especially that both letters came to the Jews, and if we did not go to this understanding of the teachings of Jesus (peace be upon him), it would have a negative impact and it would not have the authority to apply punishment. However, the legislation after Jesus (peace be upon him) changed after the emergence of several indicators like the emergence of "Paul" who gave the legislation a new breath, as well as the role of the mainly animist, Councils, churches after that. Crimes that does not exist in the Bibles appeared so the church made for it harsh penalties such as heresy which means opposing the opinion of the church, a scientist who sees the world in science and cosmic heresy, an attempt to understand the holy book of a man-synod heresy and criticizing any-

thing related to the church heresy and helping one of these or dissatisfaction with the reversed heresy. heresy and helping one of these or dissatisfaction with the reversed heresy. The Church absolved murder, arson and the courts of the inspection, men burned (John Mania and Jerome), and books of (Abelard) were burned and he was prisoned till death, the inspection courts catched heresians and innocent people without any discrimination15, and late Christianity knew different ways of harshest sanctions which were not mentioned in the Holy Book in general and the new era in particular, like slow aside exaggeration in torturing, candles orientated on the body of the victim, teeth are yanked as (Benjamin) the archbishop of Egypt because he refused to yield to the decision of the Council of Chalcedon that Christ have two natures human and divine. the death penalty was preceded with ways of torture, ironing with fire, beatings, perhaps the accused pleads guilty, if he did not confess he is murdered, because he is not considered innocent until proven guilty, but criminal until proving his innocence, and won't succeed to prove, even if the suspect confessed being guilty, his torture continue before his elimination perhaps he reveals his supporters and partners[16].

The groups that were executed cannot be counted, in Spain only inspection court provided more than thirty-one thousand people to be executed by burning and sentenced more than two hundred ninety thousand other by sanctions following the death penalty. In 1568 BC, and all the inhabitants of the lowlands are convicted and sentenced to death, excluding few named members from the provision, ten days after the judgment, millions of men and women and children were put on a guillotine[17].

Since its establishment between the years 1481 and 1499 BC, the inspection court sentenced ten thousand and two hundred and twenty people by burning alive, so they were burned, and on six thousand eight hundred and sixty by hanging after defamation so they were defamed and hanged and on ninety seven thousand Twenty three people by different penalties which were performed, then all Hebrew biblical were burned[18].

All these sanctions were carried out by the church in its late periods and there was nothing in the four Bibles that was mentioned like described in the Gospel of Luke: (As for my enemies, those who did not want to own them, bring them here and slay them before me)[19].

In sum, the original Christianity is too poor to a clear system in the area of criminalization and punishment, this poverty was replaced by the late followers by providing new crimes and decimated cruel punishments on indigenous people over the centuries, these developments that led to the emergence of reformist movements,and the emergence of juristic schools in Europe. Modern views in the field of criminalization and punishment was not immune to these repressive regimes, if the Church and Christianity are based on a clear system in the criminalization and punishment, their provisions would have been propagated and souls would have been reassured especially in the days when the authority was theirs, kings under their jurisdiction, jurisprudence schools in Italy and Germany were in fact built

on the ruins of the provisions of the church, where judges owing to the lack of clear legislation in the criminalization and punishment, rush in issuing judgments on the basis of Control and absolute jurisprudence which led to the discharge of unjust and arbitrary provisions suffered by many members of the people.

Teachings of Christianity started in the era of darkness, including invitations to love, brotherhood and peace, and rejection of evil and violence, and love for others.

European states in the medieval era have known the existence of a higher authority, namely the authority of the church, which is a spiritual and religious authority, but those powerful authorities started the control of those States, which allowed to make the European Community a society where prevails a special system with certain rules due at the end to Christian ethics[20].

Although the teachings of Jesus Christ (peace be upon him) condemns the death penalty in both the Gospel of Luke and the Gospel of Matthew in what regards who slaps you on the right cheek, turn for him the left cheek, where Jesus Christ (peace be upon him) defends the Adulterous woman exposed to stoning in public saying to the crowd reproving them:

"was you who is without sin throw upon her a stone" the others see it supporting the death penalty, in addition to this, there is a full list of positions that support the implementation of the death penalty.

Opinions of Christians vary in this matter, the sixth commandment in general(the fifth according to the Roman Catholic Lutheran churches) says: "do not kill", but because some Christian doctrines has no fanatic position on the matter, the Christians belonging to these doctrines have the right to take the decision based on personal beliefs.[21]

The Roman Catholic Church:

In June 2004, a memorandum was issued to the archbishops of the United States, where Pope Benedict XVI (known as Cardinal Joseph) stated the follow: "the ethical issues associated with murder do not have the same importance as the issues of abortion and euthanasia". There may be a difference in opinion among Catholics on waging wars and the application of the death penalty, but that is not true regarding the issues of abortion and euthanasia, in the past, the church used to accept the death penalty following the religious studies of Thomas Aquinas (who considered the death penalty a deterrent and necessary measure, but could not be used as a means of revenge).

(In the Gospel of life, the church considers that the death penalty should not be applied unless the only way to protect the community from the offender is to sentence this punishment, and that given to the penal code currently used, the presence of such a position requiring the death penalty, is something rare or impossible, also, the oral teachings of the Catholic Church adopts a similar stance to that)[22].

The Anglican and Episcopate Church:

In 1988, the Lambeth Conference of the archbishop of the Anglican and Episcopate Church con-

demned Death Penalty:

(This Conference ..3. Urges the Church to speak out against..(b) all governments who practice capital punishment, and encourages them to find alternative ways of sentencing offenders so that the divine dignity of every human being and yet justice is pursued ;..)

The mentioned above in the Conference, is how this group condemn the death penalty, and talk to the public opinion against it, precising all governments which are applying the major criminal sanctions and encourage them to find alternative penalties to the death penalty to ensure justice and protection of the human community.

The United Methodist Church:

The United Methodist Church - as well as other Methodist Churches- condemns the death penalty in the view that it could not accept impunity or revenge of the community from the offender a reason to kill a human spirit[23], it also believes that the death penalty is applied in an unfair and unjust way to marginalized persons in society, such as the poor and the illiterate, ethnic and religious minorities and persons with mental and psychiatric diseases.

The General Conference of the United Methodist Church demands bishops to oppose the death penalty, as well as governments to immediately halt the implementation of the provisions of the death penalty.

The Protestant Lutheran Church in America:

In 1991, the protestant Lutheran Church in America expressed the refusal position of the death penalty through the statement of social policy. It stated that revenge is an essential impetus to the application of the death penalty and that the real recovery will only take place by the offender's repentance, the forgiveness of the victim or his family.

Southern Baptist Convention:

The Southern Baptist Convention, held in 2000, renewed the faith and message of Baptists, and it has approved officially in the Southern Baptist Convention on the application of the death penalty in the United States, and the speakers announced at the conference that it is the duty of the state the execution of guilty of murder and that God initiated the use of the death penalty in the spirit Charter.

Other categories of Protestant churches:

At the beginning of the Protestant Reformation movement, many important religious scholars- including Martin Luther and John Calvin - adopted a traditional way of thinking that defend the application of the death penalty, and the private Augsburg Lutheran Church recognition defended clearly the application of the death penalty. Some Protestant denominations quoted from Genesis travel 9: 5-6 and the Epistle to the Romans (3: 13.4) and Leviticus (20: 1-27) as the basis for the legalization of the death penalty, however, the Mennonites groups represented in the Church of the Brethren and the As-

sociation of Friends of the implementation of the death penalty opposed the application of the death penalty since the beginning of the establishment of the movement and still opposing it to the present day.

These groups and other Christians opposing the death penalty cited the sermon of the mountain delivered by Christ (codified in Chapter 5-7 of the Gospel of Matthew) and (the sermon of plain in the Gospel of Luke chapter (6: 17-49)) In these sermons, Jesus says to his followers "whoever strikes you on the cheek, offer him the other also", and to love their enemies, which is what these groups see as a claim to the principle of non-violence, and therefore opposition to the death penalty.

Eastern Orthodox Christianity:

Eastern Orthodox Christianity opposes the death penalty, as it believes that murder is wrong in all circumstances.

Secret Christianity:

The Group of rose and Cross and other underground Christian schools condemn the death penalty in all circumstances.

Penalty in Christianity on literature and media:

The four Gospels described the execution of Jesus Christ (peace be upon him) in detail and these news composes the basic story in the Christian faith, also there are so many images that illustrate the crucifixion of Christ in Christian art.

The novel Damon and Pythias made by "Valerius Maximus" is considered to be one of the most famous examples that embody the value of fidelity, (Damon) has been sentenced to death (although the reason behind this provision was not explained) and his friend (Petheias) offered him that he leads punishment instead.

An Occurrence Owl Creek Bridge is a short story by Ambrose Bierce and was first published in 1890 the story deals with the execution of a sympathizer with the American alliance during the American Civil War.

In the novel, A Tale of Two Cities to the writer Charles Dickens, events end with the execution of the main character of the novel.

In his novel the last day of a condemned man, (Le dernier Jour d'un Condamné) Victor Hugo describes the accused ideas before his execution, and it is noted that in the introduction to the novel, Hugo detailed his opposition to the death penalty.

The literary excerpts, published under the title Little Birds by the writer Anaïs Nin included a lusty description of a death execution in public. The novel Naked Lunch by the writer William Burroughs included also a strange lusty depiction of the death penalty. In the suit exciting obscenity held against Burroughs, the defense managed to prove that the novel is a form of dialectical forms of anti-death

penalty, and therefore carry a political value.

There are many stories written about the death penalty in Christianity, as well as cinema, theater, film and television, such as "Seed" & "Dead Man Walking", etc., and the play "Exonerated", and the TV series "Prison Break".

Theme 3: Sanctions regime in Islam and Death Penalty

It is known that prescribed sanctions in Islamic law are: border crimes punishment (Hudud), retaliation (Qisas) and discretionary (ta'zir). Actually, in the Quran and the Sunnah death penalty was mentioned as prescribed crimes and retribution sanctions for the crime of apostasy and adultery of married man or woman[24], and crime of fighting[25], and intentional killing.

Yet, discretionary (ta'zir) resorts to the decision taken by the legitimate ruler as required by the concern, but this mandate is not taken as it is launched. In addition to studies made by Muslims Interest in the criminalization and punishment, there are other regulations which address the discretionary and its sanctions. Basically, all what we are concerned about, includes the maximum discretionary penalty, or in other words: Is it permissible to sentence by death in case of discretionary?

There were disagreement in the?Islamic jurisprudence (Fiqh) about the verdict of the death penalty for the crime of apostasy and adultery for married man and woman. Hence, some researchers concluded that the law imposes the death penalty for prostitution crimes either by prescribed punishment (Hadd) or by discretionary (ta'zir), but we think that this crime is not sentenced by death in the Islamic law (Sharia). The crime of prostitution - which is considered as a political crime, in the modern term, - rests almost entirely on conjecture to be sought punished by discretionary principles and that it does not require to end up with execution only if the wrongdoer (prostitutes) committed crimes deemed necessary death penalty either by the prescribed punishment (hadd) or by retaliation (Qisas) and identified with the personality of the perpetrators. In this case, they were been seized for these crimes as ordinary crimes.

Therefore, we will deal with death penalty in each of the following crimes: apostasy, adultery for married man and woman, prostitution, and discretionary crimes, in the following sections:

- Section I: Death penalty in the crime of apostasy.
- Section II: Death penalty in the crime of adultery for married man and woman.
- Section III: Death penalty in the crime of prostitution.
- Section IV: Death penalty in discretionary crimes.

Section I : Death penalty in the crime of apostasy

Apostasy literarily: the irreversibility of the thing to another, as Almighty Allah says:{...and turn not back (in flight) for then you will be returned as losers.} $_{Suratalmaidah(5:21)}$[26], and he says also: {...so they went back retracing their footsteps.} $_{suratalkahf(18:64)}$[27]
However, according to the scholars of Jurisprudence, Apostasy is defined by:

- The Shafi'i doctrine as the abandonment of Islam by Muslim, with intention, in ungrateful words or through deed[28].
- The Maliki as the disbelief of the Muslim intentionally[29].
- The Hanbali School as the disbelief of the person after converting to Islam[30].
- The Hanafi School as the fact of losing faith[31].
- The Zahiri School as converting from Islam to another religion for anyone who is known as Muslim[32].

We conclude from the foregoing that the majority of scholars agree that apostasy is to convert from Islam. Therefore, no apostate is to be prosecuted for moving from the religion other than Islam to another one: as a Jew convert to Christianity or Christian converted to Judaism. Apart from this, Shafi'i adds to definition that what is happening by the recoil or cutting with Islam, is converting by intention or saying or acting. Whereas, Malikis raises the point of "choice" which represents general requirement to assume responsibility for action, as Almighty Allah says:{Whoever disbelieved in Allah after his belief, except him who is forced thereto and whose heart is at rest with Faith but such as open their breasts to disbelief, on them is wrath from Allah, and theirs will be a great torment.}[33] $_{Al-Nahl(16:106)}$, and:{ They swear by Allah that they said nothing (bad), but really they said the word of disbelief, and they disbelieved after accepting Islam, and they resolved that (plot to murder Prophet Muhammad SAW) which they were unable to carry out, and they could not find any cause to do so except that Allah and His Messenger had enriched them of His Bounty. If then they repent, it will be better for them, but if they turn away, Allah will punish them with a painful torment in this worldly life and in the Hereafter. And there is none for them on earth as a Wali (supporter, protector) or a helper.}[34] $_{Al-Tawbah(9:74)}$.As Prophet Muhammad peace be upon him said: "He who changes his religion (i.e. apostates) kill him."[35] Moreover, The Messenger of Allah (peace and blessings of Allah be upon him) said: "It is not permissible to spill the blood of a Muslim except in three [instances]: the married person who commits adultery, a life for a life, and the one who forsakes his religion and separates from the community."[36]

As Prophet Muhammad peace be upon him said: "He who changes his religion (i.e. apostates) kill him."[37] Moreover, The Messenger of Allah (peace and blessings of Allah be upon him) said: "It is not permissible to spill the blood of a Muslim except in three [instances]: the married person who commits adultery, a life for a life, and the one who forsakes his religion and separates from the community."[38]

Discordance in the judgment of the apostasy of woman:

The Hanafi School opposes the majority about the judgment of an apostate woman, as they said that any woman who converted from Islam should not sentenced to death but she would be sent to prison for the rest of her life till she repents and returns to Islam or dies39. In its perspective, the Hanafi consider an apostate leaving Islam as an atheist who affiliates with the enemies of Islam which threatens Muslims and Islam, and the killers ... pay bayonets.

While woman, who according to its intention and social status cannot guide men and even to take up arms against the Muslims, is considered as a real infidel and so the punishment cannot be applied in the rule of apostasy. As originally, the basis of the Law of God asserted that disbelievers will be punished in the judgment day _ the Hereafter. In fact, God Almighty established relations between labor and penalty, in this world and in the Hereafter. And every penalty proceeded in the real life is only the results of human actions in it such as; retaliation, tossing, drinking, adultery, theft, etc. hence, all sanctions and penalties related to the mentioned above proscriptions were proceeded to save souls, minds, lineages and money.

Thereby, in the killing punishment of apostasy the purpose is rather to push the evil in the apostate as well as to avoid Highway robbery, and not because of the reaction of disbelief. Because his punishment is greater than that when God Almighty is concerned with those who come from bayonets [40], and as the idea of killing may refer to fighting so it is forbidden to kill women because they were not fighting[41].

Conforming with this view means that the Hanafi considered the killing punishment for apostasy as a measure of security and safety of the Islamic state, and that disbelief in itself is not a good reason for killing, but what permits the killing is rather to fight the Muslims, be aggressive against them, and try to fetch and tempt them from their religion, etc. and this act comes from the man unlike woman.

The Hanafi argued also that the Prophet, peace be upon him forbade the killing of women in jihad, and he God?s peace be upon him did not differentiate between the apostate woman and the indigenous infidel one, as the original infidel does not be killed if she went out with the infidels to fight the Muslims, and so is the apostate should not be killed if she converted back from Islam, and because women are helpless, its harm can be avoided once imprisoning her.

However, the public has said that it must kill the woman for apostasy as mentioned in the Devine

Hadith which does not differentiate between man and women in this , and they added to it, the report narrated by Jaber (may Allah be pleased with him): "that?a woman?called?Um?Roman bounced back from Islam, ordered the Prophet, peace be upon him to show her Islam, either she repents, otherwise she would be killed"[42], it has been reported also that: Abu Bakr (may Allah be pleased with him) asked an apostate woman called Um Qerfa to return mercifully to Islam, she did not repent so he killed her [(43)].

However, the Hanafi considered likely the conditions coupled with the circumstances of the killing of (Um Roman) and (Um Qirfah) which differ them of others? situations, and requires certainly killing penalty, as they said: "Um Roman was fighting Muslims and incite fighting as she was obeyed by her people, and Um Qirfah had thirty sons, and she was inciting them to fight Muslims", In such case, killing purpose is to avoid an absolute threat[(44)].

In the point of view of some of commentators if a woman was trustworthy that she is not going to allure others and convince them to follow her path she would rather be imprisoned and asked mercifully to return from till she dies. But if she is not dependable, and seeks corruption and creates commotions among others, in this case, she will be sentenced to death like man, because it is a must to protect the claim of affinity within the community and face all who seek to disguise and deceive people for their religion and throw the seeds of doubt in their hearts [(45)]. In fact, it is agreed between the majority of scholars that keeping religion among the five purposes of Islamic law for which the law is meant to preserve it, and that the Islamic ruling emphasize the necessity of killing the apostate from Islam.

Some modern researchers went to the denial of the death penalty for apostasy, as they differentiate between "being a kharijite" and just "converting from Islam". Insofar as converting from Islam is one of the things involving intentionality to abuse and tamper with Islam, as well as to prejudice its dignity and more to deny publicly any of its cornerstones or any of its provisions. And thus, no doubt that such action when it does occur collectively - not individually - as was the case in the era of the Prophet Muhammad peace and blessings be upon him, and in the era of the rightly guided caliphate of Abu Bakr (may Allah be pleased with him), at a time when the provisions of Islam is the basis of Islamic rule in the country (as was the case in early Islam), it is considered as a war declaration against the system of government in the state, also it is considered to be a sinful action against the provisions of the religion that is embraced by the state46. The essence of that opinion is these two things:

1. That the persistence and determination on the punishment in apostasy is related to the fear of compromising the Islamic nation and beliefs because of any factual or behavioral antagonism, what the punishment came to drive it off.

2. That the collective apostasy had better to be punished, because of the clear inherent intent against Islam that harm the interests of the entire Islamic nation. As other researchers sought that apostasy would rather be punished only if the apostates work on impressing Muslim community and creates commotions among them, and they "persecuted Muslims by showing opposition as well as massacring Muslims wherever they found them [47]".

The situation is different from the cases where apostasy occur often collectively, and from that individual cases of apostasy that occur on rare occasions in the modern era, when we find a Christian who converted to Islam to get rid of his Christian wife or to marry a Muslim, and if he could not become straight with his Muslim wife they divorce and he left Islam to his Christianity. Also, we may find a Christian woman who converts to Islam to break up with her husband, and then she bounce and return to the Christian religion. Actually, such cases do not involve harm to Islam or even threaten the structure of the state, though in both examples the apostate piddles Islam, but this fact would affects the religious feeling and image of Christians not Muslims[48].

Briefly, these researchers modern opinion is that apostasy in itself is not a crime that requires to be sentenced by death, because according to them s/he who converts to Islam is not punished by death by his/her religion. Contrariwise, for them s/he who displays and makes his/her apostasy clear and arouses hostility against Muslims by killing them. In such case, they give their advisory opinions to fight as necessitates the circumstances.

The most important arguments relied upon by them are:

1. There is an inconsistency?between the freedom of religion explicitly prescribed by the Quran about the punishment of the apostate _ which is death, as Almighty Allah says: There is no compulsion in religion. Verily, the Right Path has become distinct from the wrong path[(49)], and says: And had your Lord willed, those on earth would have believed, all of them together. So, will you (O Muhammad SAW) then compel mankind, until they become believers (50). It is said that the verse (no compulsion in religion) it includes those who return from Islam after converting to it, because as it is abhorred and duly disapproved to make someone embrace religion under compulsion, hence this conviction should persist constantly.In fact, the radical reason behind this is that s/he who is enforced to embrace Islam, his/her faith would be arrantly corrupted in the beginning of converting to the imposed religion and yet its persistence would be fake and not guaranteed[51].

2. Although it is of a serious issue, the verses invoked by the majority of scholars about the must of killing the apostate did not indicate the worldly penalty for such crime, as it is the case of some crimes sentenced by death. The commonly-held opinion is to have a true dependable

peremptory source to refer to - as the holy Quran, the frequent talk, or at least well-known of it, cannot never be based on reported news - in other words, it is the conversations that clearly showed the punishment of the apostate which may be useful and trustworthy in the field of religious doctrine, or the ones that showed the judgment of apostate who incites fighting against Muslims(52).

3. The Prophet Muhammad peace be upon him did not kill the hypocrites who wore after their Islam, despite the fact that he (peace be upon him) was aware of their disbelief and knows the hypocrisy of many of them, just because they did not fight the Muslims, or pronounce aggressive action against them, they rather keep peace with Muslims by suspending hostilities as swordsmen. Faithfully, if Muhammad (peace be upon him) is taught to kill the hypocrites because of their disbelief "people would said: that Muhammad, peace be upon him is killing his companions, what will make people getting alienated from Islam, because the guilt is not conspicuous and prominent to people " (53). This indicates that worldly sanctions, including the killing of an apostate is related to the clear evidences for apostasy, and cannot be otherwise, because it is impossible to pertain it to one's innermost feelings [54].

4. That apostasy alone were not the reason why Caliph Abu Bakr (may Allah be pleased with him) warred against the apostates who returned from Islam after the death of Prophet Muhammad (peace be upon him), yet it was because they joined their infidel people, to kill Muslims after knowing Muslims private aspects, and being acquainted with their secrets and weaknesses[55].

5. Some also went to the point that there is no exact rule on apostasy, as - the true apostasy is not backing away from the faithful relationship between the person and his Lord, so the act of apostasy, from this perspective, does not affect the interests of Muslims insofar as it affects one's relationship with his solemn Lord who would dispose with his ultimate power to announce the judgment in this matter. As " if turning from religion to another and the origin of disbelieving are to be considered of the greatest crimes between a person and his Lord, it is sought to better let the retribution between the disobedient and his Lord and it should be left to the day of reckoning"[56].

Section II: Death penalty in the crime of adultery for married man and woman

The scholars altogether decided that the penalty in the crime of adultery for married man or woman, is stoning to death, based on the prophetic conversations (hadith) received from the Prophet Muhammad (peace be upon him), as well as the occurrence of stoning in the era Muhammad (PBUH) and his

companions after him, as they did not deny it, it became a consensus.

In this concern, many conversations were reported regarding the stoning of a married adulterer. We will mention only some of them:

1- 'Abdullah b. 'Abbas reported that 'Umar b. Khattab sat on the pulpit of Allah's Messenger (PBUH) and said:

Verily Allah sent Muhammad (PBUH) with truth and He sent down the Book upon him, and the verse of stoning was included in what was sent down to him. We recited it, retained it in our memory and understood it. Allah's Messenger (PBUH) awarded the punishment of stoning to death (to the married adulterer and adulteress) and, after him, we also awarded the punishment of stoning, I am afraid that with the lapse of time, the people (may forget it) and may say: We do not find the punishment of stoning in the Book of Allah, and thus go astray by abandoning this duty prescribed by Allah. Stoning is a duty laid down in Allah's Book for married men and women who commit adultery when proof is established, or it there is pregnancy, or a confession.[57]

2- Abdullah b. 'Umar reported that a Jew and a Jewess were brought to Allah's Messenger (PBUH) who had committed adultery. Allah's Messenger (PBUH) came to the Jews and said:

What do you find in Torah for one who commits adultery? They said: We darken their faces and make them ride on the donkey with their faces turned to the opposite direction (and their backs touching each other), and then they are taken round (the city)He said: Bring Torah if you are truthful. They brought it and recited it until when they came to the verse pertaining to stoning, the person who was reading placed his hand on the verse pertaining to stoning, and read (only that which was) between his hands and what was subsequent to that. Abdullah b. Salim who was at that time with the Messenger of Allah (PBUH) said: Command him (the reciter) to lift his hand. He lifted it and there was, underneath that, the verse pertaining to stoning. Allah's Messenger (PBUH) pronounced judgment about both of them and they were stoned. Abdullah b. 'Umar said: I was one of those who stoned them, and I saw him (the Jew) protecting her (the Jewess) with his body[58]

3- Abu Huraira reported that a person from amongst the Muslims came to Allah's Messenger (PBUH) while he was in the mosque. He called him saying:

Allah's Messenger, I have committed adultery. He (the Holy Prophet) turned away from him, He (again) came round facing him and said to him: Allah's Messenger, I have committed adultery. He (the Holy Prophet) turned away until he did that four times, and as he testified four times against his own self, Allah's Messenger (PBUH) called him and said: Are you mad? He said: No. He (again)said: Are you married? He said: Yes. Thereupon Allah's Messenger (PBUH) said: Take him and stone him[59]

4- Imran b. Husain reported that a woman from Juhaina came to Allah's Apostle (PBUH) and she had become pregnant because of adultery. She said:

Allah's Apostle, I have done something for which (prescribed punishment) must be imposed upon me, so impose that. Allah's Apostle (PBUH) called her master and said: Treat her well, and when she delivers bring her to me. He did accordingly. Then Allah's Apostle (PBUH) pronounced judgment about her and her clothes were tied around her and then he commanded and she was stoned to death. He then prayed over her (dead body). Thereupon Umar said to him: Allah's Apostle, you offer prayer for her, whereas she had committed adultery! Thereupon he said: She has made such repentance that if it were to be divided among seventy men of Medina, it would be enough. Have you found any repentance better than this that she sacr ficed her life for Allah, the Majestic? (60)

5- Abu Huraira and Zaid b Khalid al-Juhani reported that one of the desert tribes came to Allah's Messenger (PBUH) and said

Messenger of Allah, I beg of you in the name of Allah that you pronounce judgment about me according to the Book of Allah. The second claimant who was wiser than him said: Well, decide amongst us according to the Book of Allah, but permit me (to say something)Thereupon Allah's Messenger (may peace be upon ham) said: Say. He said: My son was a servant in the house of this person and he committed adultery with his wife. I was informed that my son deserved stoning to death (as punishment for this offence). I gave one hundred goats and a slave girl as ransom for this. I asked the scholars (if this could serve as an expiation for this offence). They informed me that my son deserved one hundred lathes and exile for one year. And this woman deserved stoning (as she was married). Thereupon Allah's Messenger (may peace he upon him) said: By Him in Whose Hand is my life. I will decide between you according to the Book of Allah. The slave-girl and the goats should be given back, and your son is to be punished with one hundred lashes and exile for one year. And, O Unais (b. Zuhaq al-Aslami), go to this woman in the morning, and if she makes a confession, then stone her. He (the narrator) said: He went to her in the morning and she made a confession. And Allah's Messenger (PBUH) made pronouncement about her and she was stoned to death[61].

Thus, it is obvious, according to these prophetic conversations - beyond any doubt - that the unmarried adulterer deem necessary to be subjugated to the legal punishment of (Hadd) and to be flogged for hundred lashes. However, the married adulterer man or woman must be stoned. The difference in the punishment between the two wrong deeds (unmarried and married adulterer) was agreed upon unanimously by Muslim Scholars, but the kharijites opposed this credence and went to the belief that flogging is the absolute legal punishment for both married and unmarried person, what has been supported and adopted by some modern writers[62]. And then, as they are all influenced by a number of

arguments, those writers accede to propagandize them[63]. Their arguments are discussed one by one and presented as follows:

First, scholars resorting to the words of Omar Ibn al-Khattab may Allah be pleased with him (Hadith No. 1). It was said that "the stoning sentence is the rule mentioned verbally in the holy Quran and remained for judgment", while the "the fact of just reciting some verses of the Quran without implementing its judgment is not granted by Islamic jurist, and it is an airtight case" .

In reply to this argument, as the majority of scholars believe that the prophetic conversations that were received from the Prophet (PBUH) set out for the stoning sentence along with the words of the Caliph Omar may Allah be pleased with him, are all dedicated to the flogging punishment as Almighty Allah says: The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment[64]. These conversations copied the generality recited in the verse related to the right of the married person, which diverted it (i.e. the generality) from that related to the unmarried one, such as copying the generality of the Quran with the specific Sunnah[65].

Second, there is an assumption that the words of Caliph Omar (may Allah be pleased with him) about the stoning punishment may came down before Surat Al-Nur. And that the Prophet (PBUH) had referred to it to pronounce the judgment in one case or more, till the revelation of Surat Al-Nur in which flogging was declared to be the adulterer punishment. In this concern, confusions have been driven in novels and as a matter of fact, we refer to this incident; **Abu Ishaq Shaibani said:**

I asked 'Abdullah Ibn Abu Aufi if Allah's Messenger (PBUH) awarded (the punishment) of stoning (to death). He said: Yes. I said: After Surat al-Nur was revealed or before that? He said: I do not know.[66]

According to this talk, the reality of stoning is proven, but it arouse suspicions about it with hindsight to the possibility of its time i.e. does it happen before or after the revelation of Surat Al-Nur where was first mentioned the verse of flogging. Actually, this is leading to the throwing of the argumentation of conversations that mentioned stoning, which may come up with the preventative virtue of stoning.

As a response to this argument, it was affirmed that the stoning happened in the time of Prophet Muhammad (PBUH) and happened also after him in the Caliphs time. And none of them, who are the best to claim relationship, had declared that the stoning sentence is amended after the revelation of Surat Al-Nur. Moreover, Hadith representatives say that talk of stoning was after the revelation of Surat Al-Nur, its narrators were Abu Hurayrah and Ibn Abbas, knowing that the first came to Medina in the seventh year, whereas, Ibn Abbas came with his mother there in the ninth year, while surat

Al-Nur - civilian - have descended in the fourth year, before five or six years of immigration[67].

Third, that the Prophet (PBUH) when he stoned Jewish (Hadith No. 2), he might rely on the provisions of the Torah to adjudicate with juristic deduction such verdict on Muslims, before the revelation of this verse in Surat Al-Nur.

To controvert this argument, some scholars refer to the verse in which Almighty Allah said to his Prophet (PBUH): And so judge (you O Muhammad) between them by what Allah has68. But, came Jews asking the Prophet for the jurisdiction, as is indicated in the prophetic tradition, Muhammad drew their attention and reminded them of the Torah verdict they had concealed, as came the Jews to him (PBUH) asking for his judgment, which is betoken from the telling, and so he told them about what they had concealed of the Torah verdict because it is not reasonable that the last Prophet of Allah would have a different judgment, however because it is not allowed to seek a decision from any abrogated verdict (the Torah), it was indicated that it is an abrogating verdict (which is the Qur'an)[69].

Forth, the final argument for these is the last verse in the holy Quran about the bondmaid "if they commit illegal sexual intercourse, their punishment is half that for free (unmarried) women."[70], this verse, according to some extent indicates the prescribed punishment (hadd) of the married bondmaid (non-free) if she made an adultery she would be sentenced by half of the prescribed punishment legislated for married free adulterer. In this case, stoning could not be classified, whereas, flogging could be, consequently the married adulterers shall be flogged, in order to classify it, because stoning punishing self unlimitedly, what makes its classification conceivable.

It is noted that this argument remain intact if the sought after is the married adulteress only, but the word chastity is meant also to pertain of free married women[71], this latter sense is consistent with the context of this verse: "If any of you have not the means wherewith to wed free believing women, they may wed believing girls from among those whom your right hands possess: And Allah hath full knowledge about your faith. Ye are one from another: Wed them with the leave of their owners, and give them their dowers, according to what is reasonable: They should be chaste, not lustful, nor taking paramours: when they are taken in wedlock, if they fall into shame, their punishment is half that for free women. This (permission) is for those among you who fear sin; but it is better for you that ye practice self-restraint. And Allah is Oft-forgiving, Most Merciful", and the meaning reported by commentators is that for this verse "If any of you have not the means wherewith to wed free believing women .." (i.e. free Muslim women) "they may wed believing girls from among those whom your right hands possess" (i.e. bondmaid women) and so, If guarding (i.e. married)", if they fall into shame, their punishment is half that for free women (i.e. free Muslim women)[72].

We conclude from all the mentioned above arguments, that the verse in Surat Al-Nur: The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes), it is rather spe-

cific to the free fornicators, and it the Sunnah of the prophet clarified who is peculiar to the hundred stripes, and it is exactly this meaning pointed out by Al-Shafi'i, as he sought that this verse should be applied on all the free adulterers, and some of them over others, referring to the Sunnah of the Messenger of Allah, whom is intended to be flogged a hundred stripes"[73].

Section III : Penalty in crime prostitute

The crime of aggression according to the ancient Islamic offset collocates for the word (political crime) in the modern legal term, because the aggressor as defined and sought by scholars' traditions is (the person who deflects from obeying the imam of the right)[74].

Actually, It is noted that referring to aggression as "crime" implies transgressing the limits, because aggressors divert from the Imam's interpretation by coming out with another interpretation that they believe is possible, but they are, in fact, wrong. Thus, with such an interpretation they seem to have some kind of excuse. For this reason, Al-Shafi'i said: "For us, aggression is not meant for insulting and the terms disobedience and diversion are applied on those who are unqualified for discretion, or whose interpretation is unreliable or those who have an absolutely wrong interpretation"[75]. It is also determined within the canonical law of Islam that fighting aggressors implies detaining them and warding off their evil and not killing them. If possible, achieving this aim just through conversation would be better than fight as, the latter, brings damage on all Muslims[76].Indeed, God said: (And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah ...[77]), and so, God, the exalted, said: (then fight against the one that oppresses until it returns to the ordinance of Allah).

The scholars' opinions Varied about the definition of aggression, it is according to the Hanafi: "Aggressors are Outlaws prostitutes who fought against the right imam unlawfully; if they were right, they could not be aggressors (Bughah)[78]"

And al-Hanabila said: "Aggressors are people belonging to those who follow the right path, they get out of the Imam's control and aim to overthrow him on the basis of an acceptable interpretation. As they have defenders, the Imam needs to gather the army in order to detain them"[79]. And al-Malikia said: "aggressors are a band, that is to mean a sect, of Muslims who refuse to follow the Imam whose leadership was proved by agreement in order to prevent a right -of God or man-or to overthrow al-Imam"[80], al-Shafeia said that aggressors are: "those who disagree with al-Imam by means of diversion and disobedience, or prevention of a right_ like zakat [charity] or had [punishment] or speech_ [a right that they would acknowledge] on the condition that they have the upper hand on people, have an interpretation, and supporters" [81].

As such, if we look into all these definitions, we find out that the Imam of Muslims or the president in our modern concept is the one subjected to aggression. That is to say, he is the one around whom Muslims in any country gather. In fact, if al-Imam had referred to the person around whom all Muslims gather, his benefits would have diminished" [82].

Based on this, it can be said that the term aggression- in the conception of the four creeds- refers to the act of disobedience committed by a group of Muslims against the imam of the people of Justice on the basis of an acceptable interpretation. At the same time, they should be in a position of power or have immunity that makes it possible for them to resist al-Imam or the guide of Muslims.

On the basis of such a concept, we can conclude:

1- The crime of aggression is not committed by non-Muslims. Also, it is not committed by an individual or a small band as these could not be deemed aggressors. This means that if they commit crimes, they would not be treated differently from ordinary criminals even if they claimed to be able to interpret[83], and this is the mostly held opinion in jurisprudence, because treating those who belong to small bands as aggressors would result in the loss of souls and money[84]. In addition, this perception goes along with the jurists'stipulation that diversion from al-Imam should be performed by a majority[85]. Therefore, the aggressors should have immunity and should be in a position of power. Indeed, there is no immunity for an individual or a small band[86].

This is justified be by the words of Imam Ali (may Allah be pleased with him) whenhe was injured by ibn Muljam: "[...] treat him well. If I live, I will decide on what to do with him. I may forgive him or enforce the judgment of Allah. If I die, I want you to enforce qisas, take only his life for my life. Refrain yourselves from damaging his corpse[87].

2- Likewise, laws concerning aggressors are not applicable to the dissenters who do not come up with an interpretation that arouses suspicion. These too are censured for the crimes they commit as normal crimes whether or not their dissension was based on immunity and majority[88].

cAl-Shafia consider that the interpretation which arouses suspicion is the interpretation that has a presumptive meaning for the group of Muslims. Yet, for the aggressors this interpretation is right. On the basis of this interpretation they believe that their dissension and refrain from doing their duty are permissible[89].

This is close to the view of al-Dahiria who classifies the aggressors into two groups: a group that is not pardoned for its interpretation, and a group that is pardoned. Then, those who interpret with the aim of obliterating anything in the Sunna [the speech of the prophet (peace be upon him) and the practices of Islam] like abrogating the performance of the Sunna that is proved to be the practice of

the prophet (peace be upon him); these have no excuse as their interpretation is corrupt and they are judged as if they have diverted from what is agreed upon and with no interpretation at all. The other group, however, -the group that is excused for its interpretation-consists of those who come up with an interpretation that is illegible for many scholars. They are like those who cling to a verse which was better clarified by another [verse] or they cling to a Hadith [the speech of the prophet (peace be upon him)] that was [either] clarified or abrogated by another. So, these are excused and they are judged like the legist that makes wrong interpretation, and then, he is killed or his interpretations are put down[90].

3- Also, laws concerning aggressors are not applicable to the dissenters who are not in a position of power or do not have immunity through which they can resist the established power. In the view of al-Hanabila, the dissenters are proved to be immune when their resistance necessitates resorting to army[91], and we are inclined to the view of al-Shafia which consists that the dissenters could be proved immune if they are in a position of power because of their number or strength so that it becomes difficult to capture them without the government's resistance. In addition, they should be subjected to the rule of a person whose decision determines their actions even if they do not have an Imam[92].

Concerning the punishment exerted on the aggressors, what has been agreed upon is that mere disagreement with the guide of Muslims or the president does not require fighting or punishing those who disagree: if the aggressors do not go with their own creed to the extent of disobeying the president, and if they have sought seclusion in a specific place (meaning they have gathered in it), and if their seclusion was not aimed at fighting the people of justice[93], and if they did not abstain from doing what is right and did not recline to disobedience_ they would be left alone and would be subjected to the laws of the people of justice in terms of their rights and duties[94].

Yet, if the aggressors make use of their own creed in order to disobey al-Imam or the president, al-Imam would clarify for them how their creed is corrupt so that they would repent and return to the right creed and agree with the group of Muslims, and he could rebuke and censure those who seek corruption without going beyond reprimand to killing as they do not commit crimes that require Hadd or quisas.Yet, if the aggressors make use of their own creed in order to disobey al-Imam or the president, al-Imam would clarify for them how their creed is corrupt so that they would repent and return to the right creed and agree with the group of Muslims, and he could rebuke and censure those who seek corruption without going beyond reprimand to killing as they do not commit crimes that require Hadd or quisas and the identity of the criminal should be identified so that he would take his punishment. This is the view of Abu Hanifa, al-Shafei, and the group of jurists. In addition, this is what have been narrated from Omar Ibn Abdil Aziz (may God be pleased with him)[95], on the basis of this, if the aggressors commit that do not require punishment or quasas, reprimanding or forgiving

them would be apt to the president because they committed a sin whose punishment is unspecified. We could mention what have been reported about a band that were insulting al-Khalifa [president] Ali (may God be pleased with him) in the mosque of kufah, and one of them was saying I promise God that I will kill him. So, he captured him and brought him to Ali who released him and said to the one who captured him: am I going to kill him while he did not attempt to kill me, [the addressee] said: then, he insulted you. So, he said (may God honor him): then, insult him if you want or release him[96]. As such, the aggressor should not be killed unless he starts fighting or defending himself, and if he was not an aggressor defending himself, killing him would be forbidden, which means killing him out of reprimand would not be permitted.

It is obvious to us, from what is advanced, that the crime of aggression in Islam is an issue that has a political feature as long as the dissension which is out of aggression is but "the dissension from the president" or from "the political system" in the country. As such, aggression is synonymous with "political crime" in modern criminal jurisprudence. Yet, there is an essential characteristic that distinguishes political maneuvering in political crime. In fact, in aggression, political maneuvering always starts from a corruption in conception. Indeed, aggression is a dissension from the guide of Muslims by means of a corrupt interpretation because it includes the evidence (of conviction) in a self-reflexive way. That is why, Islam's perception and judgment of "aggression" has been determined by two things:

1- If aggression was restricted to being merely "a negative attitude" on the part of the governor or the state apparatus, aggression would be dealt with as "an ideological opposition" and the aggressors would be left alone if they refused to return to the right path and join the people of justice.

2- However, if the aggressors' doctrinal position was associated with crimes that necessitate punishment or quasas or reprimand - it was for the state to intervene to ward off corruption; they would be punished for the crimes they commit as ordinary crimes. And for us to note how close the criminal thought in his treatment of political criminals to Islamic jurisprudence in its treatment of the aggressors in terms of looking at the means of expressing corrupt opinion or belief as the basis for punitive treatment in political criminality.

Section IV : Death Penalty in Discretionary Crimes

We have already pointed out that if the penalty was already mentioned in the Islamic law, we would be dealing with a punishment that pertains to prescribed penalties or Qisas. In fact, these penalties are fixed and there is no way to adjust them either by addition or omission.

If the penalty was just prescribed - without estimation - we would be dealing with one of the discretionary penalties. Jurists agree that discretion is justified in every sin that has neither prescribed

penalty nor expiation[97], such as a stealing that does not necessitate punishment, and do not require much, and enjoying a foreign woman that does not necessitate punishment, forgery, perjury, and unjust beating,and other transgressions for which the law-giver did not find out a prescribed penalty, and it is - meaning discretion - delegated to the opinion of the governor or the judge as he deems beneficial in context (in terms of time and place), and he would take into account when determining the kind and extent [of discretion] the situation of the guilty person and the crime that he had committed, because the purpose of it is "to make the guilty person abstain from bad deeds so that they would not be part of his personality and, therefore, he would commit hideous blunders and would be drawn to what is much more obscene"[98].

Originally discretion is a measure aimed at facing the crimes that are less serious than those of the prescribed penalties and quasas, and this is done through preventing the guilty person from falling in the shafts of crime, it is notable that most of the definitions given by jurists for discretion associate it with "discipline" and then there must not be - going back to origin - killing or cutting[99].

What most distinguishes the prescribed penalties and quisas from discretion, is that the former are unchangeable by time and place, as they protect the fixed values that are not subject to change from time to time and from place to place, while the latter changes according to the requirements of time and place, and its flexibility allows for facing any act that legal interest requires it to be bound by punishment at a specific time or in a specific place[100].

And the legitimacy of discretion is fixed in the Quran and Sunnah and the consensus:

1- In the book, the Exalted says: ... But those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them...[101].

2- From the Sunna that a man from Muzainah came to the Messenger of God (peace be upon him) and said:'O Messenger of Allah, what do you think about a sheep stolen from the pasture?" He said: "(The thief must pay) double and be punished. There is no cutting off of the hand for (stealing) livestock, except what which has been put in the pen, if its value is equal to that of a shield, in which case the (thief's) hand is to be cut off. If its value is not equal to that of a shield, then he should be paying a penalty of twice its value and be flogged as a punishment."[102]

3- Concerning the consensus, the nation has agreed upon its legitimacy when dealing with every sin that has no prescribed penalty or expiation[103].

It is clear that resorting to discretion has been stated in the Quran and Sunnah, without determining its extension, which makes it possible that the discretion penalty extends from being moderate to being strict and that is according to the interest, and the type of crime and the situation of the guilty person. Jurists did not agree on the minimum of discretion penalty if it was of the type of three flogs, and

others insisted on the inadequacy [of these flogs] if the assault was against one of the rights of individuals, but such views were not acceptable for most jurists since determining the minimum of discretion penalty is meaningless if the aim behind it -which is abstaining from bad deeds- without it. If the minimum of discretion penalty did not raise problem or real controversy in jurisprudence, its maximum that was of the kind of beating or imprisoning - has sparked controversy, and the jurists' views in this subject were diverse.

As for the way discretion penalty reaches the extent of execution, it is a subject of most controversy and disagreement among jurists as execution represents the utmost punishment that can be imposed for a crime which does not require prescribed punishment or Qasas.

We knew that discretionary penalties are applicable only to those crimes that do not have prescribed penalties, but they require punishment even if they were not mentioned, hence, the guide of Muslims or the judge would have the delegation that allows him to estimate the appropriate punishment for such crimes, and this right given to the judge which enables him to find out discretionary penalty is but a precedent in appropriate discretionary work in two ways:

1. Be achieve the interest in punishment, it is of two types:
   a- Discipline the offender so that he would be redeemed.
   b- Preventing all people from imitating the guilty person in his crimes

2. Taking into consideration that the penalty should be suitable to the situation the guilty person and to the circumstances of the crime.

It can be said that these general restrictions -when taken into consideration-draw the extension that discretionary penalty could reach; with its moderate and strict sides, it goes along with what achieves the above objectives, and then we can say that discretionary penalty- when seen in the context of the idea of ??interest and justice - It may amount to eradication.

That is why al-Hanafia went to the possibility of discretionary execution, where he uses the footnote of Ibn Abidin, which was reported from Hafiz Ibn Taymiyyah: " one of the basics of al-Hanafia that if [the crimes] which do not require killing, such as retribution killing and undone sexual intercourse, are repeated, then, al- imam can kill the perpetrator, as well as he can exaggerate [in punishment] if he saw interest in it, and they deem what has been reported from the Prophet, peace be upon him and his companions concerning the act of killing as punishment in such crimes as the requirement for interest or what they call (killing is politics) as if its outcome is that [the Imam] can resort to killing as a discretionary penalty in the case of the crimes which aggravate with repetition; in such crimes killing is legitimate, for this reason, many contended that anyone who over insults the Prophet (peace be upon him) among the people with whom there is a treaty should be killed even if he had

converted to Islam after being charged, and they said his killing is a matter of politics, accordingly, we can mention that the Imam of Muslims has the right to kill the robber as a matter of politics if such a deed was repeated, and that who has been repeating the act of strangling people should be killed as a matter of politics since he sought corruption, and warding off the evil of anyone who acts in the same way could be achieved through killing, and if the wizard or the non-believer was charged before repentance, and then, he repented, his repentance is not taken into consideration. If he was charged after [repenting], his repentance is taken into consideration and repentance in the case of strangling is not taken into consideration[104].

It is taken from this that al-Hanafia deem possible the fact that discretionary penalty extends to execution in the crimes which are aggravated by repetition, killing was legitimized in such crimes, and if [execution] ineffective as it does not lead to the redemption or deterrence of the criminals, there should be another penalty which less than execution.

Likewise, some of al-Shafia view that the one who calls for heresy and results in dissention within the group of Muslims is called to repentance; either he repents or else he would be killed[105].

However, al-Melikia perceives that to reach the extent of execution, discretionary penalty is not conditioned by the repetition of the crime on the part of the criminal. In fact, it is enough that the crime is grave in itself-such as the crime of spying for enemies-if the interest requires executing the criminal, this opinion was held by Ahmad's companions and was chosen by Ibn Akil [106].

However, concerning those who deemed that discretionary penalty should not reach the extent of execution in the case of the crimes for which there is no prescription of punishment or Qasas, they upheld to what have been reported from the Prophet(peace be upon him) -which was narrated by Ibn Masoud and Aicha (may Gad be pleased with her) and others-that He said : (It is not permissible to spill the blood of a Muslim except in three [instances]: the married person who commits adultery, a life for a life, and the one who forsakes his religion and separates from the community)[107].

However, there were reports from Prophet peace be upon him that confirm the possibility of resorting to execution as a discretionary penalty, amongst that his ordering peace be upon him to kill the drunker who drinks for the fourth time[108], and His statement peace be upon him: (Whoever you find doing as the people of Lot did (i.e. homosexuality), kill the one who does it and the one to whom it is done)[109], and His statement peace be upon him: (and if you find anyone having sexual intercourse with animal, kill him and kill the animal)[110].

It can be concluded - in the light of the foregoing statements - to the need to look at the discretionary penalty and the possibility of its reaching the extent of the fairly punishment of genocide by the following:

1- Discretion could extent to execution, provided that this act would not expand to reinforcing exe-

cution as a discretionary penalty, meaning that the issue is based on a permission that is extremely restricted[111].

2- That there is a cultural justification for the reaching of discretionary penalty the extent of execution, because the communities which are in the process of evolution are exposed to emerging interests that require protection, so that the abuse of such new interests, represents new forms of crime to which the legist determines a penalty that was not prescribed , so the task of the rulers is to assess penalties for these new crimes which go along with their severity on these interests, and this means that discretion is a legislative safety valve through which society could protect the emerging interests on which the assault had not prescribed punishment.

Article two :

Historical development of war crimes in international criminal justice

The international criminal justice has gone through different historical stages since antiquity that began from and evolved with the development of communities firstly till they reached the stage of building empires and states, and witnessed the conflicts and atrocious wars that targeted the human being, and his rights, and his property, and the period witnessed the emergence of courts and arbitration committees to resolve disputes between states, but they were limited and on a small scale. Some researchers in international criminal law had gone to the conception that the first applications of the international criminal judiciary go back to ancient Egyptian history on which concerned the act of exclusion on the year 1286 B.C[112] And (Nebuchadnezzar), king of Babylon has conducted trial against (Cydizias) the defeated King of Yoda, where trials took place in Sicily before the fifth century[113]. As recent days of medieval ages knew, under the influence of the teachings of Christianity, the idea of ??signing criminal sanction on war crimes handled by independent courts, and ?Alberico Gentili,?Francisco de Vitoria?and?Hugo Grotius were considered to be the "fathers of international law" as they pointed out to the existence of an international judicial authority subsidiary of the victorious nations aimed at prosecuting the defeated nations for the damage they had caused[114].

In the modern history, an international court was held and Switzerland participated in its creation in 1474, to consider the issue of (Sire Pierre de Hagenbach), who was the archduke of Austria at that time and suffered from a financial hardship that forced him to give up his property located in the territory of (Bourgogne), and that was when he began launching attacks and brutal raids on neighboring countries and cities that surrendered to him temporarily.Then, France, Austria and the Union of Swiss cities and young princes inhabiting the top of the Rhine established alliance among themselves and were able to capture (Hagenbach) on 4^{th} November, 1474 AC, and it did not take a month until he brought to trial before an unusual Supreme Court which involved some judges from Switzerland,

which ended after many deliberations to sentence him to death[115].

After the French Revolution and the spread of its ideas in the countries of Europe, especially the principles of liberty, fraternity and equality, and the way dealt with to lead to the freedom of people to determine their destiny, in this period, the idea of legalization of Peoples Act has emerged and Napoleon Bonaparte grabbed this idea and assigned the committee, that has developed the civil law in 1810, an delegated to it the mission of developing a project for the law of the people, [a project that the committee] rushed to accomplish in the same year, and Napoleon?s primary goal was the re-formation of the empire of Charlemagne in Europe, especially after failing to subdue the East, and after the down fall of his French Campaign on[116].

Napoleon entered into the successive wars against different countries (England, Austria, Prussia, and Russia), and the kings and leaders of those countries felt the great danger posed by Napoleon on their countries, so, they made an alliance against the French armies which led to its downfall, then, Napoleon retreated and fell Paris fell down and was invaded by the allies on the 31st Mars, 1814, and we see here that the allies did not call for the execution of Napoleon and decided to retain him as a prisoner with some measures and the reason for this is the absence of a criminal international basis that exerts penalty on those responsible for the crimes of assault, as well as the absence of an international criminal court to consider the case for such a crime so that the accused person would be brought before it in order to be judged and punished.

Perhaps the first to call for the establishment of international criminal judiciary and organizing it is Swiss jurist Moynnior, as he proposed in 1872 to organize an international judiciary to punish the crimes committed against the people, and called for the establishment of a court composed of five judges, two of whom are delegated the role of knowing the belligerents and the remaining three are appoints by the neutral countries, but this proposal was not accepted by states which considered at the time that the national judiciary is responsible for handling these crimes, and then the Swiss jurist resubmitted his proposal which was rejected again in front of the Institute of international law at its session that was held in Cambridge, and [this proposal comprised] an evolution as he demanded that the proposed international court should be specified in investigation and interrogation along with the trial, and, again, his proposal did not meet success, but the idea itself was an echo at the international level[117].

In 1907, the twelfth Convention of Lahay included a text about establishing an international court that tackles the issue concerning the capture of a ship by another one that pertaining to another country , but this attempt failed despite its narrow scope[118].

In this article, we will tackle the following three topics:

Topic 1: Trials in the era of the League of Nations, the period after the First World War

Topic 2: The trials in the era of the United Nations Organization, the period after World War II.

Topic 3: Trials in the era of the UN Security Council, the period after the Cold War.

Topic 1: Trials in the era of the League of Nations, the period after the First World War

After the end of the First World War proposed the accountability committee, which was established by the preliminary peace conference on 25^{th} January, 1919, proposed that these war criminals be tried before an independent international court, but the American and Japanese delegations strongly opposed that proposal, and amended the proposal in the Treaty of Versailles to the establishment of a tribunal of the allies for the trial of Guillaume II, the former Emperor of Germany, as well as war criminals whose crimes were acted upon the citizens of several countries, but the court was not established and none was tried before it. This is explained by the fact that the international circumstances in early 1914 were alarming with serious danger, as Europe was divided into two camps: the first includes Germany, Austria, Italy, and the second consisting of France, Tsarist Russia, but England was not bound to a specific camp, rather it was monitoring the situation closely and taking the decisions that achieve its interests and ambitions,and concerning the rest of the European countries, some of them were in a situation of an acknowledged neutrality ; they included Switzerland, Belgium, Luxembourg and the other countries were inclined to one of the camps without being bound by a treaty. In the aftermath of the First World War the United States exchanged views with England on the establishment of an international organization, they agreed upon forming a "joint committee" to study the issue and develop a draft when the Commission had finished its work, it called on States to a general conference in April 1919 to discuss and express opinion. So, the nations represented at the conference confirmed the proposed project through the establishment of the international organization that was called the (League of Nations) and its covenant or charter has become effective in 1920.

It was agreed on considering the official headquarter in Geneva, as Switzerland is a neutral country, and the aim behind its establishment was to keep peace and develop international cooperation[119].

The Charter of the League of Nations included a number of provisions that limit the freedom of resorting to fighting, and calls for questioning anyone who initiates it without resorting to peaceful means as exposing the subject on the international courts, also it included a number of sanctions that the League imposes on the country, which disturbs the prescribed rules, to sign. These sanctions were restricted to expulsion from the league, economic boycott and criminal penalty[120].

In this article, we are going to tackle three topics, as follows:

Theme 1: Trials of Emperor of Germany (Guillaume II) 1919

Theme 2: Trials of War Criminals in Leipzig 1923

Theme 3: The contribution of the Treaty of Versailles in the development of international criminal law

<u>Theme 1:</u> Trials of Emperor of Germany (Guillaume II) 1919

Events began with the assassination of Crown Prince of Austria in Hungary on 28^{th} June, 1914, in which the Government of Austria felt that the Serbian government is responsible for that crime and drew her a stern warning, followed by the declaration of war on 28 thJuly, 1914, exactly when Russia took care about Serbia, it has announced a general mobilization,which was objected to by the Emperor of Germany (Guillaume) because Russia did not heed his objection, the war was declared on the 1^{st} August, 1914, hence he took his armies creeps westward so it crossed the frontiers of Luxembourg and Belgium and declared war on France, which was an ally of Russia, and announced that Luxembourg and Belgium are joining to the French- Russian camp- due to crossing its frontiers - England, Italy, the United States and some other countries also joined the same camp. However, the Ottoman Empire joined Germany where it was an ally, and the war continued with its horrors for four or more years since hostilities ended on 11^{th} November, 1918 with the defeat of Germany and the Allied victory, but it have raised international public opinion, which demanded the punishment of war criminals and both collaborators in front of an international criminal court and the return of peace to the international community.

For that reason, in the meeting of the Preliminary Peace Conference which was held on the 25^{th} January, 1919, a committee dubbed (committee of responsibilities), submitted its report to the conference, which ended with the conclusion of the peace treaty in the French city of Versailles with Germany on the 28^{th} June of the same year (1919).

The majority of the Committee of responsibilities have suggested to create a supreme international court consisting of 22 judges appointed by three for each of the five allied countries (United States, Britain, France, Italy, Japan) and one for each of the States, namely: (Belgium, Bologna , Greece, Portugal, Romania, Serbia, Czechoslovakia). This court can be divided into departments, each composed of at least five judges, and the proposal included determining the court's jurisdiction and the principles, the trial procedures and obligations of States in this regard.

It is noted that after the defeat of Germany militarily, it sought from US President Wilson to mediate in the conciliation but he stipulated to abdicate Emperor (Guillaume II) for the throne so he acquiesced and fled as a refugee to the Netherlands, and since the committee responsibilities have overlooked the issue of the responsibility of the emperor, the preliminary Peace Conference found it necessary to consult the dean of the Faculty of Law in Paris, Professor Larnaude and the jurist De Lapradelle, professor in the same college, about the criminal responsibility of Guillaume II, on one part, and the

extradition request on the second part, and the competent authority to try him on a third part and the applicable law. The two jurists provided a report on this matter to the Peace Conference stressed the responsibility of the emperor criminally responsible for the crime of provoking a declaration of war and war crimes that were committed, and counseled the authenticity and legality of demanding to extradite him as a war criminal, and called for the establishment of an international criminal court where the allied nations represent the neutral and tried before it war criminals.

The Peace Conference has taken into account the reservations of the United States and Japan[121] and the report of the two Frenchmen Jurists on the International Criminal Justice, the Versailles Peace Treaty signed on June 28, 1919 did not take into account the proposal to the Commission of the responsibilities to build an independent supreme international tribunal, whereas, Article 227 stated that the Convention provides " ...a special court established to try the accused (Emperor Guillaume II) with the necessary guarantees to ensure that it carries the right to defense and this court is made up of five judges are appointed by the five major countries." and for the other war criminals Article 229 of the same Convention stated that "...perpetrators of crimes against nationals of several countries, are tried in front of tribunals composed of members belonging to the military courts of the concerned States...".

This means that the International Tribunal established by the Treaty of Versailles Court is restricted in terms of its members, as these members are limited to the five Allied Powers only for the emperor and the countries where international crime occurred if it occurred on the nationals of more than one country.

However, in the practical application, international criminal courts with the former unrestricted profile has not been established, so Netherlands did not agree on the delivery of the Emperor (Guillaume II), and Germany did not accept the extradition of its nationals to be tried in front of the Allied Powers courts or before the International Tribunal.The refusal of Netherlands to deliver the Emperor was based on that Crimes against him are not mentioned among the crimes that may be recognized in accordance with Dutch law and the laws of the requesting countries. the Dutch law states in its fourth article "it ensures that all individuals on the ground in the region - regardless of their nationality - have equal rights with regard to the protection of their persons and their money ".Besides, there is no international criminal rules on its basis the Emperor should be tried meaning that there is no rules on which deciding that what was issued from him is considered to be a crime. So the emperor stayed in Netherlands, where a royal decree determining his place of residence was released until he died on June 4, 1941, and therefore there was no International Special Tribunal established to try him.

Theme 2: Trials of War Criminals in Leipzig 1923

Germany asked to prosecute its nationals before the Court of Germany and it put forward a proposal in this regard to the Preliminary Peace Conference which agreed on that retaining for themselves the right to request the extradition of these nationals in accordance with the provisions of (Article 228) of the peace treaty in cases where the results in trials before the German court does not sound just results, and based on that, a German law was issued to establish the Supreme Court in the imperial city of Leipzig for the consideration of felonies and misdemeanors committed by the German people, whether in Germany or abroad since the beginning of the First World War and until the 28^{th} June, 1919.

Trials of Leipzig did not begin until 1923, despite the fact that the committee charged with investigating the committed crimes during the First World War completed its work in 1919, which indicates a lack of seriousness in prosecuting the war criminals and violators of the laws and customs; this is on the temporal level. On a personal level, it did not provide an indictment except for (45), accused only, out of (854) accused received their names on the list that have been prepared by the Commission in 1919 and actually did not appear in court only (12) officers accused of breach of the laws of war and ranged provisions sentenced to between six months and four years and actually no one of them spent his sentence. Perhaps, behind this decline in international justice stood the trial to open a new page in the history of international relations between the allies on the one hand and Germany on the other hand as a way to lay the foundations for peace in Europe, especially since the League of Nations had already begun its work and managed to settle many disagreements that were threatening international peace and security and has been able to settle (Lithuanian - Polish) crises by peaceful means in 1921, and the Colombian conflict also the (Bulgarian - Greek) conflict on the frontier.

Theme 3: The contribution of the Treaty of Versailles in the development of international criminal law

The Preliminary peace conference held in 1919 resulted in the Treaty of Versailles, which included in Part VII, a bunch of texts that define the responsibility of the emperor of Germany (Guillaume II) for committing a number of crimes against peace and human security. The Treaty identified also the responsibility of senior German leaders for war crimes which its sectors reached a level that squandered all international conventions on the values ??and limitations contained on the rights of combatants and civilians and neutrals[122].

It should be noted that the treaty had included provisions for the establishment of an international

tribunal to try (Guillaume II) and senior German leaders for the crimes against them.

The text of (Article 227) of the Treaty came to decide "that the allied countries indict public to the emperor (Guillaume II) for committing a great insult against international morality, and against the Holy power of treaties, and a special court will be formed for the accused which will give him the fundamental guarantees to exercise the right to defend himself, and shall be composed of five judges each of the following countries (USA, Britain, France, Italy, Japan) appoints a judge from its citizens, and this court will base the exercise of their jurisdiction on the highest principles of politics among nations, and will pay attention to ensure the observance of the public obligations, duties and International ethics, and the court have the absolute right to determine the punishment, which sees applicable, and the allied countries and participants sent to the State of Netherlands a request to extradite the former Emperor to conduct a trial[123]. It is noted that the German delegation submitted a memorandum dated May 20, 1911 in which he objected the (Article 227) of the Treaty, and so on the ground that the court referred to "special court" exceptional charge of implementing the laws retroactively[124].

It involves a blatant waste of the principle of legality of offenses and penalties and the rule of non-retroactivity of criminal texts generated by it as well as the lack of historical precedent base. Allied delegations did not take this objection into consideration, and signing the Treaty of Versailles took place. It should be noted that the trial of the emperor (Guillaume II) was just a formality trial only, because it has not a legal nature, the evidence for that is that the allied governments sent to the Dutch government an official memorandum dated 16/1/1920 asking them to hand over for trial the former emperor. The memorandum included the following note:

"The allied and participating governments would like to make it clear that the accusation publicly directed to the former emperor, has no legal nature in terms of subject, but rather is intended to put him in front of a legal formality only, before a Court which give him his full rights to defense himself, " this saying shows that the trial will not be held in the intention to punish the Emperor, but it was intended to condemn the Emperor only politically.[125]

The answer of Netherlands arrived on 24/01/1920, and was negative. It has refused to hand over the Emperor depending on the opinion of the Dutch Professor (Simons), who argued that there is no responsibility upon himself according the Dutch legislation or extradition on Treaty between the Netherlands and some States requesting the delivery[126].

Actually, the Allied nations have tried to repeat the same demand from the Netherlands in February 15, 1920, but it increased determination to its advanced position.

It is noted that although the foregoing obstacles have prevented the actual applied to the perpetrators of international crimes, the Treaty of Versailles in the scope of international crime and international

criminal law virtues cannot be ignored or denied, and therefore, the importance of this treaty seems clear in the following facts:

First: it introduced for the first time in the history of international criminal law, the idea of "war crimes" that was mentioned in Article 228 of the Treaty (the German government recognizes the right of the allied countries and cooperating ones in bringing persons accused of committing violation of the laws and customs of war), which condemns explicitly crimes against "the laws and customs of war."

Second: It is acknowledged also for the first time the responsibility of the heads of States for policies that are contrary to the principles of the law of nations, and they were not asking before for their actions.

Third: It reconciled the rules of domestic law and the principles of international law, which was in the majority nothing but a set of unstable norms[127], and that was when it allowed the trial of perpetrators of crimes against the laws and customs of war which is an international crime that in front of national courts of the allied countries or in front of German courts, it is applied to them the penalties provided in the laws of these countries. Also, it decided that they should prosecute the perpetrators of international crimes against the citizens of allied countries before military courts for these countries, but if the victims belong to several nationalities, the trial should take place in front of one Court constituted from judges each one chosen by one state[128].

Fourth: It raised for the first time also the idea of individual accountability at the international level for their illegal actions.

Topic 2: Trials in the era of the United Nations Organization, the period after the Second World War

After the end of the Second World War, i.e. after the end of hostilities, it was signed in (REIMS) in 08/05/1945 to hand over Germany, then, on 05/06/1945 a statement includes the defeat of Germany and recognition of the governments of the United States, England, and France was released giving the right to the supreme authority to act.After this, the United States sent judge (Jackson)129, to negotiate with representatives of other countries on the idea of ??achieving the trial of war criminals.

After his return from England, France, and occupied Germany and gathered facts and information and listened to a number of prisoners and witnesses, he returned to his country and raise serious report to the President (Truman) in 06/06/1945 in which he explained the crimes committed by the Nazi leaders and organizations in general, and his conception of the International Tribunal which will try them and restrict the jurisdiction of this International Criminal Court to prosecute big war criminals whose crimes do not have a specific geographical placement, its composition and the procedures of trial before it.

At the Potsdam Conference (Russia) in the period from 17/07/1945 up to 02/08 for the year between (Truman, Stalin and Churchill) (Attlee replaced Churchill starting from 28/07 because of the fall of the latter in the elections),in which Chapter IV of the agreement reached by the presidents in this conference was allocated for the trial of war criminals and saying that the three governments had taken note of the controversy about the views that have occurred in recent weeks in London between Britain, America and France representatives to reach agreement on the ways of trial of the major war criminals for their crimes that have no particular geographical place. These three governments reaffirm their intention to apply real and quick justice to those criminals.

The events of the World War II were as a rock that crashed (the League of Nations) which revealed its serious weaknesses, and its inability to cope with the serious violations of the international system, and the lack of success in international peace and security keeping. The Allied Powers realized this fact during the war, it came in the Atlantic Charter signed in 14/8/1941 between (Roosevelt and Churchill) that presidents hope, after the elimination of Nazism, that all the nations will be able to get rid from fear and want, and be able to live with international peace and security, as it will ensure the organization of the new international plan after the end of hostilities. In the first of January 1942,representatives of twenty six countries met in Washington and issued a statement called (United Nations statement) stating that they will make efforts in order to reach a new international organization to ensure the restoration of international peace and security in the world, and in 30/10/1943, the famous

Moscow statement was issued and in one of the paragraphs came the expression of the desire of the representatives of the four countries to establish a public international body to replace the League of Nations.

The Conference of (Yalta) confirmed the resolve to invite nations to hold the San Francisco Conference and a preliminary conference was held for this purpose in (Dumbarton Oaks) in Washington at 17/10/1944 between Britain and the representatives of the United States, Russia and China and it ended with the development of a preliminary project for the establishment of a new international body, then States were invited to the conference in San Francisco held from 25/04 to 26/06/1945 to look at the project. Representatives of fifty countries attended this conference. In 26/06/1945, the fifty states approved on the Charter (of the United Nations) after the introduction of some amendments to the draft of (Dumbarton Oaks), and entered into force on 24/10/1945[130].

In this topic, we will discuss three requirements as follow:

Theme 1: The Nuremberg International Military Tribunal in 1945

Theme 2: International Military Tribunal for the Far East in Tokyo in 1946

Theme 3: The contribution of the Tribunals of Nuremberg and Tokyo in the development of international criminal Law

Theme 1: The Nuremberg International Military Tribunal in 1945

On November 20, 1945, the International Military Tribunal in Nuremberg was formed, which became known as (Nuremberg), and has taken upon itself the trial of war criminals, especially the Nazi leaders, who were mentioned in the Moscow Declaration signed by (Winston Churchill, Theodore Roosevelt, and Stalin), in 1943. The General (MacArthur), being the Supreme Commander of the Allied forces in the Pacific region, was the one who announced the establishment of this court[131].

In 1943, he met the three poles of the major allies listed above (the United States, Soviet Union, Britain) in the Iranian capital Tehran, the presidents at this summit decided to punish the responsible for war crimes during World War II, and by the end of the war, (200) of German Nazi Party leaders were put on trial in Nuremberg tribunal and (1600) others in unusual military trials from outside Nuremberg. The leaders of the three allies provided the Court by a Prime judge and another alternative one (Deputy), and a General Attorney, and it is worth mentioning that France was able to reserve a chair for a French judge to become the number of judges four instead of three.

However, in terms of the legitimacy of the court, the accused by crimes in the World War II have not the right to select judges, which made many doubt the integrity and fairness of the trials, especially

as the judges present in the court came from countries affected grossly at the hands of the accused Nazis, and perhaps the mandate of Russian judge (Nikichenko)[132] by the Soviet Union gave a negative aspect in the integrity and fairness of trials, so the accused have not an available staff of lawyers to be responsible for their defense, as the judges drafted a series of accusations that are not based on any legal controls for any of the four countries participating in the trials, and has prepared a list of (24) accused convicted by preparing for the crimes: (conspiracy, crimes against peace, war crimes, and crimes against humanity), sentences were varying between death penalty for (12) accused and life imprisonment for (3) of them and prison between 10 to 20 years for (4) of them, each according to the charges against him and the evidence on the implementation of one of the above-mentioned crimes[133], note that the majority of the defendants confessed to the crimes against them despite their claim that they follow higher authorities orders. Executions were carried out in October 16, 1946 and after the completion of the hanging of ten of them because of the suicide of one and the loss of the other, the bodies were burned and the ashes were put in the Acer river, however, the convicted by prison have been placed in the prison of (Spandau) in Berlin.

This Court came after the Article I of the London agreement stated that "an international military tribunal should be created - after consultation with the Supervisory Board in Germany - for the prosecution of war criminals who do not have specific geographic location for their crimes, whether as individuals or as members of organizations or bodies or qualified by these two together."

Article II of the Agreement stated also that the establishment of such a court and its jurisdiction and functions provided for in the Regulations annexed to the agreement and that those regulations are an integral part of it. The list of Nuremberg included (thirty) articles spread over seven sections: the formation of the court (Articles 1-5), Jurisdiction and some general principles (Articles 6-13), the Committee of the investigation and prosecution of major war criminals (articles 14-15), guarantees of a fair trial for the accused (Article 16), the court authorities and management of the trial (articles 17-25), sentencing (Articles 26 29), expenses (Article 30)[134].

After its formation, the court received the first indictment on 18/10/1945, and held its first meeting on 20/11/1945, and issued its verdict on September 30, and the first of October 1946.

This Court departments include: the court, and the public prosecution and investigation department, the administrative department, and the court is not valid unless attended by four judges, whether they are original or deputies, and this means that every state was able to disrupt the proceedings if it pulled its judge.

The (Article 22) of the Regulations of Nuremberg stated that Berlin should be the permanent headquarters of the Court, and it was stated in (Article 14) as well, that a commission of investigation and prosecution made up of a representative of each of the four should be established[135].

The Court's jurisdiction was specialized on crimes against peace, war crimes, and crimes against humanity, and it was specialized in the prosecution of natural persons and not moral persons, and identified that from natural persons only major war criminals should be tried on the grounds that their crimes are not specified in a particular province, but other than these criminals they should have trials in the States where they have committed their crimes.

The court can consider during the investigation on a claim against a member from an organization or body- on the occasion that every act the individual is responsible for it - that this body or organization that he belongs to is a criminal organization.

All the official documents submitted to the court and all court proceedings were in English, French, Russian, and the language of the accused, and it is allowed to translate the court proceedings to the language of the country in which the hearings are held, if the court considers that it do serve justice and contribute to enlighten public opinion.

In spite of the criticism directed at the Nuremberg trials, in particular, being a trial of the winner for the vanquished and the lack of impartiality among the judges, and that they do not include judges from neutral countries, and the lack of respect for traditional principles on which the criminal law is based, in spite of all that and more of it, these trials is a living embodiment of the idea of international criminal judiciary. For the first time in history, these countries succeed in the trial and punishment of war criminals who commit a war crime assault (this crime was considered a legitimate act during the nineteenth century), war crimes and crimes against humanity.

The trial was held without procrastination or delay, as the sanctions were carried out in the defendants sentenced without regard to their positions or formal qualities. There was no doubt that this was due to the insistence of the Allies and their cooperation to make it a success, but we must not forget that the Nuremberg Court was not a permanent court, but was a temporary court which finished its mandate in 01/10/1946, the date of the judgment it made.[136]

Theme 2: International Military Tribunal for the Far East in Tokyo in 1946

In December 1945, the Committee of the Middle East (CME) which is composed of eleven countries was established. This Committee was a political body, not an investigative one with the mission is the support of Japan's policy, coordinate and asserts cooperation between the allies in the Far East. The Committee has played an important role in providing political cover for allies to intervene in the actions to be undertaken by the International Military Tribunal for the Far East in the trial of persons suspected of having committed war crimes and crimes against humanity, and in the implementation

of sanctions against convicted or released persons.

General (MacArthur), the Supreme Commander of the Allied Forces at the time, was tasked the management of affairs concerning the occupation of Japan, and in 19/01/1946, the general assigned on the Far East established the International Military Tribunal for the Far East in Tokyo (IMTEF), but the establishment of the court was not under the international Convention as was the case with the International Military Court of Nuremberg, and what justifies that is the will of the Allies, especially the United States, that this court remain under the authority of the allied forces commander, and the removal of any ally, particularly the Soviet Union from the work of this court, and not to enable the access to files and information available there as well as the interference in the court proceedings.

In April 1946, the Committee of the Far East issued a political decision regarding the necessity to arrest war criminals in the Far East and try them, and implement sanctions against them so this decision was entrusted to (MacArthur). Being the Supreme Commander of the Allied Powers, he ordered the formation of a special department working under his chairmanship to consider on the war crime reports, investigate and collect evidence, examine and take action to arrest suspects. The General also announced the right in the selection of organizations and people who will be tried and the court which they will stand before[137], and it is worth mentioning that the participating members of the Committee of the Middle East and the International Military Court in Tokyo were chosen by the allied great powers, and each member representing his state, does not enjoy any autonomy in his work, and this of course led to politicize the work of the Committee and the Court, and have found that judges were acting in accordance with the political objectives commensurate with the interests of the state they represent, as well as the practice of (General MacArthur) of his influence on some other members, which led to the practice of justice selectively away from the realization of the right. The work of the Military Committee has been characterized by procedures marred by irregularities, and marked by numerous and serious violations of legal and proper so that the charge to some defendants based on political criteria, and has tried without taking into account the most basic principles of criminal justice with committing errors in the interpretation and application of the law against the other, as observed not to be subjected to the military allies who have committed war crimes for the accused and prosecuted. However, in what regards the implementation of sanctions, this procedure is subject to the will of (General Mac) and his political objectives, being the owner of absolute power to pardon and commutation of sentence and parole for war criminals convicted by the military court[138].

A list of the procedural regulation of the Tokyo court was released at the same day as the release of the Declaration in 19/01/1946, and it has been approved by (General Mac) where it was amended later based on his orders.

There is no fundamental difference between the list of Tokyo Court and the list of Nuremberg Court,

in terms of jurisdiction nor in terms of the conduct of the trial nor in terms of the principles upon which the accused is pursued nor in terms of the charges against the accused, but the difference is in the number of members of that court. Article II of the Rules of Court stated that (The court is made up of members numbering between six members at least and eleven members at the most, selected by the Supreme Commander of the Allied Powers based on a list of names provided by the signatories of the document delivered, India and the Philippines). This court consisted from eleven judges representing eleven countries, (ten), of which fought against Japan, namely: the United States, the Soviet Union, Britain, France, China, Australia, Canada, the Netherlands, New Zealand, the Philippines, and a neutral country which is India.

There is another difference between Nuremberg and Tokyo Courts where that judges of Tokyo Court are chosen by the Supreme Commander for the Allied Powers who appoints one of them on its head, contrary to what was the practice in Nuremberg, where the president was elected.

(Article VII) of the Regulations of the Tokyo Tribunal came to state that official position can be considered as a circumstance mitigating circumstances for punishment, while at the list of Nuremberg Court that position have no impact on the punishment.

The Tokyo tribunal also omitted the indictment report of crimes against humanity that have been committed, although they were committed in the Far East as committed in Europe.

Tokyo trials lasted from 19/04/1946 till 12/11/1948 meaning more than two years, and issued at the end a guilty verdict against (26), accused from the military and civilian with penalties close to the sanctions pronounced by the Nuremberg tribunal.

Because of the convergence between the two lists Nuremberg and Tokyo, the criticisms that have already forwarded to the Nuremberg trials serve as guide to Tokyo trials in terms of the Court's jurisdiction and the irresponsibility of individuals and lack of respect for the principle of legality of offenses and penalties, and in particular because they are the courts of the winner to the defeated.

We should not forget here that the Tokyo court is an international military temporary court and not a permanent court, and that its mandate was over in 11/12/1948, the date of the judgment, and this court and trials that took place in front of it and the sentences handed down are considered a realistic application of international criminal law added to the International community in this regard, and his success in the trial of the perpetrators of international crimes.

<u>Theme 3:</u> The contribution of the Tribunals of Nuremberg and Tokyo in the development of international criminal Law

The issue of the establishment of International Criminal Law and its development is closely linked to solving the core issues of modern international relations, namely, peacekeeping, human security and the prevention of acts of aggression and to prevent massive violations of fundamental rights and freedoms along with other issues that sour the international atmosphere today[139].

International conventions and treaties, can be considered, before others, the source of international criminal law primarily since it have contributed a lot to its evolution, the agreement on the establishment of the International Military Tribunal for the trial of German war criminals and the other for the trial of Japanese presidents war criminals, and its regulations and charters issued from them and issued to prepare a report of declaration of the governments of the Soviet Union , the United States, and Britain, released on 2 November 1943, about the responsibility of the Nazis for the brutal crimes committed against communities, are considered in fact the first international criminal laws procedural matters because they contained international documents including for the first time, elements of international crimes as well as arranged the detailed procedures to prosecute criminals and to consider suits to the offenses covered by the jurisdiction of the International Court circle and in particular the text of the Nuremberg International Military Tribunal of system elements for three categories of crimes that carried out the criminal liability of the natural persons namely: crimes against peace, war crimes, and crimes against humanity[140].

The International Jurists (A. Paul Torald, and Safynsky) were right when they wrote that, when assessing the development of international law in the area under discussion, they came to the right conclusion that the so-called (Nuremberg Code) i,e the set of rules for criminal responsibility for crimes against peace and humanity and war crimes, and on the basis of the Nuremberg principles that have been developed and updated in the Geneva Conventions about the protection of victims of war and in the Hague Convention of 1954 about the protection of cultural values in case of armed conflict as well as the two additional Optional Protocols(1 and 2) added to the Geneva Conventions of 1977 and the agreement on the fleeting of duration of time on war crimes and crimes against humanity for the 1968 and the Convention on Genocide and Racial Discrimination.

The evidence of the presence of international criminal law and development primarily is the United Nations General Assembly?s Resolution No. (95), which was adopted unanimously in 11 December 1946, which stressed that the Nuremberg principles are considered the principles of international law, and the International Law Commission ,the subordinate of the United Nations, formulated the principles of international law recognized in Nuremberg system of the government and discussed in

1950, a project of the material in this regard, and in accordance with Article (6) of the project (crimes against peace, and war crimes, constitute crimes under international law). Article (1) from the same project stipulates (that any person who commits a criminal act in terms of international law, has to bear responsibility for it and is subject to punishment).

The text of the project of the list of crimes against peace and human security prepared by the International Law Commission and by the General Assembly of the United Nations in 1954,stated that the crime against peace and human security are also considered a crime in terms of international law which punishes committed people, and we see that the Assembly did not submit objections to the principle of criminal liability of natural persons for international crimes and that these documents become a source of international criminal law.

The Convention on on the fleeting of duration of time to war criminals and crimes against humanity adopted by the General Assembly of the United Nations on November 26, 1968, (in its resolution No. 2391) another document interfering in Sources of International Criminal Law and its development.

The raise in the level of cooperation between the countries in the criminal prosecution of guilty persons from those who commit international crimes and included in international criminal law and punishment, would help to activate the struggle to fend off the most serious international crimes that violate human right and at the same time pose a significant development of international criminal law.

Topic 3: Trials in the era of the UN Security Council, the period of the post cold war

The Security Council is the most important United Nations' organs and is responsible for keeping international peace and security according to Chapter VII of the Charter of the United Nations, and the Council have legal authority over the governments of the Member States therefore its decisions are considered binding on Member States under Article IV of the Charter of the United Nations. The Council consists of (15) members, including five permanent members who have the right to veto and they are: the former Soviet Union, China, France, the United Kingdom, and the United States, while the other ten members are elected by the General Assembly to be non-permanent members in the Council for periods of two years. They numbered six members, then the number has been increased to ten in 1965 when modifying the Charter of the United Nations.

The Cold War is a term used to describe the conflict and tension and competition that existed between the United States and the Soviet Union and their allies from the mid-forties period until the early nineties, which ended with the arrival of the US president (George W. Bush) to power, and the collapse of the former Soviet Union in 1991, leaving the United States the sole superpower in a mono-polar world.

It is worth mentioning that after the end of the Nuremberg and Tokyo trials until early last decade of the twentieth century meaning, the period of the Cold War and beyond, no international criminal courts were originated and no trials held for defendants in international crimes, and this does not mean that there were no international crimes, but in this period by more than the forty years almost, many international crimes were committed, including the tripartite aggression against Egypt in 1956, and the War of 1967 launched by Israel against Egypt, Syria, Jordan, Palestine, and the war in October 1973 between Egypt and Syria, Iraq and Israel, the Vietnam War, the Korean war, and many wars in other regions of the world , and the Israeli invasion of Lebanon in 1978 - 1982, war crimes and crimes against humanity and crimes of genocide that Israel remains committing against the Palestinian people, starting with the massacre of Deir Yassin and Jenin, and Grapes of Wrath Operation and the massacre of Qana and many other crimes in many countries of the world, but we did not find from the international community any heeding nor a sense of justice, which would have required to refer the suspects of those crimes to the international criminal court, and the cries of the victims in these crimes did not move the feelings of the international community or, rather, the great powers, to demand the trial of the perpetrators of these crimes.

However, we found that these feelings have moved rapidly toward the tragic events that took place

in the former Yugoslavia in 1991, that the international community rose up and demanded to punish the perpet rators of international crimes in which it occurred and their trial before the international criminal court created for this purpose in 1993, by a resolution of the UN Security Council.

Then came the massacres and genocide committed against certain groups in Rwanda during internal conflicts that took place in one of the countries of the African continent, which also prompted the international community to punish the perpetrators of these crimes by creating an international criminal court in 1994, the Rwanda Tribunal. These Tribunals have a temporary structure and their function ends after the completion of the trial of the perpetrators of these crimes, then the International Criminal Court was formed in Sierra Leone in 2002 in order to prosecute the perpetrators of grave crimes committed against children, which was also a temporary court,while the rest of the international crimes that have occurred and continue to occur in more than one place in the world, which are no less brutal and cruel from its predecessors, are still waiting for the international community to prosecute the perpetrators in an International permanent Criminal Court, and this is what had been taken by the Rome Statute on the establishment of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Commissioners on July 17, 1998, in order to achieve criminal justice for all international crimes and their perpetrators which we will scrutinize in the second topic of the next third article, and so we will divide this topic into three themes, as follow:

Theme 1: The International Criminal Tribunal of the former Yugoslavia in 1993.

Theme2: The International Criminal Tribunal of Rwanda in 1994.

Theme3: The contribution of the tribunals of Yugoslavia and Rwanda in the evolution of international criminal law.

Theme 1: The International Criminal Tribunal of the former Yugoslavia in 1993.

Following the collapse of the republics of the former Yugoslavia and the disintegration of the Union since 1991, this union of republics sought to independence.

This collapse and disintegration began with the Declaration of Croats and Slovenians (the Muslims) their independence from Yugoslavia at 25/06/1991[141], and because the Republics of Serbia and Montenegro wanted to retain some form of union between the former republics of Yugoslavia, they did not welcome this announcement, and federal forces declared war on Croats and Slovenians, and agreements which were held in the (Bryony) on 07/07/1991 between the conflicting parties, did not succeed in the cessation of hostilities and in reaching an agreement in this regard, but the Declaration of Independence on 08/10/1991 was for sure, and the European Conference for Peace in Yugoslavia held in The Hague on 7/9/1991 , did not reach a solution to the conflict at the time. The armed conflict in the Republic of Bosnia and Herzegovina was at the beginning a dispute between multiple nationalities, especially among Serbs, Croats and Muslims, which has a character of civil or internal war, but it has evolved into an international conflict with the intervention of Serbia and Montenegro as well as the Bosnian Serbs, in addition to the intervention of other allies in subtle and covert ways to support the Serbs, such as Russia[142].

Because of the asymmetry in military power between the Serbs backed by the Serbian army (and the tip of a hidden Rossi) and between Croats and Muslims, non processors with weapons, the Serbs committed serious offenses which were considered international crimes, especially war crimes, crimes against humanity and genocide, they were wiped out villages and killed innocent and defenseless civilians , and committed the most egregious types of torture and inhumane treatment, arbitrary detention and the taking of hostages and the destruction of hospitals, ambulances and the mass rape of women, and the construction of camps for psychological humiliation and physical liquidation and burial in mass graves, and ethnic cleansing.

In spite of previous European efforts to halt this flagrant international law and criminal law violations, the Serbian attacks did not stop, prompting the Security Council to deal with this conflict, building on the Chapter VII of the Charter of the United Nations, so it issued at the first stage a decision on 25/9/1991, including a complete and general ban on sending all kinds of weapons and military equipments to Yugoslavia in order to achieve peace and stability in this dysfunctional state.

However the arms embargo did not apply to Muslims only without the Serbs and Croats military actions did not cease, so the Security Council issued a resolution on 15/12/1991, to send a small group from among its members some military who are considered the nucleus of the power of an international military protection formed - later on - by the decision No. (743) dated 21/03/1992.

As a consequence, the Security Council passed a resolution on 30/05/1992, condemning explicitly the Federal Yugoslav authorities (Serbia and Montenegro) and deciding at the same time the signing of strict sanctions against it as all parties demanding to immediately cease hostilities and inhumane acts committed in the former Yugoslavia region.

Based on a French initiative, the Security Council issued a decree No. (808) dated 22/02/1993 to establish an international criminal court to try persons accused of serious human rights violations in the territory of the former Yugoslavia since 1991.

Three months after, the Security Council passed a resolution No. (827) dated 25/05/1993, to approve the court system which includes (34) article.

This court consists of three departments: the Chambers, the General Prosecutor, and the Registry which assists both the Chambers and the Prosecutor, the Chambers are constituted by (11) independent judges belonging to different countries, and are elected by the General Assembly based on specific conditions, the election are held when the Secretary General of the United Nations invites all the member States of the International Organization as well as non-Member States which have permanent observer status at the United Nations headquarters to introduce who they want to nominate within the judges of the Court. However, the General Prosecutor and his staff, and the Registry shall be appointed by the President of the Security Council or the Secretary-General of the United Nations by conditions.

The Court's jurisdiction is over war crimes, genocide, and crimes against humanity. The Court prosecutes criminals of the former Yugoslavia war from only natural persons who have committed international crimes identified by the court system, and it is not specialized in the prosecution of legal persons such as countries, companies, associations and organizations, the spatial jurisdiction of the Court is determined by all the territories of the former Federal Republic of Yugoslavia, and besides, the Court shall have jurisdiction to crimes that fall within a specific period of time, its start is specified on the first of January 1991, but did not specify an end that it is left for the Security Council to decide upon it later on.

The jurisdiction of the consideration of crimes is not limited by the rules stipulated by the International Criminal Court only, National Courts also participate with them in this jurisdiction (Article 9/1), but the system gave priority to the proceedings of the International Criminal Court in the trial of war criminals in the former Yugoslavia.

The following observations are taken on this Court[143]:

1. They are based in their establishment to a decision of the Security Council and not to the international agreement or an international treaty, and that means it is considered one of the

Security Council devices and therefore had not sufficient independence and impartiality while conducting a judicial function.

2. The investigation held by the prosecutor and his discretion whether or not to refer the investigation to a judge of the Court, meaning in any prosecution of the accused, makes him an opponent and a judge at the same time as he combines the position of the public prosecutor and the investigator position.

3. That the International Criminal Court system leaves the trial in absentia unanswered, what is the authority of the court if the accused did not personally appear before that court?

4. The court system only provides for one sentence which is the one of imprisonment, and ruled out the rest of sanctions and, in particular, the death penalty.

5. The court system did not include any reference to the compensation paid to victims of international crimes, because it is not enough to refund the illegally seized funds because victims in these crimes were materially and morally damaged on which they deserve serious compensation.

6. The competent criminal court to try crimes committed in the former Yugoslavia temporary and specific scope of a temporary court in terms of time, place and crime and people go away they end their mission after it is best that a permanent international criminal court established to consider the international crimes that fall after its inception not be established after the occurrence of crimes being dealt with in particular.

Theme 2:The International Criminal Tribunal of Rwanda 1994

Rwandan crisis was due to the armed conflict where the judgment was in the hands of the Hutu tribe which broke out between government forces and RPF militias on the impact of not allowing the participation of all tribes in the system of government, particularly the Tutsi tribe.
Security in Rwanda has been affected because of this conflict, and its influence was spread to neighboring African countries. These countries began singly and through the Organization of African Unity (OAU), to mediate to reach for a solution between the conflicting parties and the cessation of hostilities which may lead to the destabilization of security in the African continent, and particularly in the neighboring countries. The African mediation ended with an agreement in the city (Arusha) Republic of Tanzania on 04/08/1993, whereby a cessation of hostilities and the sharing of power between the Hutu and Tutsi tribes took place.

This international community agreement was endorsed, whether by States or by the United Nations and the Security Council or by the bodies and other international organizations. Everybody rushed to provide humanitarian aid to thousands of refugees and displaced persons in Rwanda and abroad who have been forced to flee from armed hostilities. Despite this agreement, armed conflict continued on its pace and signs of implementation of its provisions did not appear on the horizon so the situation remains as it is until 06/04/1994. In this day, the plane carrying Rwandan president and Burundi was crashed near the city (Kigali), and the impact was the eruption of a heavy fighting between armed militias and the forces of the Rwandan Republican Guard before the dawn of 04/07/1994, which claimed the lives of a large number of leaders and ministers in addition to a large number of peace-keepers, and the greater number of civilian victims of the Hutu and Tutsi.

Because of the constitutional vacuum that emerged after these events, an interim government for the country was formed and constituted by the Hutu tribe, which led to the continuing acts of violence and ferocity intensified between the Hutu tribe backed by the government forces, and Tutsi.

In the wake of escalating violence as it was previously in Rwanda, the Security Council held two sessions during the month of April 1994 to discuss the Rwandan crisis and its developments, and during which, the President of the Council delivered two statements on behalf of the members of the Council through which he pointed out to the state of unrest and the resulting deaths of thousands of civilians, as well as members of the United Nations Mission exposure to attacks which resulted in the death and injury of many of them.

The President of the Council focused also on the serious violations of international humanitarian law, and recommended the need to provide everyone inciting the attacks or participating, to trial and be punished on the basis that killing members of an ethnic group with a view to eliminate them entirely or in part constitutes a crime punishable under international humanitarian law, and he requested from the Secretary General to submit proposals on the need to conduct an investigation into reports of serious violations of international humanitarian law during the conflict.

After that the Secretary-General submitted a report on the situation in Rwanda on 13/05/1994, the Security Council met and confirmed its previous resolutions, and referred to the two statements of the President of the Security Council. It also considered the report of the Secretary-General and condemned the continuing acts of violence in Rwanda, particularly the killing of civilians, and stressed the importance of (Arusha) agreement and the need to apply it, and expressed the Council dismay and displeasure of the occurrence of flagrant, organized, and wide-ranging violations of international humanitarian law in Rwanda, including: the attack on the right to life, the right to property and, in particular, killing members of ethnic groups in order to destroy in whole or in part, what constitutes a crime punishable under international law, and demanded to take some measures to alleviate the suffer-

ing of civilians and to avoid the spread of the threat to international security and peace to neighboring countries[144].

In 03/06/1994, Security Council passed a new resolution on the Rwandan crisis, in which it stressed on what is stated in its previous resolutions, and pointed out that the hostilities are still going on and that criminal acts continue to be committed, and it noted the important role played and the work of the Commission on Human Rights of Nations United[145], and he demanded a halt to the hostilities, and to refrain from incitement, violence and racial hatred especially through the media.

Previous and subsequent events have prompted the Security Council to pass a resolution that number (955) in 08/11/1994 approving the establishment of an international criminal tribunal for Rwanda on the basis of Chapter VII of the Charter of the United Nations, and the court's system has been attached to this decision[146].

The International Criminal Tribunal for Rwanda System includes (32) materials, in which the first article stipulates that this Court has jurisdiction to prosecute persons accused of serious acts against international humanitarian law on the Rwandan territory, as well as Rwandan citizens who committed such acts on the territory of neighboring states during the period between 01/01/1994 till 31/12/1994.

In (Article 10) of the court system, came the constitution of departments which is set forth in the former Yugoslavia tribunal, consisting of: circles, the Prosecutor, and the Registry. The election and appointment in it is in the same way as the former Yugoslavia tribunal.

In terms of jurisdiction it is noted that the specific jurisdiction is not identical between the two Tribunals where, for symmetry, they look at crimes of genocide and crimes against humanity, while differ in terms of jurisdiction over war crimes, as the jurisdiction of Rwandan Court is limited to some of the actions of all war crimes, namely violations, which are stipulated by the Common Third Article of the Geneva Conventions on 12/08/1949 on the protection of victims in time of war as well as in the Second Optional Protocol to these conventions on 08/06/1977.

(Article IV) of the Rwanda Tribunal system for example, has provided for such acts which are acts on people only but not money, as indicated in the former Yugoslavia court system. However, the personal jurisdiction is identical between the two Tribunals which shall not only be applicable to natural persons whatever their degree of contribution is and whatever their job situation is.

The spatial jurisdiction of the court covers Rwandan ground and air territory, as well as the territory of neighboring countries in case of grave breaches of international humanitarian law committed by citizens of Rwandan, and temporal competence specified from 01/01/1994 till 31/01/1994.

And the unrestricted or unexceptional competence for the Rwanda Tribunal is the same meaning for the former Yugoslavia court.

The International Criminal Court issued its first rulings in September 1998, and there were two judg-

ments through this month, the first judgment against the mayor of Taba City (Jean-Paul Akayesu) of his responsibility for the acts of sexual violence, torture and inhuman acts, and killings what can be described as crimes of genocide and crimes against humanity. He was found responsible for past crimes as a direct instigator to commit, and he was sentenced to life imprisonment; while the second rule in 04/09/1998 against (John Kambanda), the prime minister in Rwanda and he was sentenced to life imprisonment for committing acts of genocide, the conspiracy to commit it, direct instigation, and participation in the commission (murder, serious physical and psychological attacks on the people of the Tutsi tribe), and crimes against humanity (murder and deportation of civilians).

The International Criminal Tribunal of Rwanda continues to consider the crimes within its jurisdiction and looks into the responsibility of their perpetrators.

The same drawbacks that have already been sent to the former Yugoslavia court are also taken to this court as it was established by the Security Council and considered to be one of its subsidiary organs including the adverse effects of the consequences of this dependency on the criminal justice for the intervention of the international political factor during trials, and lack of sufficient independence of the organs of the Court and in particular the Attorney General, his staff and the rest of the court staff who are appointed by the President of the Security Council or the Secretary-General of the United Nations, as the case, and the State Prosecutor combines both (opponent prescription and referee prescription) at one time because he is the one in charge of the investigation and have a wide discretion in the indictment and prosecution.

In addition to administrative and financial problems faced by the Court and, in particular, the need for the presence of the accused person to court proceedings and not to the introduction of trial in absentia system, and despite of the trial of the Regulations of the Court to overcome this problem, it did not reach definitive solutions, as it is an attempt to stimulate the countries through a note or the arrest warrant and the international arrest issued by the court to assist the Court in the arrest of the fugitive and his extradition to stand before trial. The situation remained the same in the inability of the court to try the fugitive, which reduces the importance of this Court in deterrence and paralyze its ability to prosecute perpetrators not only of international crimes, but also the most dangerous and the worst of these crimes.

It is also taken on the Rwanda Tribunal that its jurisdiction does not extend to other crimes that fall after 31/01/1998, nor does it even cover the international crimes during the specified time period of its jurisdiction on crimes committed on the borders of neighboring Rwanda states on civilians who have been forced to flee in front of the horror of combat operations from non-Rwandan citizens, as they may be, who favors one side or another of the parties of the Rwandan conflict.

Whatever the case was, it was a private and a temporary court linked to the conditions of establish-

ment and jurisdiction of certain crimes and wiped out its mandate after the completion of its mission, and this critic in all respects the situation as it may not be from the standpoint of justice in general and criminal justice, in particular, the emergence of the Court to consider the crimes that occurred before its inception, and to determine its mission of certain international crimes occurred in a given period of time, leads to the lack of punishment of other international crimes that took place, and this is what makes the criminal justice a selective and biased justice.

Theme 3:The contribution of the Tribunals of the Former Yugoslavia and Rwanda in the development of international criminal law

It was known that for the former Yugoslavia Criminal Court has confirmed explicitly that the crime of aggression, war crimes and crimes against humanity attributed to Yugoslav President (Slobodan Milosevic) on the one hand, and in the judicial agreement with the Bosnian Serb leader (Radovan Karadzic) on the other hand, the reality of the matter is that all of crimes of genocide, crimes against humanity and war crimes have been brought out and attributed to a lot of military and political leaders of Serbs in that regard, as a result, in particular in the face of all of the General (Radislav Krstic),which is attributed to him of war crimes and crimes against humanity, and (Dusko Tadic) which is attributed to him as well as that of committing crimes of genocide in the massacres of (Srinicha)[147]. Formerly, Yugoslavia was the scene of the massacres committed by these criminals, as it has wiped out entire villages and killed large numbers of civilians, and committed acts of torture and inhuman transactions and destroyed hospitals. All of this pushed the Security Council to intervene to put limits for these brutal massacres and punish those responsible and it was decided to establish the International Criminal Court for the former Yugoslavia to punish criminals for all international crimes committed against the innocent citizens, and in order for this court to have its mark in the evolution of International Criminal Law.

In fact, the steady tribal discrimination followed by the systematic cleansing by the Hutu representative of the majority of the population of Rwanda in the face of Tutsi, increased pace particularly since the beginning of the nineties of the last century, when assuming the (Jean Kambanda) presidency of the Rwandan government, which ended by the Rwanda Tribunal convicting him of committing crimes against humanity and war crimes against the Tutsi, which was the same indictment issued as well to confront the Rwandan Hutu militia leader (Omar Sir Hajo), in addition to condemning (John Paul Ocazio) of incitement to commit genocide against the Tutsi, which led to the great conflict between the Hutu and Tutsi tribes and the occurrence of major clashes between armed militias and guard troops to the death of a large number of civilians. Individuals from the Tutsi tribe were collected

inside churches and hospitals in order to protect them from attacks, but they are slaughtered and eliminated by government forces, so came the intervention of the Security Council including the decision of the establishment of an international criminal court for Rwanda to punish all the responsible for international crimes committed against the Rwandan people.

International Tribunals for the former Yugoslavia and Rwanda have contributed to provide pressure to adjust the work of political leaders, with the development of the standards of individual responsibility in time of war. They developed the concept of international crimes, especially war crimes and crimes against humanity. They also prominently legalized international humanitarian law, regardless of the large contribution in international jurisprudence, that is, they were a major reason for the evolution of international criminal law, particularly for the countries in which the international crimes were committed against other countries, and the cradle of the success of these Tribunals, despite the criticism directed at them, and the way for the establishment of an international eradicate permanent criminal law and the formation of a permanent international criminal court because the temporary courts mentioned above, reflect the international situation which is still complaining about a serious shortage in the justice and integrity[148].

Article three:

International Criminal Law and Islamic Sharia and their outlook/ perception of death penalty

It is known that international criminal law is a branch of the Criminal Code which regulates the international character of national criminal problems, and therefore included in the scope of this law to determine the jurisdiction of the national criminal court for crimes committed in a foreign country and the applicable law, and determine the extradition rules, as well as the extent of possibility of the implementation of the criminal rule within the territory of the foreign state, and the limits of international cooperation in the fight against some of the crimes and the extent of adherence of states to international agreements of criminalization and punishment.

It should be noted that the criminal responsibility is of an utmost importance in the context of International Criminal Law. The contemporary jurisprudence of international law acknowledged the individual as a person of international law after that was the state the main person who represents the criminal responsibility. The First World War constituted an important turning point in the matter of the recognition of the legal personality of the individual for international crimes.

We note that the punishment in Islamic law play a secondary role in the fight against crime and the elimination of its causes in view of the role of the overall teachings of the Shariah of orders and prohibitions. These teachings provide the best conditions for the elimination of criminality inherent in the souls, as the man who believes that his God be rewarded for obedience, and punish him when sin, this man was closer to the performance of duties and leave of the sin[149].

In this article, we will discuss three topics as follow:

Topic 1: Evolution of war crimes and the concept of an International crime

Topic 2: International Criminal Court

Topic 3: Death penalty and its means of implementation in the Islamic Sharia and International Criminal Law

Topic 1: Evolution of war crimes and the concept of an International crime

The crime, whether internal or international, represents an aggression or an attack on interests protected by law, but in the field of internal crime, domestic criminal law shall protect interests and determines the elements of the crime and the penalties prescribed for the perpetrator. While in the field of international crime, the international criminal law shall protect interests and determines the elements of the crime and the penalties prescribed for them.

We will discuss this topic in four themes, as follows:

Theme 1: Definition of an International crime

Theme 2: Nature of international crime

Theme 3:International crime basis

Theme 4: Distinction between international crime and other crimes

Theme 1: Definition of an International crime

Whereas there is no standard conventional definition on International Crime among jurists and it does not have a provision in international law known as international crime in general150, but that did not prevent the scholars of public international law to contribute to the known international crime doctrinal definitions, and some that were said by some scholars of public international law, whether in the West or the Arab The contributions of the western Jurisprudence definition of international crime can be listed in the following two sections:

- Section 1: The contributions of the western Jurisprudence
- Section 2: The contributions of the Arab Jurisprudence

Section 1 The contributions of the western Jurisprudence

The Jurist (Pella) defines International Crime as: the act or the abstention which is punishable on behalf of the international community[151]. Thus, this definition takes a formal direction in the definition

of international crime, as it requires the ability to actually be what an international crime is, that this act has already been criminalized by the international community, and to apply the penalty and execution in the name of the international community, also notes that the jurist (Pella) see the obligation of taking with the introduction of the principle of dual criminal responsibility of the individual and the state for international Crime.

The Jurist (Glacier), however, defined the International Crime as: an act that commits a breach of the rules of international law to the detriment of the interests protected by the law with its recognition legally as a crime and its perpetrator as a criminal that should be punished[152].

It is clear from this definition that in order to an act to be actually an international crime, it is required to be disturbing for the international law and detrimental to its interests, as well as taking the principle of legality for the man who said "no crime and no punishment except by law", however, it was not required in this legitimacy to be written or contained in the text of the Convention and it remained customary international law, and (Glaser) took the principle of criminal liability of a natural person but not the moral persons[153].

And (Lombois) sees that the International Crime is: an aggression representing an essential interest of the international community which enjoys the protection of the international legal order by the rules of international criminal law, or is the actions that are contrary to the rules of international law for violating the interests that the international community has decided to protect with those rules.

It is also defined by (Plawski) as: representing an illegal act for individuals, punishable by international law for harming human relations in the international community[154].

Section 2 The contributions of the Arab Jurisprudence

The contributions and efforts to determine the thorny issue of the definition of international crime, were not confined to Western scholars of law only, but also there have been efforts by the Arab jurists to define the international crime and we will discuss some of these definitions:

Dr. Mahmoud Najib Hosni defined international crime as: (a wrong act issued in international law from considering a person with the will of the law, and connected in a particular way with the relationship between two or more States, and it has a particular signed punishment)[155].

Dr. Hassanein also defines the international crime as: (an involuntary wrong conduct issued by an individual in the name of state or by its encouragement or satisfaction about it, and it is tainted with prejudice to the interests of an international and legally protected)[156].

And defined by Dr. Abdul Wahid Alfar as: (it is nothing but an act or abstention, which is a grave breach of the provisions and principles of international law and prejudice to fundamental and human

interests of the international community and members of the human race, which requires international responsibility as well as the need to sign the criminal punishment for the perpetrator of that offense)[157].

And Dr. Hussein Omar defines it as: (a criminal incident punishable by international criminal law through an international criminal court for damaging the international peace and security of mankind)[158].

Dr. Mohiuddin Awad defines the international crime as: (each violation of international law whether prohibited by national law or approved by it, taking place by doing an act or not by an individual holding his freedom of choice (morally responsible) causing damage to individuals or to the international community at the request of the state or under its encouragement or satisfaction and the criminal penalty on it is possible in accordance with the provisions of that law)[159].

After reviewing all the previous definitions, we can see that the definition of D. Mohammed Mohiuddin Awad is characterized by comprehensiveness and is distant from mystery, as is every act issued by a reasonable person free in his choice, including a violation of one of the rules of international law, becomes an international crime whether the act is considered guilty in internal national law or not, it is thus taking the opinion that the rule of international law is high over domestic law.

He also considers the act as an international crime when there is damage, whether such damage is the result of an act or abstention alike, and is thus equalizing between positive and negative crime and covered in together, and the act is considered to be an international crime whether the victim is the international community as a whole or one of the countries or ethnic groups or religious groups or individuals as long as it their latest act may harm them.

<u>Theme 2:</u> Nature of international crime

whatever it is, the International crime is represented in the aggression against an interest protected by public international law, because of the resulting threat to international public order, or the damage to international peace and security, and therefore the International Crime is accompanied by a universal jurisdiction in punishment, which is the right of every state to arrest the perpetrator of an international crime to punish him without regard to the nationality of the perpetrator of the crime or where it was committed, and his trial before national courts, and the base in this that international crimes are subject to the principle of universal jurisdiction and universality of the right of punishment.

We can stop on the nature of international crime through the In terms of the magnitude of risk and criminal responsibility in the two following sections:

- Section 1: In terms of the magnitude of risk
- Section 2: In terms of criminal responsibility directed from it

Section 1 In terms of the magnitude of risk

It is well known that the international crime have a high degree of risk, because the international community, criminalize only the most grave of the acts that touch the important international interests or the humanitarian and cultural values that do not vary from one people to another[160].as Spiro Paulus[161] confirmed that the idea of the international crime is only applied on acts of private huge magnitude that would disrupt security and public order in the international community. Therefore, the gravity of the international crime is due in fact to the gravity of the interests that affect it, we find that international jurisprudence in its definition of the concept of international crime confirms and refers to the gravity element as one of the Landmarks of international crime from other crimes. The international community has tried to codify international crimes, and especially war crimes, because of what was left by those wars from brutality of the committed crimes, in order for perpetrators of those crimes not to escape from punishment.

So we find these attempts that have clearly emerged after the post-World War II in Nuremberg and Tokyo trials, where those two Tribunals highlighted the international character of the crime through the severity of the crime and its threat to people and money and the violation of the laws and customs of war, which must be committed to and adhered to during the war, despite what coincided with this stage of obstacles and difficulties which obstructed international crimes proceedings. We find also that the United Nations has made strenuous efforts till the adoption of the Rome Statute of 1998[162], which included the legalization of four international crimes[163], is the subject of attention of the international community which classify such crimes as being of great magnitude and seriousness for what it stands for, from violations directed against the Human peace and security.

Section 2 In terms of criminal responsibility directed from it

There is a disagreement in the international jurisprudence on the identification of the one in charge of international crime as previously mentioned when defining the international crime. The views of jurists about this, was divided into three doctrines:

The first doctrine[164]: that the state alone is responsible because it is the only person who commits the crime of international law and without it, the individual (any normal person) cannot commit an international crime, and it is inconceivable that a natural person is subject to two different laws at the

same time, domestic law and international law.

The second doctrine: taking the double responsibility of the individual and the state together, the holders of this trend see that crimes and misdemeanors committed by states give rise to two types of responsibility, individual responsibility who are natural persons, and collective or social responsibility of moral persons (countries), but it is noted that supporters of the two previous doctrines are few nowadays.[165]

The third doctrine: supporters of this view see that a natural person is the only perpetrator of the international crime and therefore is the only responsible for the crime in a direct way[166].

The latter doctrine is the one prevailed in jurisprudence, and was adopted by the UN and the judiciary, and this is what we support in our research. If moral people have the ability to will, according to the law, there is nothing preventing them from committing crimes. In this case there is a kind of mystery, because the term will be used in a different meaning from its psychological meaning, or its common meaning. From the psychological side, talking about "the will" of the moral people does not make sense, because this will can only function by the members representing the moral person, and it will not be there anything but the will of these members[167].

However, some of the legislations predict sanctions on moral persons like abolition/exemption or the fine, but the abolition is not a punishment in the technical sense, but it is merely a legal interception to the illegitimate position of others' purpose that members are engaged in and revoke their special agreement on the composition of the group. In terms of the fine, however, it is known that all damage must be repaired, so the share capital of the moral person is the one who takes the responsibility of the burden of the damage resulting from its representatives[168], but this method is useful, since through which insolvency of the person in charge and his inability to pay can be avoided, but it cannot be inferred from this that the moral person can criminally persecuted. Thus, the State is indirectly responsible for its citizens and it holds responsibility of the compensation of damage to the victims, as it always have the ability to pay, and those responsible for the damage are its nationals. In fact, the address of international criminal law to the individual looks inevitable and with no escape, considering that international crime and what it raise from various issues are the subject of this law, and that the individual is the actual perpetrator of the crime.

Whereas state or international organization, cannot commit it by itself, as moral persons[169]. (Glaser) sees that the perpetrator of an international crime can only be the individual, meaning the natural person who commits crimes for his own account, or on behalf of the State or for its own account, so he rejects the moral responsibility of the persons criminally speaking[170].

And (Nichola Leates) sees that only the human person is the one who can commit crimes and he alone who can be punished by criminal penalties and therefore any opinion other than this is an arbitrary

opinion of no point because the Criminal Code does not care about analyses and perceptions but it does care about facts[171].

The various international documents, multiple international and practices of international criminal justice came to confirm what is said by the proponents of this doctrine, that a natural person is the actual doer and is the first directly responsible for the international crime.

Therefore, the Treaty of Versailles did not provide for the trial of Germany criminally as a state, but provided for the trial of "Guillaume II," the Emperor of Germany and other war criminals, which was confirmed by Article 277 and beyond of the Treaty of Versailles of 1919[172]. Which is noted from the provisions of this Treaty is that it recognized the individual responsibility of a natural person, and it is considered to its favor that it recognized the criminal responsibility of the State.

The Nuremberg tribunal in 1945 decided in its verdicts that only natural persons are the ones who commit crimes, not theoretical objects, and so, it tried natural persons but it did not prosecute the German state as moral entity.

The principle of individual criminal responsibility has been adopted explicitly in the statute for each of the International Criminal Tribunal of the former Yugoslavia (ICTY)[173], and the International Criminal Tribunal of Rwanda (ICTR)[174].

The report of the Commission allocated to the establishment of an international criminal court came in accordance with the United Nations? General Assembly resolution (49/53) of 9 December 1994, stressing on the principle of criminal liability of a natural person for International Crime[175].

This principle was confirmed in the Statute of the International permanent Criminal Court, where Article 25 of the Statute came to confirm that the personal jurisdiction of the court is limited to the trial of natural persons who were individually responsible for committing one of the crimes within the jurisdiction of the Court[176].

Thus it is clear that the implementation and application of the principle of criminal liability of a natural person in international law through international courts mentioned above, so the researcher supports the doctrine that the natural person is the responsible for international crime directly because the realization of this principle supports the stability of the criminal justice of the international community and to preserve the integrity and security of mankind.

Theme 3:International crime basis

In the previous themes, we dealt with the international crime in terms of definition, the idiosyncratic dispute about it, and the contributions of western and Arab jurisprudence in its definition, then we stated its nature, gravity and seriousness, and that a natural person is responsible for it directly, and

that the responsibility of the state is indirectly responsible as a moral entity.

The establishment of any crime whatsoever requires the availability of elements on which a crime is considered a crime. The internal crime stands by availability of three bases: physical base which is the physical act, and a moral base which is the criminal intent, and a legitimate base which represents the criminalization of the act into national law. The international crime also requires for its establishment the availability of the three mentioned basis but there is a fourth basis that distinguishes it from other crimes, and must be provided in order to be in the process of an international crime, which is the international basis. For this reason, in this theme we will discuss these elements in four sections, and as follows:

- Section 1: Physical base
- Section 2: Moral base
- Section 3: Legitimate base

Section 1 Physical base

Whatever the crime is, it is represented in the physical appearance of the concrete in the outside world, and without this appearance, society does not compromise the disorder and rights that worth protection will not be affected by aggression, and this means that international criminal law and criminal law procedure are not concerned only by the will if the act does not lead to an external concrete behavior being its reflection, but in fact, far from the psychology of the offender, which means that only the crime committed by a natural person is conceivable, as it is a voluntary human being behavior significant in law[177].

The International crime, like any other crime, needs the physical base for its establishment, and that means the presence of a voluntary activity or human behavior having an external significant appearance, whether this behavior, positive or negative or positive refrained behavior, leading to a criminalized result under international criminal law. Like all crimes, the physical base in international crime has three elements which are:

- Behavior
- Result
- Causal relationship

First: Behavior

Behavior is one of the elements of the physical base of the crime, and it is defined, yet, as a voluntary

membership movement. It disintegrates into two components; the first is in requiring a member of the body of the offender, while the second is about using it willingly. If this movement did not occur, or occurred as a result of a compressive force on the Human body, the crime is not considered due to the lack of key ingredients of its physical base[178], and so behavior comes in three images:

1- Positive behavior:

The positive behavior is represented in a movement or group of voluntary movements of members, and that means that the act or behavior that makes a change in the surrounding outside world can be realized by senses, whether it leaves traces or not[179].

There are two components required for the positive behavior to stand:

The first component: that the movement be issued by one of the body organs, for this, behavior cannot be achieved as a case characterizing a person if it is voided of any organic movement, if behavior is negated the crime is negated.

The second component: that the will of the offender is the cause that made a member of his body move and led him to engage in this behavior, so if the organic movement stripped of such voluntary description, the criminal behavior is not achieved, and thus the physical base of the crime[180].

To constitute an international crime, it required from the positive behavior to affect the interests or the international community values, or that for the perpetrators to belong to more than one country, or that the result from the act is to terrorize the world's conscience and transmit the horror in the hearts of people, in spite of being committed over a specific territory and the consequent effects are on the region, and criminal behavior is not limited to the physical executive work only, but the agreement or incitement to practice physical work is also a positive behavior[181].

Examples of positive behavior in war crimes "killing the wounded and prisoners of war, torture and rape ... Etc", or as in crimes against humanity "slavery and murder, deportation of the population, imprisonment without trial and verdict, or sexual slavery, racial discrimination ... Etc," All acts constituting these crimes are positive acts.

2- Negative behavior:

The negative behavior in the domestic law is represented in refraining from performing a certain action required by law, resulting in non-achieving the required result and the essence of negative behavior in international criminal law does not differs from its counterpart in domestic law, as it represents the reluctance of the State or the individual in some hypotheses about doing the work required by law, leading to the non achieving of a result as the law requires[182].

It is clear that the negative behavior differs from the positive behavior. In the second one, the person does what he should refrain himself from doing, by leading his behavior to a result that law prohibits, while in the first, the person refrains from doing what he must do, resulting the failure to achieve a

result that the law requires.

From International crimes that are committed with a negative behavior like in the war crimes, the abstention of the highest President in the army from preventing his subordinate soldiers from committing a war crime with his knowledge of their intention to commit it, and it is well known that international law imposes the duty to prevent the commission of such crimes[183].

3- Positive behavior with abstention:

This behavior is represented in the reluctance to engage in a particular behavior, and doing it prevent the realization of a result criminalized by law, and the abstention leads to the occurrence of the result prohibited by law, and this is done without issuing by the person any positive behavior, and therefore these crimes are called, "the negative crimes with result "as distinct from the purely negative crimes or abstract abstention crimes[184].

Abstract negative behavior differs from negative behavior which leads to check criminal result. In the first case, law criminalizes the mere abstinence, regardless of the occurrence of criminal result, because abstinence is worth punishment, regardless of the occurrence of criminal result, because abstinence, through which the crime is realized in its full image is worth punishment in itself, while in the second case, the occurrence of the criminal result is an element in the physical base of the crime as defined by the legal model, so that if the result of the negative behavior did not occur, the complete crime is not realized,because what the legislator criminalized is achieving a definite result, whether achieved by positive behavior or negative behavior[185].

Of the examples of international crime that its physical base takes the image of positive behavior with abstention, murder by depriving the prisoner of food or the lack of medicines or medical aid for the people of the occupied territory[186], and this is what Israel is doing to the Palestinian people.

Hence it is clear that the behavior, in all its forms, is the most important element of the physical base of the crime because without that behavior which represents the exterior perceived appearance there is no criminal result and therefore there is no crime.

Second: The result

The concept of criminal result in domestic criminal law means every change happening in the outside world as a result of committing criminal behavior, and this change is the criminal result in its physical base, and there is a legal concept represented in the aggression against the interest or the right which are the subject of the criminal protection, and this aggression is through damaging the interest or right or just exposing it to the risk of harm[187], as well as the result in international criminal law, as the physical base in the international crime does not differ from the domestic crime in terms of requests of the result in the physical base.

The concept of the result in international crime is determined, as in domestic criminal law. The

criminal result in international crime has a physical connotation, represented in what the criminal behavior causes of physical change significantly happening in the outside world, as well as its legal significance, which is aggression obtaining right or international interest, is the subject of criminal protection.

Examples of crimes with criminal result, the crime of aggressive war which is one of the most dangerous crimes to international peace and security for what it leads from killing, destruction, sabotage, and turmoil in relations between states.

The crime of genocide in most of its forms is considered from crimes of physical result, if it occurred by killing members of the group or causing serious bodily or mental harm... etc. It is clear from the foregoing that the criminal result in international crime can be achieved as a result of positive behavior, as it may be the result of a negative behavior, as it is in the crimes against humanity, "such as the deprivation of food and medicine with the intent to destroy part of the population, as well as torture and inhumane suffering arising from deprivation of persons of appropriate living conditions."

There is another type of crime law which does not require achieving a physical result to occur, whether committed with positive behavior or represented in pure abstinence. What is criminalized by law in these cases is the criminal behavior, regardless of the possible impact of actual harm, so we find that the crimes of danger results in criminal Legal conception and this result represents the threatening of behavior to a right or interest relevant to the international community[188].

Examples of the crimes of danger in international crime, the crime of threat of aggression[189], as well as the crime of conspiracy against peace, which is represented in the preparation of a drawn plan to commit a crime against peace, against another state with an aggressive intent[190].

Third: Causal relationship

It means the character which links between behavior and result, as it assign result to act deciding by this the availability of an essential condition of criminal responsibility conditions, meaning that it is limited to crimes with result, the physical crimes, without formal crimes[191].

The causal relationship represents the link between the act and the result, and confirms that the act causes the creation of the result; therefore, what is attributed of this result to a particular person is to confirm a causal link between this crime and its perpetrator[192].

The problem of causality is among the most important legal problems, that was and still controversial jurisprudentially and judicially. This dispute resulted in all three theories :

First theory: The theory of direct or effective reason and the content of this theory is that the effective reason is the underlying cause of the multiple reasons that brought the occurrence of the result in the first and direct place. However, the theory of effective reason is weak, because it does not solve the problem of a causal relationship, but put her vague controlling standard, through which the judge

cannot see the availability or the lack of a causal link between the offender' s conduct and the criminal outcome[193].

When deciding upon the various factors or causes that led to the result, the judge may not have the ability to determine the direct or effective cause because of its variety and similarity[194].:

Second theory: This is the theory of equivalence of causes as it determines the equality of all the factors that contributed in the creation of the result. Every factor is considered a cause of the result between which there is a causal relationship, and the offender bears full responsibility as long as his did was a factor which caused bringing about this result, even if other factors combined with the offender and contributed in bringing about the result[195]. It was taken on this theory that it is contradictory, as it decides the equality between the multiple causes in its impact, and then chooses a single reason to carry the burden of the result, and proud by the intent of the offender to achieve the result without being his behavior that led to it in its final form[196].

Third theory: it is the theory of adequate or appropriate reason. According to which the behavior of the offender is considered to be a reason and a justification for the criminal result; if the behavior was of a potent force in accordance with the natural ongoing of things[197]. In this theory, if inhuman or natural factors, earlier or later or contemporary to the behavior, intervened or contributed to this criminal behavior in bringing about the result, and whenever it was familiar normal factors that can be expected, the causal relationship between the behavior of the offender and the result cannot be denied[198] .

This latter theory is the best of theories in determining disciplined standard for causal relationship, whether it was international crime of war crimes, or against humanity or any other crime, because it is closer to the criminal justice, in restricting the responsibility of the offender in the imposed considerations of justice.

Section 2 Moral base

The moral base of the crime represents the psychological or moral aspect which consists of a set of internal or personal elements with humanitarian content, and that is related to the criminal physical incident, as it represents the illegal direction of perception and the free will towards the criminal incident, or in other words, it means all the images of the will token by a crime intentionally or unintentionally[199]. The sinful will is the essence of error which is the basis of criminal responsibility in the modern era[200].

The error presumes the availability of two conditions: the perception and sciences, and the freedom of choice, and since these two conditions can only coexist in humans, he is the sole criminally responsible whether under its domestic law or international law[201].

Since the natural person is directly criminally responsible for international crime, the issue of sciences and free will play an important and prominent role in whether to attribute him a criminal responsibility or not, and thus, the moral base can be in one of these three images: Criminal Intent, unintentional error, and contraindications of criminal responsibility and can be tackled as follows:

I- Criminal Intent:

The concept of criminal intent in international criminal law does not differ from that in domestic criminal law, as it is based on two components which are sciences and will. It is also a subject of consensus among all jurists and was confirmed by all concerned international conventions. The International Criminal Jurisprudence equalizes between direct intent and probable intent[202]. And their support in this is that the customary nature of international law pigmented the international crime differently from its analogous in internal crime based on written law, and the result of this is that the elements of international crime are not defined in a precise manner, so it is difficult to determine the mental state of the perpetrator[203].

The international crime is often committed by inspiration or commission of someone else, so it is not committed by the perpetrator to achieve a personal purpose, making it difficult to say that the direct intent is available for committing it in most cases, in conjunction with the probable intent. So, if it was said on the inadequacy of the probable intent of the moral base to take place, the rules of the international criminal law are a small-talk and this confirms that the crime of aggression, war crimes, and crimes against humanity are all under the direction of state authorities, and their perpetrator is forced to commit them unwillingly or without being convinced to do it, and thus justice requires not to question him on the basis of direct intent, as it also requires not to except him from punishment or not to commutate it, hence his conviction which was a necessitation according to the international criminal justice on the basis of probable intent which is equivalent to the direct intent[204].

An example of direct intent in the war, "launching a rocket at a Hospital intending to destroy it and killing the sick and wounded persons hospitalized there," The probable intent in the same example, "to launch the rocket with the intention to destroy the hospital without the intention to kill the wounded and sick persons, but the doer expected the presence of these persons but this have not dissuaded him to do it, though he was not primarily intending to kill them."

The probable intent differs from the unintentional error, that is in the first the awareness of the offender goes to the possibility of prediction of the result and accepts it, because he does not seek to achieve it from the very beginning, but he does not mind it, meaning that its realization or not is the same for him, however, in the unintentional error, the perpetrator wanted the act, but not the result, which occurred because of his unintentional error.

II- Unintentional error:

It is a form of less serious criminal intent of the moral base represented in the unintentional error, where the will of the perpetrator goes to act but not to result205. An act or a voluntarily left act may lead to unwanted result whether directly or indirectly, but it was in his power to avoid it[206].

The unintentional error takes one of the two following forms:

a- Conscious error: that is the expectation of the offender the possibility of the occurrence of the result based on his action, but he does not want it and he estimates that he can avoid it without basing his estimation on it[207].

An example of the conscious error in war crimes, "the soldier who torture a prisoner to admit the secrets of his army despite knowing that torture may cause his death, but hopes it would not happen, but death happens. "

b- Unconscious error: where the offender does not expect the result while he was able and it was his duty to expect, for example, in the war crimes, "the soldiers who are in the process of deporting civilians belonging to the opponent State from their homes in very cold weather conditions, thus causing the death of a large number of children and old people. Soldiers do not expect the occurrence of death, while they were able to expect this result, given the rigors of weather conditions and the weakness of people."

We can conclude that international crimes can also be committed by negligence or lack of precaution[208], and then whether the perpetrator committed intentionally the international crime, directly or indirectly, with conscious or unconscious error, his act remains penalizing and constituting a crime which requires punishment. It is just that in the international criminal law there is no division according to the gravity of the crime or its criminal sanctions, misdemeanors, and infractions, as is the situation in the domestic law, because of its predominant customary nature.

The difference between domestic and international criminal law is that international criminal law defines in general the violations that deserve criminal punishment, and the criminal character overwhelms it, without explaining the sanctions that will follow the commission, so the estimation of international crimes is considered of the work of the judge which includes during the trial, the physical and personal side, meaning the importance of any violated interest and the moral element, and thus the degree of the actor's error[209].

III- Contraindications of criminal responsibility:

It is agreed upon in the domestic law that the responsibility is denied for several reasons, such as insanity, mental disability, the young age, involuntary drunkenness, and coercion ... etc, but some of these reasons cannot be token in international criminal law for not fitting with the idea of international crime, like insanity, young age, drunkenness, that is this crime cannot be committed instantly, and cannot be committed by an insane or a minor, due to what it requires from preparation and former

processing which assume differentiation and freedom of choice to the offender, which is difficult to conceive for international crime.

Therefore, the error is the basis of criminal responsibility, and it was supposed for perception and discrimination to be available on one hand, and freedom of choice on the other hand, so that the unavailability of these two conditions lead to the unavailability of error, and thus excluding criminal responsibility, however it is possible to commit it under the pressure of coercion or ignorance, and then we have to tackle these two causes[210]:

1. Coercion:

In all contemporary criminal legislations, coercion is considered a reason for excluding responsibility and this is what was confirmed by the Statute of the International Criminal Court in article (31/1/d), and there are two types of coercion:

i. Physical coercion:

It means to completely erase the will of the offender by attributing to him only an organic movement or a negative attitude devoid of the voluntary character[211].

According to Bella, the physical coercion prevents responsibility in international criminal law for both, states or individuals. He also sees that the State may be the offender and the responsible in international criminal law, and he cites as an example of physical coercion, the strong state that its armies invade the land of a small country, and cross its territory to attack a third state and this small state let it do so and let it take from its territory a base for attack due to its inability to resist.

In the other hand Glaser believes that physical coercion does not exclude only criminal responsibility, and therefore the reference, but it also destroys the physical coercion of the crime[212].

ii. Moral coercion:

It means the pressure on the will of a person by another person intending to make him engage in certain criminal behavior, and this pressure takes the image of threat by significant harm or extreme wracking evil menacing the impeller to crime in order to avoid what may be afflicting him from danger[213].

Coercion plays a major role in international crime, and often is in the form of the highest order issued by the President, and this order can go to paralyze the freedom of the responsible in this action, such as the order issued by the commander of the soldiers, to murder all the prisoners and the wounded, or the issued order to strike the civilian facilities such as hospitals and the Houses of Worship[214].According to the report of the International Law Commission in its commentary on the draft of the codification of crimes against peace and security of mankind, the general trend in the post-World War II disclose the emergence of the idea of coercion, as a means to exclude criminal responsibility if it is proved that the act was committed in order to avoid grave and real danger which cannot be avoided without

committing the criminal act, and it is estimated on personal basis rather than objective ones, in the case of any impeller person and the circumstances surrounding him, as there is no law requiring from anyone to sacrifice his life or the safety of his body to avoid the commission of a crime[215].

The recipient of the order, which implementing it leads to the break of the law and then to a crime, may find himself facing one of two things, either obey it and commit the crime, or not to obey it and be exposed to risk in his money or his interests, and often his right to life. It is enough to imagine the intensity of the military regime for example, as it may be that the recipient of such an order finds that the only way to avoid the death penalty as a sanction for disobedience, is the execution of the order, because the commission of a crime in a situation like this to save his life, or to get rid of this danger, is under the influence of coercion, and thus we must recognize him not responsible[216].

Since there is no law requiring anyone to sacrifice his life or the safety of his body to avoid the commission of a crime, the perpetrator of the crime under the influence of physical or moral coercion of any kind, exclude the criminal responsibility of the perpetrator[217]. The Statute of the International Criminal Court addressed this issue in the Article (31/1/c, d) of the court system, which stipulates: "excluding criminal responsibility if that person:

* Acts reasonably to defend himself or herself or another person, or to defend, in the case of war crimes, properties which are essential for accomplishing a military mission against the use of an imminent and unlawful force in a manner which commensurate with the degree of danger that threats that person or the other or the properties intended to protect. The involvement of a person in a defensive operation conducted by forces shall not in itself constitute a reason to exclude criminal responsibility under this subparagraph.

* If the alleged behavior constitute a crime within the jurisdiction of the court and was under the influence of coercion occurred resulting from a threat of imminent death or of serious ongoing or imminent bodily harm against that person or another, and the person acts necessarily and reasonably to avoid this threat, under the condition that the person does not mean to cause a greater harm than the damage to be avoided, and that the threat would be:

- Issued by other persons.
- Formed by other circumstances beyond the will of that person.

2- Ignorance or mistaking facts:

Ignorance is full insufficiency to know something; however, the mistake is a relative lack of knowledge resulting in incomplete or inaccurate knowledge. Ignorance then is the negation of knowledge as a whole, while the mistake is an incomplete knowledge conducive to an abstention contrary to the truth about a particular matter; in other words, ignorance is the negative side for knowledge, and the mistake is a positive side for knowledge contrary to fact, and then Ignorance and mistake deny the

knowledge about fact[218].

Because ignorance or mistake has influence on the moral attribution, a differentiation between two cases will take place:

The first case: If ignorance or mistaking facts has been on the essential elements of the crime, "the person's belief that he is shooting an animal but the victim was human" , in this case, the criminal intent is excluded, regardless of whether the act will become justified or remain punishable as it is an unintentional crime.

Second case: if the focus of ignorance or mistaking facts was on secondary matters or things which do not make up the crime, although they are related to something, it does not negate the moral attribution, " who points a gun to Zaid to kill him, believing that he is Amr," he is considered a deliberately killer because the mistake in the character of the victim does not affect the attribution[219].

This is also what "those courts" decided concerning crimes called crimes of organizations which consists of joining criminal organization or group, it has made criminal responsibility based in this case to the personal element, knowing criminal purposes, or the criminal activity of the organization, as recognized by those courts that ignorance or mistake in the core facts of the crime negates criminal intent[220].

In fact, the international criminal judge has the discretion to often adapt the facts and determine the sanctions, as well as his assessment to personal factors of the perpetrator and the impact of the circumstances surrounding him when committing the crime[221].

However, the researcher believes that it is legitimate to stick to ignorance or mistake in customary international criminal law, which is not the case in Conventional international criminal law[222], to exclude international criminal responsibility in the obvious crimes that treaty or international agreement ensured to detect the international custom that it contains, and it explained these crimes and provided for sanctions.

Section 3 Legitimate base

The legitimate base is presented in the principle that "no crime and no punishment except by law" as it requires the existence of a legal provision criminalizing the act before the commission of the crime. Unlike the case in domestic criminal law, the legitimate base in the field of international criminal law raise difficult and controversial doctrinal issues because the latter is requiring that the text should be identical to the transcript of texts in order to consider the act an internal crime, while only in international crime, it is sufficient that the act composing the crime is subject to the international incriminating rule; Whether the act is directly penalized by custom or it was stated on penalizing it in a text or in an international treaty or agreement[223]. This principle is an essential guarantee for achieving

criminal justice, to protect the freedom and rights of individuals through its statement and explanation of criminal illegal acts, and everything else is considered a permissible act for all individuals to do it without fear of fall under the penalty of law[224].

First: The concept of illegality

There are two basic concepts for illegality:

1. Formal concept: It is the opposition of the human behavior with one of the law's rules. Technically, the act opposes with the law and considered a violation of a base issued by a legislation power in the state.

2. Physical or objective concept: it is available if it is proved that the act represents an assault on vital interests of the individuals or of the group that are supposed to be protected by legal rules, therefore, it represents a violation or a threat to the legal money[225].

To find out the concept of legitimacy, we have to compare between physical incident and typical incident in the criminal rule, and therefore the status of the conflict without which the wrongfulness on the incident cannot be taken off, can be determined. Then, it is considered one of the necessary elements for the existence of the crime because without it, the conformity between the incident and its legal model is lacking resulting in recording the punishment of the perpetrator or his partner[226].

Each violation of these rules is an international crime and can results in criminal responsibility under international law, and therefore, the principle of legitimacy is one of the crime elements in international criminal law as it represents one of the crime elements in national criminal law. We will therefore be exposed to the possibility of working with the objective legitimate rule in the criminal International law, as well as some practical applications of the principle.

Second: The possibility of working with the objective legitimate rule in the criminal International law

It is difficult to say that the objective legitimate rule is applied nowadays in the framework of international criminal law. The reason for this is that these rules are customary in their entirety[227]. So when the criminal judge adjusts a specific incident as legitimate or illegitimate, he is obliged to reference to the set of resources that reflect the conscience the international community which represents a whole ethic of the civilized world, and that does not stop at international treaties or agreements, but all other sources of international law[228]. Going back to those sources to find out the criminality requires the realization of measurement and the expansion of interpretation, both of which are forbidden in the framework of the criminal texts to work with because it opposes the objective legitimate rule that is "no crime and no punishment except by law". The objective legitimate rule is required and applied in the framework of the International criminal law, such as the criminal internal law, because the criminal justice requires so. However, that customary nature prevents its achieving in the present day, but that

does not deny that the principle itself should be respected at least in terms of its spirit until codifying the provisions and rules of international criminal law in a manner that ensures the criminalization of acts in explicit texts, leading to the full respect for the principle as existing in domestic law[229].

Third: Some practical applications of the principle of legitimacy in international criminal law

The problem of legality of offenses and penalties arose in front of the Nuremberg court when some litigants defended the major war criminals saying that their trials are illegal because the acts they committed were not considered crimes the moment of completion of the actions[230], while, in reality, the court did not deny the principle of legality of crimes and penalties altogether,but it was not capable of applying it entirely and literally, which means that war criminals would escape with impunity, and therefore, the waste of the most basic principles of justice, [as well as] the contempt and humiliation of the department of social defense. That?s why, the jurist (Dundee de Vapore) says that the Court has not entirely denied, in international law, the rule, "no crime and no punishment except by law ", rather, it reduced its severity to suit the social and technical factors, in order to consolidate the relations between States[231].

In his justification of the trial of war criminals, the jurist (Blood ski) says, that the rule "no crime and no punishment except by law", is conceived in domestic criminal law differently from the international criminal law, because the latter does not has the power to codify its rules, and if treaties has represented Laws in international law, the custom plays an important role in the formation of the concept of international crime, and its impact cannot be denied, and concerning the crimes by which the defendants were convicted, they were [meaning the accusations] considered crimes in the treaties preceding Nuremberg[232].

The judges of Nuremberg court had disagreed on whether the 8^{th} August, 1945 treaty and the list annexed to it resulting in the creation of a new law, or confirming and revealing crimes that existed before, and most of the judges perceived that they were revealing a law that existed before, but not establishing a new law. Then, in the custom of the court "war crimes existed before the mentioned above date (August 8, 1945), because they were derived from a number of international texts approved by international authorities during the last fifty years, "and the Court went further than that, when it decided that the rules of war had not been established by those various treaties, rather they had existed before them, and countries gradually abode by [these rules which]derived their origin from the ideas that go back to (Grotius) the year 1625, and if the treaties and customs prior to Nuremberg did not include criminal sanctions, this does not mean that the criminal would escape punishment, because what Article (6), in the system of Nuremberg court, had mentioned about the non-specific enumeration of war crimes, represented, at the same time, violations of the laws and customs of war contained in the treaties and the Hague Regulations of maritime war 1899-1907, and [violations of] Washington

(1922), and London (1930), treaties [233].

And then we conclude that it is not permissible to defend without knowing the laws and customs of war, because with no doubt war criminals had the full knowledge that, by their actions, they were violating the international law, and this is what made the Nuremberg court say that "if they had the total knowledge and impetus." Thus, refraining from punishing these on the basis of the free application of the rule makes them despise justice and international ethics[235].

Theme 4: Distinction between international crime and other crimes

International crime is distinguished from other crimes by the existence of a fourth basic element which is the international element that makes the crime international and distinguishes it from national crime, if this element disappeared, the investigation would be directed towards national crime, and, for the crime, to be deemed international, it should affect the interests and ethics of the international community or its vital amenities, , or in the case that the criminals belong to more than one country by means of their nationalities if their nationality perpetrators belong to more than one country, or if the criminals harmed persons enjoying international protection.

In addition, the international corner investigates if the crime occurred on the basis of an arranged plan or a plotting done by a State against another, also it investigates the criminal acts committed by some terrorist organizations or individuals, if they are directed against a State, or included an attack on the international services or amenities , even if there were no state plotting or inciting the commission of these crimes, as long as [the crimes] include any of international elements 236, and the international element is proved to be present when the internationally protected goals are violated, and the crime takes on the characteristic international once it terrorizes the world's conscience and inflicts fear in the hearts of people, in spite of its being committed in a specific territory, and its effects are dealt with in this territory[237].

The international criminal law determines the important international interests that are alone worthy of criminal protection, but what else, the non-criminal penalty is enough to protect them[238].

Thus, we find out that the presence of the international element in the crime is determined by the type of rights and interests that are violated, so it is proved to be present through the assault on a right or interest which is subject to the protection of international criminal law.

In order to check the realization of this protection of the violated right or interest, we must go back to the sources of that law, the most important of which is the international custom, the treaties revealing this custom, and the general legal principles that are known in the civilized countries. Through this, it is clear how important the violated right or interest is and the extent of its guaranteed international

protection.

We find that the international element is clearly evident in the four international crimes: war crimes, genocide, crimes against humanity and the crime of aggression, for the attention that the international community pays for them. That is because they constitute a danger and a threat on the safety and security of mankind, which led to the legalization of these crimes in the form of agreements or treaties or international statements, confirming that these crimes are international crimes.

Topic 2: International Criminal Court

There was a span of fifty years between the United Nations General Assembly's decision to approve of the Convention for the suppression of and the exertion of penalty for Genocide in 1948 and the approval of Rome's Statute concerning the establishment of a permanent international criminal court in 1998, the Article (6) of the treaty of 1948 confirmed such a court.

During the period (1948 - 1998) research did not stop either at the level of scientific associations, at the level of the committees pertaining to the United Nations, or at the jurists' individual level. [This research was] about the need to establish a permanent international criminal court, its composition, specialization and the procedures to be followed before it.

The practical and applied experience of the temporary criminal justice in the past (the Nuremberg Court and the Court of Tokyo) and the last decade of the twentieth century (the previous Yugoslavia Court and the Rwanda Court) have had a significant impact on the development of this research and studies, their depth and seriousness, which, on 17/7 / 1998, culminated in the adoption of the United Nations Diplomatic Conference of Commissioners of the Rome Statute that is concerned in the establishment of an international criminal Court [239];The conference began in 1998, from June 15 to July 17, , in the FAO headquarters of Food and Agriculture Organization (FAO) and the United Nations General Assembly had asked the Secretary-General to invite all members of the United Nations, or members of the specialized international agencies, or members of the international Atomic energy Agency, to participate in the conference which was attended by delegations of 160 countries and 17 non-governmental organization. Then, there was the presentation of the project of establishing the court that was prepared by the Preparatory Commission which took charge of it. After deliberations, the Congress [decided to] adopt the Rome Statute, which was approved by 120 countries and intercepted on by seven states (the United States, Israel, China, India, Iraq, Libya, Qatar), while 21countries abstained from voting. The Congress adopted the Statute and opened the door for signing it from 18 July 1998 till 17 October 1998, and that was at the headquarters of the Italian Ministry of Foreign Affairs. Then, until December 31, 2000, it was at headquarters of the United Nations in New

York which was the deadline for the acceptance of signatures. 139 countries signed it.

The birth of this system has not been easy, but it was difficult because of divergent political positions of all the states, as well as the different legal systems of these countries, and among the reasons behind the difficult birth of this system is that it is not only related to the procedures or assets as it appears from its name, but it is an integrated system representing a major and solid nucleus to the international criminal law with its substantive and procedural branches. Rather, it represents a step forward for a real establishment of the codification of the rules of this law[240].

In this topic, we will discuss four requirements which are as follows:

Theme 1: The court's jurisdiction ratione materiae

Theme 2: Personal jurisdiction of the Court

Theme 3: The law applied by the Court

Theme 4: Assigning the jurisdiction court

Theme 1: The court's jurisdiction ratione materiae

The jurisdiction of the International Criminal Court is determined on the basis of the type of the crime, the personality of the perpetrator, and the time and place of its perpetration.
Its substantive jurisdiction is based on the type of the crime for which the Rome Statute has provided the Court's jurisdiction that is going to investigate in it, pursue its case, adjudicate on it, and sentence its perpetrators.
Article V of the Statute has identified this jurisdiction; it has stated that the court's jurisdiction is limited to the most serious crimes that are of concern to the international community as a whole[241], and on the basis of the statute, the Court has the jurisdiction of considering the following crimes:

- Crime of genocide
- Crimes against humanity
- War crimes
- Crime of aggression

Hwever, the court's jurisdiction of considering the crime of aggression depends on the approval of the Assembly of States Parties [which is, in turn, based on] the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime.
Article VI of the Rome Statute has defined the meaning of genocide and the acts that precipitate the crime of genocide Article VII has explained the crimes against humanity. Likewise, Article VIII determined war crimes[242].
Concerning the identification of the substantive (qualitative) jurisdiction, we could note the following[243]:
1- That despite the fact that Article V (of the statute) restricted the jurisdiction to the most serious crimes of concern to the international community as a whole, it did not include all of these crimes, especially international terrorism, drug trafficking and psychotropic substances. Among the crimes specific to the court's consideration, crimes of terrorism, drug trafficking and attacks on United Nations personnel had been introduced in the draft Rome Statute, but the tendency in the Rome Conference was directed towards rejecting the inclusion of such crimes on the basis that their definition is undetermined and that [aligning the jurisdiction of considering these crimes to] the International Court raises a lot of trouble and it is better that the internal national courts consider them in order not to hinder the jurisdiction of the international Court. The conference ended to the compromise that, while recognizing that terrorism and unlawful international drug trade are among serious crimes, in the future these crimes could be added to the jurisdiction of the court after doing extensive studies in

this regard and when considering modifying the court's jurisdiction later.

2- Supposing that the International Criminal Court has finished with the composition of its various systems after the statute enters into force, it will not be concerned with considering the crime of aggression; its jurisdiction of considering this crime remains bound to the conditions under which the Court shall exercise jurisdiction with respect to this crime. Excluding the crime of aggression from the jurisdiction of the Court is deemed a step back. In fact, this crime was aligned to the consideration of the Nuremberg Court and the Court of Tokyo. In addition, it [i.e. excluding the crime of aggression] prevents the prosecution of political and military leaders for that crime, which is one of the most serious crimes that affect the international community as a whole, and some of the great powers, and specifically the United States, had objected to the stipulation of this crime [i.e. including this crime within the jurisdiction of the court] so that [such a jurisdiction] would not be a means to struggle against the cases of military intervention on the basis of the Charter of the United Nations. This was also objected to by some countries, including third world countries, fearing the intervention of the Security Council in determining aggression and, as a consequence, controlling the judicial function of the court in this regard, and perhaps the real reason for not including this crime into the crimes that fall within the jurisdiction of the international court is the disagreement between the two conferences in Rome on the definition of (aggression) and [on] the upholding of the general definition or the definition that the United Nations / General Assembly upheld in resolution (3314) for the year 1974, or [upholding] an in-between definition, and whether or not considering this crime is dependent on a complaint from the Security Council in this regard ? And despite the fact that the discussions at the Rome conference on this subject did not reach a solution, they included some positive elements that could be discussed when the Preparatory Committee would address this issue. That the Rome Statute did not include prohibiting and criminalizing the use of nuclear weapons as a war crime; India has suggested including the criminalization of those weapons, but her suggestion was rejected. Conversely, the Arab group suggested that rejecting the stipulation of the criminalization of nuclear weapons is interrelated with excluding the stipulation of the use of chemical weapons. [...] [The conference] ended up with confirming the text of Article (8/2 / b / 20) without specifying the weapons whose use is prohibited, and on the condition: that these weapons be subject to a total ban and would be negotiated in the future, and, then, that they would be annexed to the statute by following the procedures set for the amendment of the statute in articles (121, 123). Excluding to prescribe the prohibited weapons in this way represents a step back after the Nuremberg system was stipulating the criminalization of some of them.

4- Article (124) of the Statute stipulated a selectively writ that is dangerous in its effects as it entails the disposal of the court's jurisdiction for war crimes for a long time. Indeed, according to this Arti-

cle, it is possible for the State, when it becomes part in the Statute, to declare its refusal of the court's jurisdiction for a period of seven years starting from the time when this statute becomes applicable to it [the state] in relation to the category of crimes referred to, in Article 8. Actually, it is the article related to (war crimes) if a crime is claimed to be committed by any citizens of that State or in its territory, this means that the commentary is the consequences of this selective text for war crimes before the international Criminal Court for seven years which is a long time. Also, it should be taken into account that the system force may be delayed for a long time in case the state that has become a party in the issue refuses the declared jurisdiction of the Court if the crime was committed by one of its national, or if it happened on its territory.

The serious impact of selective judgment may be reduced, as this provision can be repealed after seven years when re-examining the system and modifying it.

Theme 2:Personal jurisdiction of the Court

The International Criminal Court has jurisdiction to prosecute natural persons only, what makes it unquestionable to ask about the crimes that are considered in that court; whether it is for moral or legal persons, i.e. the criminal responsibility does not lie with the states, organizations or bodies which have legal personality.

Criminal responsibility for crimes that are specific to the Court does only rest with the human responsibility as an individual whatever the degree of contribution to the crime, whether active or interfering partner or instigator, and even if it took a position of the commandment, or the incitement, or the inducement, or the Discretionary punishment, or any other forms to commit crimes, regardless of whether the crime is full or inchoate, to be accused for the former responsibility, the criminal must not be under the age of eighteen at the time of the commission of the charged crime.

Without regarding the official capacity of the person, no impact will exempt or mitigate the criminal responsibility by any way or reason, and Immunities or special procedural rules do not preclude bringing it to his/her trial.

Yet, the military commander and the president are to be questioned about the crime first because they are supposed to know or should have known that his forces or his subordinates were committing or about to commit such crimes, second in case they do not take all the necessary and reasonable measures within the limits of their power to prevent or repress their commission of the crime and even for not submitting the matter to the competent authorities to make the investigation and then the prosecution.

The criminal responsibility is refrained if the perpetrator was suffering from a disease or mental defi-

ciencies deprives him/her from the ability to perceive discrimination, such as insanity, also in case of compelling drunk or if he was under moral coercion resulting from a threat of imminent death or of serious continuous bodily harm.
Person of criminal responsibility could not be exempt if the crime is committed as ordered by the government or the head of military or civilian, however this person is relieved from that responsibility in the following cases:

1. If the person was under a legal obligation to obey orders of the Government or the superior in question.

2. If the person did not know that the order was unlawful.

3. If?the order was not manifestly unlawful, in case of genocide or crimes against humanity.

Regarding the spatial and temporal jurisdiction of the International Criminal Court, which is mentioned in the (articles 11-12) of the Rome Statute dealing with crimes that are located in the territory of each State to become a party to the Rome Statute. For the state on which occurred the crime is not considered to be a party to the treaty, as the rule built on the notion that the court is not competent to consideration only if the State accepted the jurisdiction of that court's consideration of the crime. This application is, in fact, of a relative effect of treaties principle. But this principle, if applied, justified in the field of mutual commitments on the responsibility of each State Party to the Treaty, though it could be considered as a way to pervert the course of criminal justice according to the field of international criminal judiciary. It is enough for any aggressor state or intends to attack not to be a party in this system as to denounce the jurisdiction of the Court into crimes subject of abuse in order to escape its nationals from punishment for those crimes, this is for the spatial jurisdiction.
As for the temporal jurisdiction of the Court, there is no jurisdiction for the court only with respect to crimes committed after the entry into force of the Statute[244].
If a State becomes a party to this Statute after its entry into force, the court is not allowed to exercise its jurisdiction only in what concerns crimes committed by that state after the entry into force of this Statute. Therefore, the International Criminal Court is not competent to adjudicate crimes that happen before the entry into force of the Rome Statute even in terms of principle.
Afterwards, jurisdiction can be assigned over these crimes to the court under a decision issued by the Security Council based on Chapter VII of the United Nations Charter or by any temporary special court established under the Security Council decision, such as the former Yugoslavia Tribunal and the Rwanda Tribunal. The state, also, on whose territory happens those crimes acceptably or that one to which belongs the accused which is among its national counting the competence of the permanent

Court, if none of the previous hypotheses achieved, such crimes did not concern its consideration to the permanent international Criminal Court and so the criminals go impunity in front of her, even if had they been arrested in the territory of another state, it is even more if that State party to the Rome Statute or just has accepted the jurisdiction of the court that were not party to the system, such as the case of (Pinochet).

There is also a complementary jurisdiction of the International Criminal Court based on the halves of the preamble and the first article of the Rome Statute, which states "that the International Criminal Court is complementary to the national criminal jurisdictions".

This means that the States Parties (the sovereign states) vested with jurisdiction first into international crimes. In reality, the International Criminal Court cannot absolutely substitute the internal national judiciary in this regard, and it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes to ensure respect for international justice.

On that purpose, the International Criminal Court does not become binding jurisdiction if the internal judiciary national mandate holder has put his hand on the lawsuit issued the decision in this matter or the proceedings replaced an actual investigation or pending before the competent national court.

But this rule is not absolute, as stipulated in (article 17 /act 2) of the rules which affirm that the International Criminal Court shall have the eyes and investigate over international crimes if it is found that the author of mandate of the State is unwilling really to do the investigation or prosecution, or is unable to do so. Hence, the ICC itself holds the task of determining unwillingness or inability according to the specific system controls identified in this article, namely:

1- In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

a- The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5.

b- If there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

c- If the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with intent to bring the person concerned to justice.

As outlined above, it can be seen that the national domestic courts mandate-holder specializes in original determination of international crimes if they are found willing and able to do the job, and its judgment in this case has authoritative text, i.e. it carries the force of the case or the power of res

judicata as it is not permitted to remit the person for a retrial for the same crime again.

Thus, the ICC has jurisdiction into international crimes especially in case a vacuum was found in the trial, which is related to unwillingness or inability to pursue and prosecute and punish the perpetrator according to the conditions that we have mentioned previously, this means that the ICC does not have the supremacy of the national judiciary procedure, which is exactly the Highness that we have observed in the Court of the former Yugoslavia and Rwanda Tribunal when one of the two Tribunals take proceeding against criminals, that has already been brought before national courts. In such case, the national court had to get out of those proceedings in the interests of the international tribunal, this Highness does not have now permanent international Criminal Court which represents a step back in this regard, which is also consistent with the desire of some countries, especially the major, which was sitting in Rome.

However, the permanent International Criminal Court enjoys some privileges as to put her hand on a pending case before the internal national judiciary mandate-holder, if it found that state's judgment does not want or it is not able to deal with such a case in the previous border. Yet, in this border the permanent international Criminal Court can control and supervise the actions taken by the judicial authorities of the national state in order to reach real justice, if the international Criminal Court perceived that the national judiciary of the state does not respond to justice considerations of the international tribunal to address the hearing of the case so that it becomes the exclusive jurisdiction consideration and not the national internal judiciary, taking into account what may be carried out from sanctions for the person concerned to implement the national rule if it has already been released. And in this case, the national governance does not have the strength made up by the case or the power of res judicata, as the trial returned before the international Criminal Tribunal for the same crime to litigate the same person (Article 20).

If the supervision and control of the International Criminal Tribunal for the actions taken by the national courts of the States, the International Tribunal estimate for this justification (despite its unwillingness or inability) should be of fair and absolute neutrality, so that the standard is objectively and unique for all countries as well as for all legal systems, and only the practical application is to prove this in terms that do not discriminate for one state against another or a legal system over another, so count on good thinking Court with impartiality and neutrality, as we believe that their independence, integrity and impartiality is certainly what make us improve our conjecture by collateral.

In other words, we must recognize that the complementary jurisdiction of the International Criminal Court encountered many obstacles and delays in the prosecution and trial, particularly in the absence of the assistance of the state which was put her hand over the case, those states that mostly have crime evidence and in which lives the accused. We believe that this important drawback could be exceeded

by the text on the grounds of the Highness of the permanent international Criminal Court on internal national courts, as it is stipulated in the former Yugoslavia, the court system and the Rwanda Tribunal.

Theme 3: The law applied by the Court

1- The Court shall apply:

a- First of all, the Court's Statute, Elements of Crimes and Rules of Procedure and Evidence.

b- In the second place, when it is appropriate, the court shall apply the applicable principles of international law and rules of the treaty, including the established in the international law of armed conflict principles.

c- Otherwise the general principles of law derived by the Court from national laws and legal systems of the world as appropriate to the national laws of States that would normally exercise jurisdiction over the crime, on condition that these principles are inconsistent with the statute and with international law and with the internationally recognized standards rules.

2- The Court may apply principles and rules of law as interpreted in its previous decisions.

3- The application and interpretation of law must be a such pursuant consistent work with human rights which is recognized internationally, as they have to be cleared of any distinction based on grounds such a; gender-based, age, race, color, language, or religion, or belief, or political or non-political opinion and belief, or national or ethnic or social origin, property, birth or other status.

The conclusion that the Rome Statute of the Court set conditions for the general principles of the law applied by the International Criminal Court, and they are:

1- The principles should be derived from recognized legal systems in the world.

2- These principles do not contradict with the Rome Statute, as well as international law or the rules and the internationally recognized standards.

3- These principles are consistent with the context of human rights.

As stated in Part III of the Rome Statute of the International Criminal Court in the relevant legal materials to the general principles of criminal law are as follows:

- (Article 22), which states that "there is no crime that is not prescribed by law" where a person is criminally liable under the statute unless the conduct in question constitutes a crime within the jurisdiction of the Court immediately as it took place. The concept of crime shall be strictly interpreted and shall not be extended by analogy and, in case of ambiguity, it is explained in favor of the person being investigated, prosecuted or convicted. This article does not affect the characterization of any conduct as being criminal under international law outside the framework

of this Statute.

- (Article 23), which states that "no punishment except by law" meaning that any person convicted by the court should not be penalized except in accordance with this Statute.

- (Article 24), which stipulates the non-retroactivity of the impact on people which means that a person, under this Statute, is not criminally responsible for conduct prior to the entry into force of this system. In case of a change in the applicable law in a definite case before a final judgment, the fittest law is applied for the person being investigated or prosecuted or convicted.

- (Article 25), which states the individual criminal responsibility where the Court shall have jurisdiction over natural persons pursuant to this system and the person who commits a crime within the jurisdiction of the Court will be held responsible as individual and liable for punishment in accordance with these rules in the case that the person:

    1. Committing this crime, whether in an individual or jointly with another or through another person, regardless of whether that other person is criminally responsible or not.
    2. The command or solicits or any induces to commit any crime actually occurred or attempted.
    3. Providing help, or inciting in any form in order to facilitate the commission of this crime or any attempt, including providing the means for its commission.
    4. Contribute in any other way with a group of persons acting on a common purpose of committing this crime or attempt to commit, yet such contribution shall be intentional and shall either:

        a. Aim to further the criminal activity or the criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court.

        b. Or with the knowledge of the group about the intention to commit the crime.

    5. In what concerns the crime of genocide, the direct and public incitement to commit genocide.
    6. An attempt to commit a crime by taking action that starts with a substantial step, but the crime did not occur because of circumstances related to the intentions of the person. However, a person who abandons any effort to commit the crime or otherwise prevents its completion shall not be, under the Statute, liable for punishment for committing an offense if he gave up completely and voluntarily.

Any provision in this Statute relating to individual criminal responsibility does not affect the responsibility of States under international law.

- (Article 26) states that there is no jurisdiction over persons under 18 at the time of the offense charged.

- (Article 27) provides for the Irrelevance of the official capacity meaning that the system is applied to all persons equally without any distinction based on official capacity and, in particular, the official capacity of a person which does not relieve him in any way from criminal responsibility, whether as Head of State or Government or a member of a Government or parliament, an elected representative or a government official, as they do not in themselves constitute a ground for reduction of sentence; and, whether under national or international law, the special procedural rules which may attach to the official capacity of a person does not preclude the exercise of the Court jurisdiction over such a person.

- (Article 28) the liability of commanders and superiors where there are other reasons for criminal responsibility in addition to what is provided for in the Statute which is within the jurisdiction of the Court, namely:

    1. The military commander or the person effectively acting as military commander is the one responsible for crimes within the jurisdiction of the Court committed by forces that are under his command and control, as a result of not exercising power over them; whether this commander knew or should have known that the forces were committing or about to commit such crimes, or if the military commander or person does not take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the specialized authorities for investigation and prosecution.

    2. The President is criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his effective authority and control as a result of non exercising control over these subordinates. The president may knew, or consciously disregarded information which clearly indicated that his subordinates were committing or about to commit this especially if those crimes are related to activities ranging within the framework of responsibility and control of the president but he did not take all the necessary and reasonable measures to prevent or repress or display it on the specialized authorities on investigation or prosecution.

- (Article 29) which states the lack of statute of limitations whatever the provisions are.

- (Article 30) states on the moral side, meaning that a person criminally responsible for the commission of a crime shall not be subject of punishment only if the material elements are present with the intent and knowledge meaning that he is aware of what he's doing.

- (Article 31) states the reasons for excluding the criminal responsibility if a person is suffering from mental disease that executes his capacity to appreciate the unlawfulness or nature of his behavior in what the law requires, or be drunk in a way which prohibits his capacity to appreciate the wrongfulness if he was not voluntarily intoxicated to commit crime or be involved in a defensive operation conducted by forces, or if the behavior has occurred under duress resulting from a threat of imminent death or serious bodily harm against someone else under the condition that this threat is issued by other people or by circumstances beyond the control of that person. All this shall not in itself constitute a ground for excluding criminal responsibility.

- (Article 32) states on the mistake of fact or mistake of law in that it does not constitute a reason for objection to criminal liability to commit the crime only if it requires the negation of mental element, and a mistake of law does not constitute a reason for excluding criminal responsibility if the kind of behavior that constitutes a crime is within the jurisdiction of the Court.

- (Article 33), which provides for the orders of the presidents and the requirements of law, meaning that any person is not relieved of criminal responsibility if the commission of the offense came in compliance with the order of a Government or a superior, whether military or civilian, except for some cases where the person who is under legal obligation to obey orders of the Government or the President but that person was not aware that it is illegal or the illegality of it was not obvious as in the case of orders on genocide or crimes against humanity.

Theme 4: Assigning the jurisdiction court

The Court's jurisdiction is limited to the most serious crimes of concern to the international community as a whole based on the provisions of Article (5) of the Statute of the Court, namely the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

The following things must be taken into consideration:

First, procedures before the Attorney General:

1. Preliminary investigation procedures:

The Attorney General must make procedures survey and initial or preliminary investigation and must be informed of the crime or crimes that took place on the basis of Article 13 of the Statute following three ways:

A- If a State forwarded to the prosecutor any case where it appears that one or more crimes of crimes within the court's jurisdiction have been committed, it can ask the prosecutor to investigate the case and search whether to charge the particular person or more of these crimes, and the state shall determines the situation as much as possible as well as the circumstances relating thereto, and its request should be accompanied with the supporting documentation for the request, in accordance with Article 14 of the Statute.

B- If the Security Council referred the case to the prosecutor where it appears that one or more of these crimes have been committed, acting under Chapter VII of the Charter of the United Nations.

C- If the Prosecutor knew of the occurrence of a crime on its own, in accordance with Article 15 of the Statute.

Hence, If one of the methods mentioned above are available, the Attorney General initiate preliminary investigations, either based on the referral of a State party, or a referral from the Security Council, or on its own, on the basis of information on interference in the court's jurisdiction to crimes, and analyze the received information. For this purpose, he is allowed to obtain additional information from States, United Nations agencies, intergovernmental organizations, non-governmental organizations, or other reliable sources that it deems appropriate, and may receive written or oral testimony at the seat of the Court.

If the Prosecutor had finished the preliminary investigation and concluded that there is no reasonable basis to proceed with investigation, he submit to the Pre-Trial Chamber a request for authorization of an elementary investigation and attached to this application the collected materials and evidence in support of his application.

The victims have the right to ask the Trial Chamber to hear their sayings in this regard in accordance with the rules of procedure and evidence, if the Pre-Trial Chamber saw that there is no reasonable

basis to proceed with a Primary investigation, and that the case regards the jurisdiction of the court, it had to authorize the commencement of the investigation without prejudice to the decision of the Court with regard to the jurisdiction and the admissibility of the case; but if the Pre-Trial Chamber saw that the Prosecutor's request lacks seriousness ,it can refuse to authorize the primary investigation, but this refusal does not preclude the Prosecutor from applying again basing on new facts and evidences regarding the same situation. However, if the Prosecutor concludes after the initial investigation that the information provided does not constitute a reasonable basis for an investigation, he had to pass the information to his providers, in accordance with Article 53 of the statute, and this does not preclude the Prosecutor from considering further or new information submitted to him regarding the same situation in the light of new facts or evidence to take after that the appropriate decision.

From the above it can be said that if the Prosecutor is mainly specialized in claim, indictment, prosecution, and initial or preliminary investigations for this purpose, he is also specialized - in addition to the former jurisdiction-in elementary investigation with certain restrictions in that he may not automatically take decision of investigation, but he should ask permission or approval of Pre-Trial Chamber which is also the responsible for issuance of arrest or detention or order the reserve and not the prosecutor, as we shall see later.

If the prosecutor has done the preliminary investigation based on a referral from a State Party or on its own, and decided that there is a reasonable basis to initiate an investigation, he needs to notice all States Parties and States that would normally exercise jurisdiction over the crimes under consideration, and the state have - within one month of receipt of that note-to inform the Court that it is investigating or has investigated its nationals and with others for these crimes, and at the request of that State, the Attorney General abdicates investigation of those persons unless the Pre-Trial Chamber decides to authorize the investigation at the request of the Prosecutor, in accordance with Article 18 of the Statute.

And the Prosecutor-General can reconsider the assignment of the investigation of the state after six months from the date of assignment or at a time when significant change of circumstances happened inferring that the state has become really unwilling or unable to investigate, and the State concerned or the Prosecutor have the right to appeal the decision of the Pre-Trial Chamber before the Chamber of appeals. The appeal may be heard on an expedited basis.

2- Primary investigation procedures:

In accordance with articles (54.55) of the Statute of the Court, the Prosecutor expand the investigation and looks at all the facts and evidence relevant to assess whether there is criminal liability under the statute, and he has to investigate incriminating and exonerating circumstances equally, and he has to take appropriate and effective measures to ensure the investigation of crimes within the jurisdiction

of the Court. The Prosecutor may conduct investigations in the territory of the State in accordance with the provisions of international cooperation and judicial assistance according to which States are obliged to cooperate fully with the Court in its investigations and prosecution of crimes in accordance with the articles (86 and seq.) of the Statute, or as authorized by the Pre-Trial Chamber in accordance with Article (57/3 / d).

The Prosecutor have the right to gather evidence and examination authority, and asks to hear witnesses and victims, and interrogate suspects, and to take or request the necessary measures to ensure the confidentiality of information or the protection of any person or the preservation of evidence. The rights of the accused must be respected during the investigation and he must not be compelled to incriminate himself or to confess guilt, and he must not be subjected to any form of torture or inhumane treatment, nor be deprived of his liberty only to an extent and in accordance with the procedures provided by the system. He also have the right to an interpreter if he was interrogated with a language other than his spokenand understood language, or being questioned in sufficient detail of the charges against him, though he have the right of silence and not to answer as well as the right to have a lawyer, unless he give up voluntarily and openly the right to do it.

This appears in the decisions taken by the Attorney General, starting from primary investigation procedures carried out by the domestic law through the investigation judge in some states, and public prosecutor in others, but the specialty of the prosecutor in these procedures depends on the approval of the Pr–Trial Chamber, meaning thatthe decision of that department by approval is what the investigation opens with and serve as prosecution or indictment that is normally carried out by the public prosecutor in the domestic laws.

The Attorney General does not take all the primary investigative procedures, because they are distributed between him and the Pre-Trial Chamber, as the latter is concerned with the most important ones, namely those relating to individual freedoms, such as orders of attendance, arrest and remand.

Second. Procedures before the Pre-Trial Chamber:

According to articles (57 and beyond) of the Statute, the Trial Chamber shall issue orders and decisions, under articles (15, 18, 19, 54/2, 61/7, 72), and must be approved by the majority of its members. These orders and decisions allow the Attorney General to initiate an investigation or refuse to authorize it, or to authorize him to take certain decisions, as well as to report that there was insufficient evidence for the adoption of the charge before the trial, amend or reject it, as well as cooperation with the State regarding the disclosure of information that would prejudice the interests of national security. In what concerns other decisions and orders in all other cases, one single judge from the Pre-Trial Chamber may exercise the functions set forth in the statute in case that the rules of Procedure and Evidence did not contradict it or by a decision from the majority of the Pre-Trial Chamber

members.

The Pre-Trial Chamber specializes in issuing an arrest warrant or attendance at any time after the start of the investigation at the request of the Prosecutor, once it is satisfied that there are reasonable grounds that the person subject matter has committed a crime within the jurisdiction of the court after the examination of the application, and that his arrest is considered necessary to ensure his presence before the court or to ensure that impede investigation or trial or to prevent him from continuing with the commission of the crime or other related crime. The arrest warrant remains in effect until the court orders otherwise. The Court may, request the arrest of a person or the arrest and surrender him based on international cooperation and judicial assistance, upon the arrest warrant.

The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest, and may also ask - instead of issuing the arrest warrant- to issue a summon for the person, whether with or without conditions restricting liberty if national law provides so, and the State which receives an arrest warrant or the audience immediately takes the necessary steps to arrest the person in question who is presented after arrest to the competent judicial authority in accordance with law, and the competent authority of the State which is holding the person looks in the demand of provisional release and take the recommendations provided in mind before deciding on the request for release. If the person was brought to court or attended to it voluntarily or pursuant to a summons, the pre-Trial Chamber must ensure respect for his rights, especially his right to notification and the right to request provisional release, and consider indictments in the provisional release or modification requests, as well as to consider the prosecutor's request to re-arrest the accused, and it has on its own to consider the release or re-arrest and the warrant if it deems it necessary. The Pre-Trial Chamber holds a hearing - within a reasonable period after the completion of investigation - for the adoption of the accused. The meeting will be held in the presence of the prosecutor, the accused and his lawyer, and it may hold the meeting in the absence of the accused if he had waived his right to attend or had fled or unfound and to the Pre-Trial Chamber the right to permit that he is represented by a lawyer despite his absence if it considers the interests of justice and at the end of the session it decides either to postpone the hearing and request the Prosecutor to provide further evidence, conduct further investigations or modify the charge, reject the adoption of the charge, or adopt the charge depending on the sufficiency of evidence, then refer the accused to the trial Chamber for trial on the charges they have adopted. From all the above, we see that the Pre-Trial Chamber is the one who adopt charges, and it is the one which decides to refer them to the Trial Chamber, authorize the opening of the investigation as we have seen before. All of this makes the role of the prosecutor in the case less important than his role in domestic law, and he has the right to take preliminary measures of investigation and some primary procedural investigation. The reason for the distribution of competence as such between the Prosecutor and pre-Trial Chamber

is to create a kind of balance between the Latin system and the Anglo-Saxon system in order for the Rome Statute to enjoy acceptance and approval by all States Parties[245].

Third, The authority of the Security Council to suspend the investigation or prosecution:

Article 16 of the Statute of the Court has given the Security Council a very serious authority which includes; the paralyzing of the International Criminal Court Activity, and the suspension of their role in the investigation and trial. This article stated that it may not permitted to commence or proceed any investigation or prosecution under this Statute for a period of twelve months at the request of the Security Council to the court in this sense, in a resolution adopted under Chapter VII of the Charter of the United Nations. The Council may renew this request under the same conditions. The text provides the Security Council with serious authority that disrupts whereby the activity of the international Criminal Court, yet it may result in the abolition of the role of the court, it could have been preventing the start of the investigation or stop continuing with it or even preventing the start of the trial, or stopping to continue it for a full year, renewable indefinitely in the case of international instability or insecurity. We can imagine the seriousness of this situation in the role played by the Security Council to help the state party to the Statute, or State accepting the jurisdiction of the court in order to prevent between the ICC and the chapter in the crimes occurred on the territory of that State or committed by its own nationals. Thus, the political interests interfere to prevent or weaken the role of the international jurisdiction of the international justice by the time in which they should be separated. Therefore, the nations gathered in Rome tried to reduce the effects of this dangerous power of the Security Council, by making a proposal to not renew the period of suspension or to renew it only once. These suggestions failed and refused and it was not considered, as consequence the text of Article 16 of the Rome Statute of the international Criminal Court was mentioned unchanged with a slight mitigation on the seriousness of this text. Article 16 of the Statute, through reaching two basic limitations/constraints, prescribed that the Security Council should take them into account[246], they are namely:

The first constraint - that the decision of suspension should be attributed to Chapter VII of the Charter of the United Nations, not to the crimes dealt with by the International Criminal Court, i.e. it should be considered by this court those crimes that disturb and affect the security and global peace.

The second constraint - that the commentary should be in the form of a decision issued by the Security Council, not in the form of a statement issued by the President of the Council. Besides, the requirement of the need for a resolution from the board which will reduce the likelihood of suspension without justification or monstrosities to no end, because the decision is to be made by the consensus of the views of the permanent members of the Security Council, and the right of veto can use one of those permanent members, and this is what prevents the issuance of such a decision.

Topic 3: Death penalty and its means of implementation in the Islamic Sharia and International Criminal Law

The work of the contemporary trend that avoids any action in the implementation of the death penalty would be the rhythm of revulsion and disgust in psychology, so that the death penalty has become just a simple deprivation of life.

In the implementation of the death penalty without taking any other means, it is worth noting that each country adopts a (suitable) way Clement, except the verdict issuing death sentences against the military, which are usually carried out by firing squad whatever the variety of means to carry out executions in force for civilians of another country, with the exception of some states that go to standardize the implementation of the death penalty, making the firing squad execution whether the convicted was of civilians or military, as is the case in Russia and the state of Utah in America. Some legislation also go to the setting of and provision for the death penalty by firing squad - deriving from the general principle - in judgments against civilians, in the circumstances or particular cases, as was the case in France before the abolition of the death penalty[247].

We will address this topic in four requirements and are as follows:

Theme 1: The scope of the work of death penalty in the Islamic Shariah and their means of implementation

Theme 2: The scope of the work of death penalty in international criminal law

Theme 3: Legislation which take death penalty

Theme 4: Legislation which had abolished the death penalty

Theme 1: The scope of the work of death penalty in the Islamic Shariah and their means of implementation

We noted above that the death penalty was carried out in the Islamic Shariah by stoning in adultery of married persons, and that was never be a subject of dispute among the scholars, however, their dispute was on how to implement the death penalty as retribution in case of murder, and in the crucifixion attitude mentioned about banditry and highway robbery in Surah Al-Ma'idah of the Holy Quran: is it a means of execution in Islamic law, or is it a procedure associated with death that is intending to slander and rebuke the people?

We will show the detail of this dispute along following fields of study:

- Section I: Retribution means in case of murder
- Section II: Death by crucifixion

Section I Retribution means in case of murder

According to the Maliki, the Shafi'I, IbnHazm and Ahmad (from a reported novel), attaining the right of retribution (Qisas) against the murderer should be done the victim was killed by[248], and in how to implement it by the same instrument - it has to be in accordance with the following conditions:

1- Assimilation in the implementation of retribution in terms of measure, craftiness and manner: they said in a choking case of murder the killer should be strangled the way the victim was throttled by, and during the period that the act of strangulation was. And they said in a murder towering: fling the killer like the victim. They said in the beating by sledgehammer: take into account the killer struck with a tool with the same weight and size, and being hit the same number of strikes done to the victim, if they cannot stand up to the weight, volume, or the number of strikes decide approximately. Finally, for all cases, if the killer does not die the same way he did, he would be killed by The sword.

2- That means the avenger of blood kill the killer and not torture him: it is meant to be directed to the will of the blood Crown to kill the killer, if he tended to torture him, it cannot be so.

However, according to Ibn Hazm in case of murder wherein the killer cut off a part or more of the victim before he was killed ? in such case the avenger of blood is allowed to torture the murderer and to do everything he has done in the slain, that it is to cut off his parts and then kill him, also he may be limited on cutting the parts and then forgives the killer[249]. But it is tended to say that the avenger of blood, which cut off a part of the offender or more and then forgive him have the intention of torture,which is not allowed because the avenger of blood is authorized either to take revenge or to forgive, as says the prophet Muhammad (PBUH): "Whoever suffers from killing or wounding, has the

choice of three things, and if he wants the fourth then restrain him. He may kill (the killer), or forgive him, or take the blood money. Whoever accepts any of these (options), then kills (the killer) after that will have the fire of hell to abide therein forever."[250], if he the blood avenger chooses to retribution from the killer he could not ask for cutting his parts and then forgive him.

3- The way of killing could not be a taboo ideal: i.e. even if the victim was killed with something forbidden in Islam such as buggery or watering wine, it is not permissible to kill the murderer by such means, and to be reversible to the sword[251].

Actually, those who believe in assimilation in retribution, refer to the Almighty quoted verse: And there is for you in legal retribution [saving of] life[252], also: so whoever has assaulted you, then assault him in the same way that he has assaulted you[253], and says: And the retribution for an evil act is an evil one like it[254].

In the Sunnah, Anas narrated: " A Jew crushed the head of a girl between two stones. She was asked, "Who has done so to you, soand- so? So-and-so?" Till the name of the Jew was mentioned, where-upon she nodded (in agreement). So the Jew was brought and was questioned till he confessed. The Prophet (PBUH) then ordered that his head be crushed with stones"[255]. Obviously, from the verses of the holy Quran and texts brought from Sunnah, it is betoken that the avenger of blood may ask for the assimilation in retribution i.e. to avenge the same way the victim was killed by.

While Imam Ahmed admits, in case of cutting off another and then killing him, the revenge should be by striking his neck with the sword, without adopting assimilation, as referring to the words of the Prophet, peace be upon him: ?There is no retaliation except with the sword.? And because retribution is one of the punishment prescribed in case of murder, the Almighty God gives another alternative for retribution (Qisas) which is the blood money and if the Almighty God ordered it to be obligatory only the blood money (Diah), since the intention in retribution in case of murder is avenging the victim by killing the criminal, so it is realized by striking the neck, consequently no need for cutting his parts[256].

The Hanafi School believes that the punishment should be implemented only by the sword as referring to the saying of the Prophet (PNUH):"There is no retaliation except with the sword." And some were explaining it through studying its conditions and what it is reported exactly in its source, as it was said: "This idle tale/statement (hadeeth) is transmitted in many ways each one of it is of less repulsiveness, as admitted by Nakha'i, Asha'bi, and Hassan Abu Hanif and his companions"[257], they are also citing the statement of the Prophet (PBUH): "Allah has prescribed Al-Ihsan (m) in all things. So if you kill, then kill well, and if you slaughter, then slaughter well. Let one of you sharpen his blade and spare suffering to the animal he slaughters"[258], and they said that the order in this talk is clear about the kindness and proficiency in avenging the killing which would be better implemented

by the sword. They said also that if we had been ordered to be merciful with the immolation, what about the human being who is praised by the generosity of God Almighty[259].

In the same way, they explained the prophetic statement: "?that?an injured?forbade it?until he?recovers from his injuries", if it is agreed on doing the same thing to the offender like what he did to the victim, so there was no need to wait until the injured man recovers. In fact, it shall wait for the consideration of what devolves to the crime, whereas if the revenge is taken effect, the act will be sought as killing and so the avenger will not be considered righteous[260].

We conclude that it is not permissible according to the Hanafi dogma to attain the right of retribution through burning or deluging or something like that, because torture is forbidden even through mutilation and assimilation belief.

Eventually, there is no doubt that the opinion of the Hanafi and its doctrine is the more adequate to be followed, because if not executing by the sword there is a possibility to do more than what have the killer have done. For example: if someone is being killed by two beats, it is possible that two-strike does not kill the killer, using the sword then would be considered as a transgression in terms not only in terms of manner but in terms of craftiness as well.

But does Islamic jurisprudence accept to get rid of using the sword in the execution if finding other easier and faster tools? That is what we want to answer it:

In essence, it seems after the presentation from above, that those who adopt the prophetic statement "There is no retaliation except with the sword" they do not mind the implementation of penalty otherwise if the means is easier and faster, because they believe in the idea that the murder if not done with the sword it should not be implemented on a torturous way (e.g. mutilation), this means that, according to them, if there are other means easier and faster may resort to it , which is supported by mentioned above idle talk as it states two things: the first one: retribution must be implemented only by the sword, and the second thing: it is not permissible to do the retribution with something else for the fear of not being in the crime's ease and facility, in conclusion it is permitted to punish without the sword - as reported in the text - if the other way of punishment is easier and faster, and therefore a fortiori[261].

Section II Death by crucifixion

Scholars argued about the crucifixion mentioned in the verse of Surat Al-Maida, in the verse: Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for

them in the Hereafter is a great punishment[262]; some went to the point that the crucifixion mentioned in the verse is a fairly self-contained prescribed punishment, and so it is considered as a method or means of execution in the Islamic law, whereas the other went to the belief that the crucifixion was associated to previous or subsequent conjunction to him at odds in so, hence it is a measure intended to libel warrior and enjoined others from committing the same wrong deed, and they provided details as follows:

The majority of scholars going to combine the murder and crucifixion, in the case of the warrior who kills a human in the fighting and take money, but they differed in preceding the killing on the crucifixion or vice versa. In a congruent issues Abu Hanifa said: The crucifixion mentioned in the verse is intended to slander and to deter others from committing such wrong deed, and the crown Muslims may consider it or not, as he may to pronounce the killing or delay it[263].

However, El-Shafei differed from the former and according to him the warrior who kills and takes money, he would be killed and crucified, here the crucifixion comes before the act of killing. This implies the fall into the torture which is forbidden. Some of Shafie's fellows narrated from Ibn 'Abbas in the highway robbery: "If they killed and then took the money, then they should be killed and crucified, and if they killed and did not take the money, just kill them, and if they took money and did not kill, cut off their hands and feet from opposite/controversy, and if they scared the passenger and did not take the money, they would be exiled from the land"[264],all indicate that that the execution comes before the crucifixion for those who kill and take the money, According to Imam Ahmad ibn Hanbal the killing and the crucifixion are combined, and the former is preceding the latter. In fact, it is the adopted opinion in the Hanbali doctrine[265].In the same cope, Imam Malek said in the case of Warrior: "the killing must be done certainly, the imam is not given a choice to torture or exile him, the selection must be around the execution or the crucifixion"[266]. Indeed, Imam Malek goes to the belief that the worrior should be both killed without being crucified, or being crucifixied first and then killed. Overall, t Maalikis were famous by combining the two methods, and that they go with crucifying first and then killing the offender[267].

Another viewpoint is to be presented through Imam IbnHazm, who went on to say that the sanctions contained in the verse of banditry (execution, crucifixion, cutting, exile), each of which end a stand-alone punishment, if the imam chose one of them - apart from the highwayman's verdict - no other method would be declared against the offender, i.e. if the Imam chose to crucify him it was denied to kill or cut or exile him, he would be left crucified alive until he dies[268].

Eventually, we conclude from the above, that the view of the majority of scholars about the crucifixion mentioned in the verse of banditry in the Holy Quran is built on the belief is not a stand-alone prescribed punishment, and it is not considered as a method of execution in Islamic jurisprudence,

combining it with the murder of highwayman who kill and take the money in the banditry, as a measure intended to slander and rebuke others from committing such crime, however, the Imam may - in the doctrine of the Hanafi - sufficiently sentence by death the offender who kills human being in the banditry and to seize the money if he sees an interest in it.

Theme 2:The scope of the work of death penalty in international criminal law and the methods of its implementation

It came in the definition of jurists on international criminal law that it is: a branch of the Criminal Code, which regulates the international character of national criminal problems, and therefore this law fall within to determine the jurisdiction of national criminal courts for crimes committed in a foreign country and what should the applicable law be, and determine the extradition rules of criminals. All along with the extent of implementation of the Criminal rule against a foreigner within the territory of the state, and the permissibility of international cooperation in the fight against some crimes ... and the extent of state compliance with international agreements on criminalization and punishment[269].

Accordingly, the death penalty in this law is specialized in dealing with the international crimes, noting that the matter of death penalty had been raised by the Rome Statute as a punishment for the crimes contained therein[270].

Actually, the statutes of the Tribunals for the former Yugoslavia and Rwanda did not include any of text on the death penalty, unlike the situation for the Nuremberg court which sentenced to death twelve international criminals[271], but the pro jurisdiction which advocates the death penalty goes to the extent that despite the general trend in the international community calling for the abolition of the death penalty from the domestic laws, and the legislation of some states of the abolition, the matter is considered very dangerous and different for the international crimes, especially for the serious ones such as war crimes, crimes against humanity, and genocide[272].

In this concern, we believe that the criminal thought is interested in searching and looking for a quick and cheap tool in the implementation of the death penalty in states that adopted it in its legislation, so we will deal with the means that carries out the death penalty along with the most common ways in international criminal law.

The common methods of execution are as follows:

1. Hangings: the death penalty by hanging is implemented on a small scale in a number of US states. It was, indeed, the normal way in the implementation of the death penalty in England before the abolition of executions in 1965, and it is still in force in the Commonwealth countries, Sudan, Egypt, Iraq,

Iran, Turkey, Burma, Hong Kong, and the former Czechoslovakia, Afghanistan, Mauritius, Tanzania, the Republic of South Africa.

2. Guillotine: This was the method used in France before the abolition of the death penalty in 1981, and still it is applied in Dahomey, West Africa, Vietnam, and Laos, though the legislator in Laos allows the implementation of the death penalty on civilians by firing squad rather than the guillotine[273].

3. Electric chair execution: this method of execution is used in most of US states, the Philippines and China.

4. Firing squad: the death penalty by firing squad is implemented on states where in its military law includes provision for the death penalty, as is the case in the Arab Republic of Egypt, Morocco, Ivory Coast, Central African Republic, Togo, El Salvador, Chile, Guatemala, Thailand, Indonesia, Cambodia, Greece.

In the search field for alternative means of carrying out the death penalty, all was looking for tools and methods with lighter pain and more speed in bringing death - which brings on methods that are not commonly used, as it the case with the previous means of execution (hanging, the guillotine, the electric chair, firing squad), and these alternative methods are: gas asphyxiation and lethal injection.

1. The method of gas asphyxiation in the use of suffocating gas leaking from vents and pipes inside the room airtight called the Chamber of gas, and take into account the gas used to be effective and rapid effect on the respiratory system, and sometimes some desirable smells are added to this gas in order to avoid the inhaled repulsive action for the convicted person, as is the case in California in America where it is suffocating gas perfuming[274].

2. The method of lethal injection, it is, in fact, the injection the sentenced with a drug which is a mixture of narcotic and other material that have a fought effect, this way is designed to make a rapid loss of consciousness to the sentenced person before he dies[275].

Actually, the use of lethal injection has raised sensation in the US states on the effectiveness of the death penalty - in general - to deter criminals[276], as there is no feasibility of death which is not feared by criminals, whereby the sanction is equated with the case of the death of a patient under anesthesia during surgery.

Theme 3:Legislation which take death penalty

We can deal with man-made laws that take the death penalty in the following sections:

- Section I: Death penalty as being legislated but not implemented effectively
- Section II: Death Penalty, which was previously abolished, is now re-enacted
- Section III: Death Penalty implemented and carried out in some legislations

Section I Death penalty as being legislated but not implemented effectively

Some states have chosen to take the death penalty provision without applying the act, as if the legislator felt the need to provide the death penalty even if has not been applying it - by looking at its deterrent effect and the possibility of recourse to it if necessary. In this concern, we will mention the experience of Belgium and the region of Acentchein in this area.

1. Belgium

Since 1863, Belgium has stopped the implementation of death sentences, because of the direction of the referees to relieve every rule - automatically - to the minimum sentence (life imprisonment) unless the judgment issued by a court-martial so it is being implemented[277].

Furthermore, Belgium had applied the French penal code until it issued criminal its legislation in 1867. Thereby, on the first of May, 1848, after Belgium's independence from France in 1830, a royal decree was issued to form a committee in order to prepare a draft for the Penal code of Belgium. It was natural to discuss the future of capital punishment in the State; especially that it was abolished in 1863 before the committee finished the draft.

The committee took into account these basic indicators. They are as follows:

1. As there is no other punishment which can root out evil that exists within human beings, keeping capital punishment in the legislation is a necessity as it represents a powerful means of deterrence, though this deterrence only entails minimizing the number of perpetrators.
2. Automatic mitigation of the capital punishment was a reason for which the rate of criminality increased especially during the period of 1830-1835.

There was only two options for the committee to choose: Whether to stop carrying out the death penalty in reality, the thing that started since 1863 ,and abolish it , or to enact it though it is no longer executed.

The committee chose the second option after studying the rate of criminality from 1830 (since the independence of Belgium) till 1835 .During this period, a royal decree was issued to stop carrying out

capital punishment. This rate indicated that the number of serious crimes has increased. For instance, in 1830 only in two cases, the perpetrators were sentenced to death .However, this number increased in 1834 to 23. The committee, hence, assumed that "since people discovered that the death sentence was not to be carried out, the rate of serious crimes has increased"[278]. This led to public frustration .The government asked the king to stop granting pardon automatically for every convicted person. Thus, capital punishment was re-enacted in February 10th, 1835, till it was abolished again in 1863.

Therefore , in the committee's report on enacting capital punishment :" there is no doubt that the fear of capital punishment will permanently deter the criminal from committing his/her crime , but saying that capital punishment was abolished for this reason applies to all other punishments ,as there is no other punishment which can permanently control Man's abnormal desires. For instance, crimes will always exist regardless of punishments. However, the punishment has a natural influence on a great number of people. It will, hence, deter them from violating other people's rights.

In October 15, 1867, the Belgium penal code was passed; in which capital punishment was referred two in article 7[279] though it had not been carried out five years before the publication of the code.

It was proved later that the committee was right, when it re-enacted capital punishment in the penal code, as the Belgium government opposed the idea of carrying capital punishment in reality without opposing it in the legislation. For instance, it was out of necessity that capital punishment was carried out in 1918. It was a case of murder with aggravating factor. Later, it was implemented during the German occupation (1940-1944) in crimes of conspiracy with the Nazis. The number of sentences reached 67[280].

The modern legislative trend in Belgium is not tending to abolish capital punishment in the future. Indeed, a law was passed in July 2nd, 1975, in which another crime was added to the list of crimes which are punishable by death penalty (taking hostages). If their intention was to abolish this punishment, they would not have added another crime relating to it.

It is worth mentioning that the convicted person, who is sentenced to death and the pardoned, is subject to the other punishment which replaces the capital punishment, life imprisonment. He/she spends ten years in an individual cell and works in the morning in workshops. After finishing his/her 10 years, he/she chooses between remaining in an individual cell or joining the collective prison281. They can release him/her under the circumstance of spending his/her years in prison that is 10 or 15 years in case he/she is back.

Capital punishment is prescribed for the perpetrators who crimes violating the right to life and national security. They can be limited to this:

First, crimes violating the right to life which necessitate capital punishment are:

1. Murder with premeditation.

2. Arson if led to the death of a person existing in the places of the incident, or willfully causing the collapse of a mine on time of work and causing the death of the workers. As a condition for the implementation of the death penalty the offender should be knowing that there are one or more persons in the crime place.

3. Killing one of the parents

4. Killing a newborn immediately after birth and it is considered to be an act of premeditated murder.

5. Poisoning.

6. Murder or robbery with a view to facilitating impunity.

From this, we can see that the Belgian Penal Code is making penalty for the crime of premeditated murder whatever the legal description of the crime of murder (murder with premeditation, killing the newborn, murder by poison). In these cases premeditation is sought as an aggravating circumstance that justifies the death penalty. It also monitors the crime made against parents, even though the act of murder under the influence of a temporary sudden anger, because this is a grave act in itself and that person who kills deliberately was the reason for its existence.

Besides, opinion has been settled - in Belgium - and after some hesitation that the crime of murder committed with intent to facilitate and to ensure the theft is an also aggravating circumstance to fall for banditry/robbery.

Second, death penalty and state security crimes which are scheduled for a number of crimes against from the exterior and interior side, as follows:

From the outside:

1. Joining the enemy and fighting against the homeland.

2. Communicating with a foreign country with a view to do acts of aggression against Belgium if it comes to spying and the emergence of attacks.

3. Facilitating the entry of the enemy to the country.

4. Delivering or disclosing the secrets of the defense to a foreign state or to one of those who are working to their advantage.

5. Interfering in favor of the enemy in wartime measures to shake the loyalty of citizens and the state of the king, or the service of the enemy policy or plans, and propaganda against the intention to weaken the spirit of resistance of the people against the enemy or to target one of the acts mentioned above.

6. Entering the site - by fraud - to gather information on defense or external state security.

7. Arranging or using a means of transportation for after - whatever - to gather information on the defense or security of the State of destination abroad.

8. Concealing or harboring enemy agents or soldiers or provide them with assistance to escape from

the authorities when provisions are customary unannounced.

9. snitching the enemy real or different incident against anyone consequent undergoing procedures for liquidation by the enemy led to the death or illness of the disease is no hope of recovering the loss of its members or distorted or permanent disability of personal business, as well as arson or Punisher destruction the hard labor of 15 years and over if he commits to the interests of the enemy.

From the inside:

Belgian constitution of 1830 abolished the death penalty for political crimes, so the Belgian Penal Code of 1867 did not provide for the death penalty in the provision chapter for offenses against the security of the state of the party inside.

However, the Belgian draft text on the death penalty in the provision Penal Code for offenses against the king or the person's life and the attack on the life of the Crown Prince, and this means that the project is taking objective criteria to distinguish political crime for ordinary crime, scheduled thus to deny the political character of the mixed nature of the crimes.

2. Acentstein:

The text on the death penalty was mentioned in the Principality of sanctions of Acentstein in the 1859 law (Article 12 thereof)[282], which is scheduled for a small number of crimes against the state and attacks on life. It is worth noting that the death penalty has not been carried out effectively, in this emirate since 1798, however, the legislature entered in 1922 and ruled the work of the death penalty or a sentence of life imprisonment for minors, which time did not exceed the crime was committed about twenty years old, indicating that the legislator - there - he saw the need to provide for the death penalty - though it has not been implemented - to achieve deterrence and the possibility of recourse to it if necessary, and only the intervention of the legislature in 1922 by virtue of a new relation to the punishment which is not implemented realistically than in 1798.

Section II Death Penalty, which was previously abolished, is now re-enacted

We will mention some of the countries which abolished capital punishment, but due to certain circumstances, they re-enacted it mainly Russia, Romania, State of California, Argentina.

We sought to shed the light on the experience of each country, as all of them have experienced abolishing and re-enacting capital punishment law. This highlights the fact that only harsh punishments can represent deterrence. Another reason for which we should keep this punishment, as it is the fruit of the experiences of these countries.

1. Russia:

Russia abolished death penalty in 1752, with the exception of the crimes threatening the integrity of

the caesarean empire. For these cases, death penalty was executed harshly and without flexibility.
Some people think that abolishing capital punishment was not a random decision, out of theoretical thoughts. The Russian empire took it out of humane reasons[283].
We could have accepted this idea, if the abolition comprehended all types of crimes. In the past, It was maybe a sign to distinguish between private and public crimes. Private crimes are mainly about individuals committing crimes against each other. Private crimes were not as important to the dictator government as guaranteeing its safety and continuity .Every individual, threatening its security, is subject to repression. As soon as they discovered that following this path can lead to chaos and instability and which may require government's intervention, in some regions in Russia, which had previously abolished capital punishment, it was re-enacted in cases of crimes committed against individuals[284].
Russia emperors' fear from nihilists and anarchists and from the dissemination of their ideas, which call for individuals' liberation from any kind of authority, is behind their decision of imposing harsh penalties, basically capital punishment law in the penal code of 1885.
It was a necessity to firmly deter these destructive schools and to stress government's authority.
As they excessively resorted to death penalty under the Russian code penalty, and as it was a harsh punishment, the revolutionary government abolished this punishment in November 10, 1917.
However, under the pretext of the "revolutionary legitimacy", the government resorted to capital punishment after abolishing it. What's more, they used it excessively during the first years of the post-revolution period. Some say that between 1000 and 10000 people were executed during that period[285].
In 1920, the revolutionary government abolished capital punishment, as their opponents calmed down. Two years later, they re-enacted this law in the Russian penal code of 1922, when Lenin was in power.
In December 20, 1922, Russia became the United Soviet Socialist Republics. Federal law was hence passed in 1924, enabling republics to have their own penal legislations. Russian penal code was passed in 1926. Every penal law passed by the soviet republics included death penalty as an exceptional punishment, different from the regular punishment system. It was carried out to protect the workers' government, and it is abolished when the circumstances allow it. These laws are a proof that they acknowledged this penalty as a threshold procedure to protect society.
Resorting excessively to capital punishment brought about an abolitionist humane discipline after the war, not only in Russia but also in other countries, which were involved in the war. In time of peace, PRESIDIUM published an ordinance abolishing capital punishment in March 26, 1947, and replaced it with labour penalty in rehabilitation camps for no less than twenty five years. The ordinance stressed that this abolishment came as a response to the working unions' desire and other organisations concerned with public opinion.
No sooner capital punishment had been abolished in Russia, when peace was established, than they

re-enacted it in July 12, 1950 for crimes of treason, espionage and destruction, and later in 1954, for crimes of murder with aggravating factors. Russia passed a list of the basic rules they should abide by when drafting penalty legislations and procedures of USSR. It was a guide for the legislators of the different Soviet Union republics. They included an article regarding capital punishment, which is article 22. It involved two basic things: First, it stressed the exceptionality of capital punishment. It is hence restricted to the most dangerous and serious crimes, such as treason, espionage, murder with aggravating factors. Second, it insisted on the fact that capital punishment is a provisional punishment .It is still an exceptional penal procedure until it is completely abolished.

In light of the guiding rules, the Russian penal code was passed in October 25, 1962 .It did not include capital punishment. However, it was mentioned in article 23 as an exceptional punishment carried out in cases of crimes committed against the state, highly serious crimes, and murders with aggravating circumstances stipulated in this law[286]. Article 22 comprehended all the provisions relating to this punishment ,such as execution by gunshot for those who are older than eighteen years old when they committed the crime , death sentence for women proved pregnant was replaced by imprisonment. 2. The State of California:

The United States currently tends to support keeping death penalty or re-enacting it after abolition. Indeed, most of the states, after abolishing capital punishment, re-enacted it few years later. Public opinion was in favour of the government's position on death penalty; especially that crime rate sky-rocketed in ten years. In 1960-1970, it increased 70%[287].

Among the states which abolished capital punishment and re-enacted it later are Delaware which abolished it in 1958 and re-enacted it in 1961, as well as South Dakota (abolished it in 1915 and re-enacted it in 1939), Kansas (abolished it in 1907 and re-enacted it in 1935), Missouri (abolished it in 1917 and re-enacted it in 1919), Washington (abolished it in 1913 and re-enacted it in 1919) , and Colorado (abolished it in 1897 and re-enacted it in 1901). Other states were oscillating between abolition and re-enactment, until they settled on abolishment in the last few years. Among these states[288] we mention the State of Iowa ,which abolished capital punishment in 1872 and re-enacted it in 1878 ,and then abolished it once more in 1965 ,as well as the State of Maine ,which abolished it in 1876 and re-enacted it in 1883 ,and then abolished it once more in 1887 ,the State of Oregon , abolished capital punishment in 1914 and re-enacted it in 1920 ,and then abolished it once more in 1964.

Other states abolished death penalty, and till today they have not re-enacted it, chiefly among which[289]: Wisconsin State which abolished death penalty in 1853, West Virginia in 1957, Hawaii in 1957, and Minnesota in 1911.

The difference in positions adopted by the States on death penalty stresses the fact that crime rates are not solely related to deterrence, represented in death penalty, but also to other factors such as the

socio-economic situation as well as the composition of the population of each state. Indeed, statics have led us to this conclusion as some states abolished capital punishment and others kept it.
In 1972, The Supreme Court of California abolished death sentence from all its provisions alluding to it. They replaced it with life sentence based on a number of reasons. We divided them into three sets290 as follows:

i. Legislative reasons: Death sentence violates the sixth point of the first article of the State's law, which states that cruel and unusual punishments shall be abolished.

ii. Psychological reasons: Death penalty does not represent an efficient deterrence that could minimize the rate of crimes or eradicate crimes which are punishable by capital punishment .For the real deterrence to crimes in general is by directly targeting the circumstances and the conditions underlying criminality. Moreover, the period that the individual spends waiting for his/her execution affects him/her deeply. Indeed, the individual suffers a lot while waiting anxiously for his/her death. He/she experiences psychological destruction before physical one.

iii. Civic reasons: The common humane feeling, which advanced civilizations fight for, generally rejects cruel punishments. The notion of cruelty, which did not comprehend capital punishment in the nineteenth century due to cultural progress at that time, became among the standards to measure the new cultural progress taking into account this punishment.

These justifications are but mere theories .When it come to reality, abolition of the death penalty did not last more than five years. For instance in California, they re-enacted it in 1977[291].
3. Romania:
The penal code of Romania, which was published in October 20, 1864, was deeply influence by the French penal code, and it was not amended till 1863. It was also influenced by the Russian penal code of 1851. However, capital punishment was never carried out in Romania, though it is legalized in France and Russia. Out of necessity, in the period after the first world war, Romania unified the penal code, when some regions joined Romania. It was obvious that there were several penal codes implemented in the country.
Since 1920, many projects had been debated to unite the penal code, until the bill on unification was ratified by the parliament and enacted in March 19, 1936. The new law kept the death penalty. However, it was amended several times a year later, chiefly the law regarding capital punishment in September 24, 1938. Hence, Romania re-enacted capital punishment after 74 years of abolition. After the Second World War in 1947, Romania joined the socialist bloc. The People's Republic, known later as the Socialist Republic of Romania, was created. And since 1948, the law of 1936 was

amended many times under the new system, as it was created in 1936 under the liberal regime which contradicted the socialist vision. Hence, the current penal code of June 21, 1968, was established and it was implemented in January 1969.

Death penalty was prescribed in article 54 of this law. The original sanctions were also prescribed by the law, mainly jail sentence for no less than 15 years and for no more than 25 years, according to article 53/1.

It is worth mentioning that death sentence, which was prescribed by article 54, remains an exceptional procedure carried out in the cases and the situations prescribed by the law (article 54/1). Individuals ,children who are less than 18 years old when they commit the crime , pregnant women or mothers who have children whose age is below 3 years old when committing the crime or when announcing the sentence , are not subject to this punishment. For all these cases, death penalty is replaced with jail sentence for 25 years. Moreover, according to article 2/55, capital punishment is also replaced by 25 years imprisonment for the following cases:

- When the sentence is not carried out within two years from its announcement in his/her presence.
- If the sentence is not carried out within two years after the convicted turns himself or herself into justice or after the last sentence was announced in his/her absence[292].

4. Argentina:

Argentina abolished capital punishment in 1922 and re-established it in 1976. It seems like the political unrest, which followed the removal of Peron's government in 1955 and the attempts to overthrow the regime, was underlying the re-enactment of the death penalty[293].

Section III Death Penalty implemented and carried out in some legislations

We will speak of some countries which established the death penalty and execute it ,such as : Greece ,Turkey , Cyprus in Europe , all countries of Western Europe , the Middle East , African and Asian countries ,as well as the United States except for few states which abolished this punishment.

We will discover the Arab and the Western legislations, while trying to put an emphasis on:

- The orientation of the different legislations when executing the sentence.
- The ethic or the moral orientations which the society tries to protect and to maintain, and thus the punishment is harshly carried out when damaging the ethics.

We will present capital punishment in the Arab legislations and then in the Western legislations. Crimes in these legislations were divided into two categories: 1-crimes against private interests. 2-crimes against public interest.

as far as the Arab legislations are concerned , private crimes which damage individuals' interests which are protected by law and because of which criminals are sentenced to death ,such as threatening people's right to life , and other rights like the right to bodily integrity ,the right to health ,the right to freedom and security , the right to inviolability of the human body , or the right to property. We divide accordingly capital crimes into crimes violating the right to life and crimes violating other rights.

First, most Arab legislations on crimes violating human rights aim at carrying out capital punishment on those who committed premeditated murders in its most extreme forms. These forms vary from law to law. They are as follows:

1. Murder with malice aforethought: In the majority of Arab legislations, murder with malice aforethought is punishable by capital punishment. Though it is referred to using different judicial terms, in Egypt, they call it "premeditated" murder, while in other Arab countries, it is called intentional murder, the difference in naming is not really huge. Everyone agree that premeditated murder must be punishable by death penalty[294].

   The inflexibility of the punishment is due to the fact that the perpetrator is dangerous as he murders, though he is conscious of the damages and the risks he may cause to himself and to the victim. Moreover, among the meanings the term "malice aforethought" conveys is that the perpetrator had the chance to rethink his deeds and to choose a different kind of harm. However, he/she chose the harshest and the most serious one. In so doing, he took a decision, and he was determined to do what he had chosen to do. His determination is a sign that he is fully responsible for the murder and a full punishment must be carried out.

2. Murder by lying in wait: Lying in wait is mentioned in some Arab legislation, as it toughens up penalties to reach capital punishment. Capital Punishment was adopted as a result of the baseness and insolence of the perpetrator who stabs his/her victim in the back and kills him/her without giving him/her the chance to defend himself/ herself.

3. Murder by poison: It is worth mentioning that there is no specific text in the Arab legislations which talks about it as a form of a premeditated murder which necessitates a severe punishment - most of the time capital punishment. It is either because it is enough that the crime is "intentional" to carry out capital punishment ,as it is the case in Algeria , Sudan , Somali or it is because predetermination with malice makes the penalty tougher in case of intentional murder , and murder of poison usually goes hand in hand with predetermination.

4. Parricide: In some Arab legislation, killing one of the murder's parents is a reason for which they toughen the punishment. We mean by parricide (the father or the mother or the grandparents and the affiliates as well) . In this case capital punishment is carried out.

5. Brutal killing: killing brutally reflects the perpetrator's cruelty. This means that he/she represents a threat to society. For this reason, in the majority of Arab legislations, it is punishable by death penalty.

6. Killing a public employee when doing his/her job or because of his/her job: Some legislators have sought that public employees must be granted a special protection, so as to defend them when doing their official duties.

7. Premeditated murder committed by prisoners sentenced to life: Some legislators, those, who are sentenced to life or sentenced to hard labor for life, and who intentionally commit murder or proceed in killing- She/he is a dangerous type of criminals, for his behavior has shown that he is someone irredeemable, which necessitates her/his execution .

8. Premeditated murder related to another felony or another misdemeanor: In most legislation, capital punishment is carried out in case of a murder which precedes, comes along with or follows another crime.

9. Murder by perjury: In some Arab legislation, it is punishable by death sentence in case of perjury which leads to the execution of someone who does not deserve it. Murder by perjury reflects an unethical witness who has no conscience to the point of trivializing the life of others, and uses justice for unjust purposes.

Inciting incapacitated people or those who lack capacity to commit suicide : In this case ,the legislators has considered the inciter as the direct doer of the act of killing , for incapacitated people or those who lack capacity does not know the gravity of the actions they are about to take. In Sudan and Somali legislations, inciting incapacitated people to kill is not considered as a serious form of first-degree murder, but we mention it because it represents a form of violation of the right to life, which is punishable by death.

Second, there are other crimes violating individuals' rights other than the right to life, and which are punishable by death, since they are meant to harm the victim or to kill him/her .These crimes are:

1. Torture as an aggravating circumstance for another felony.

2. Abduction along with other crimes

3. Rape

4. Assault on private property along with assault on people.

We referred to the legislations, in which crimes are divided into two categories. The first included crimes against private interest and we dealt with them previously. When it comes to crimes against public interest, some are political and others are socio-economic.

The first category affects the state's interest from the outside and from the inside. In all these crimes we notice that the punishment accorded to their perpetrators is capital punishment. They are as follows:

A. Crimes against public interest from the outside 1Holding the armament against the state in the enemy's side is a treason crime. In the majority of Arab legislations, it is prescribed that the perpetrator of this crime shall be executed.

2 Conspiring with a foreign state against one's own nation: Capital punishment is prescribed for those who conspire against their own nation in the majority of Arab legislations, so as to make the enemy commit acts of aggression against one's own country. On the other hand, some legislators sought that there must be repercussions for conspiring against one's own nation for the perpetrator to be executed.

1. Facilitating the entry of the enemy to the country: All legislators agree that the person who facilitates the entry of the enemy to his/her own country, in any way, must be executed.

2. Destructing the means of defence: Capital punishment is prescribed in little Arab legislation, like in Algeria and Tunisia, without taking into account the time when the act occurred whether it was in time of war or in time of peace. However, capital punishment is reduced to a less severe punishment, in case the act occurred in time of peace like in Syria, Lebanon and Iraq. Capital punishment is still carried out in time of war.

3. Inciting soldiers in war time to join the enemy: Capital punishment is prescribed for those who commit this crime in most Arab legislation, such as Algeria, Tunisia, Iraq, Libya, Egypt and so on.

4. Gathering soldiers in order to conquer a foreign country and putting the country at risk of war: In the Sudanese legislation, death penalty or life imprisonment is prescribed for those who commit this crime.

5. Demoralizing soldiers or the people, that is any person who intervenes for the enemy's interest by shaking the forces' loyalty or their strength, demoralizing them or demoralizing the people is executed.

6. Getting secrets from the department of defense so as to disclose them destroy them or hand them to the enemy .For this case, capital punishment is prescribed for the perpetrator in all Arab legislations.

7. Disrupting the execution of the contracts ratified by the government so as to cripple the defense of the country during wartime: Capital punishment is prescribed for the perpetrator of this crime in some Arab legislation. It is meant for agents, contractors who a re responsible for supplying gear or specific goods related to war, such as Kuwait, Egypt and Libya. Finally, we notice that there is an independent text allocated to threatening the independence of a country, its unity or the safety of its land, and in which capital punishment is prescribed to the person who commits this crime such as in Kuwait, Sudan, Egypt and Iraq.

B. Crimes that affects public interest from the inside :

1. Attacking the governor or damaging his/her safety, his/her private life or his/her powers. We notice that the governor is protected under some Arab legislation as he/she represents the system of the state .For this reason, capital punishment is prescribed for those who threaten his life and attack him, such as in Iraq, Libya, and Kuwait and so on.

2. Assault on constitution and on the political system of the country: Arab legislators agree that Capital punishment shall be prescribed for the perpetrator of this crime.

3. Assault on political authorities, military command or attachment to power while violating the commands of the government: A number of Arab legislations prescribe capital punishment for the perpetrator of these crimes, such as Libya, Algeria, Iraq, Somali and Egypt.

4. Recalcitrance: Some Arab legislation prescribe capital punishment for the leaders or the heads of mutinies in case they keep their soldiers armed or gathered subsequent to the government's orders to release them, such is the case of Libya, Algeria, Sudan and Egypt.

5. Armed insurrection against the government: Many Arab legislations prescribe death penalty for those who commit this crime, as they incite people against the government's authorities. On the other hand, there are other legislations which prescribe this sentence in case the incitement would lead to armed clashes with the government's forces and to someone's death or in case the perpetrator was the leader or the commandant of an armed force.

6. The attack on a group of people or inhibiting the implementation of laws using arms or proceeding in the occupation of public buildings and means using force: The person, who leads a gang which attacks a group of citizens or resist law enforcement officers using weapons, as well as the person, who proceeds in occupying public buildings and means using force, are to be executed, in some countries such as in Egypt and in Iraq.

The second category of crimes is that threatening public socio-economic interest. This category includes the following:

1. Random murder , sabotage and destruction : This is prescribed in Arab legislations ;each person who commits assault aiming to increase homicide or sabotage in one or more regions , who commits an act aiming to destroy ,steal or randomly kill people in the government's property ,or who commits acts threatening public safety ,that is expose the people to death or physical injury

2. Arson, demolition or sabotage of public facilities using explosives: Capital is prescribed for those who use explosives to demolish public buildings and facilities or those which are built for the public to frequent, or those who demolish public roads, dams, reservoirs, bridges, or commercial or industrial facilities.

3. Sectarian strife and civil war: Capital punishment is prescribed for the person who commits assault by which he/she intends to urge citizens to fight against each other or which triggered civil war or sectarian fighting.

4. Putting the means of transportation in danger in case it leads to a person's death: Criminals, who have put land, sea and air means of transportation in danger, have to choose between hard labour for life and capital punishment according to some legislations, but others have no choice but to be executed.

5. Intentional fire setting which leads to the death of a person : The act of setting fire intentionally ,which leads to the death of someone , is punishable by capital punishment in Egypt ,Syria ,Lebanon ,Tunisia and Algeria.

6. Disseminating epidemics and polluting water and food ,in case it leads to the death of one person or more : In this case , death penalty is prescribed to the person responsible for disseminating an epidemic through spreading harmful germs or polluting water and food resulting in the decease of a single person or more

7. Counterfeiting currency and promoting it: Capital punishment is prescribed for those who imitate, fake or counterfeit legal coins or banknotes in their homeland or in a foreign country, bonds notes or shares issued by the Treasury and bearing its stamp, sign or profit slips coming from these bonds, notes or shares.

8. Leading gangs aiming at attacking public funds or money belonging to a group of people: In some legislation, death sentence is prescribed for those who start a gang or become the leader of a gang which aims at assaulting or robbing public and private lands and money, or who resist military forces which are responsible for chasing the perpetrators of these crimes.

Western legislations, which is represented by the eastern and the western camps, are also divided into two groups. Crimes are divided into two categories: private crimes, and public crimes against the State both from the outside and from the inside. We will define private crimes. They include crimes violating the right to life ,that is , all the sorts of preliminary murders which we mentioned earlier ,and the other forms of violations of individuals' rights such as rape resulting in death , and assault on private properties which goes hand in hand with the attack on individual's integrity. Public crimes , on the other hand, comprehend crimes threatening the State from the outside : threatening the country's independence its unity or its safety , fighting with the enemy against one's own country , avoiding the draft in times of war , spying on one's own country for a foreign country ,destroying the national armament in times of war , having access to defence secrets in order to disseminate them , or give them to a foreign country or to the enemy. As far as crimes threatening the public interest from the inside are involved, they include violating the constitution and the political system running the country, causing insurrection against the government, violating military commands or holding onto them by violating government orders, attacking the ruler of the country or some important figures, provoking riots and chaos in correctional facilities, or attacking security forces and public order teams. However, socio-economic public crimes involve smuggling drugs, disseminating epidemics ,polluting water and poisoning food in case it leads to the death of a person or it weakens the State , administering organisations aiming at turning the social and the economic order of the State, using public money or money belonging to a socialist system , stealing it ,pilfering it ,or embezzling it for evil purposes, bribery, destructing properties or means of transportation ,counterfeiting currency for smuggling and speculating purposes.

<u>Theme 4:</u> Abolishing capital punishment in some legislations

Most states, which abolished capital punishment, stopped carrying put this punishment long before the abolition, the thing that encouraged them to abolish it .That is the case of Luxembourg, the Vatican, Portugal, Norway, Denmark, Switzerland and Finland. There were no tangible changes after this abolition in terms of serious crime rate. This makes it difficult to compare between the previous figure and the figure after abolition .Hence, these states have considered abolishing capital punishment regardless of the reasons for which they must keep it, as we noted that before.

It is worth mentioning that abolishing capital punishment in these countries, taking into account their civilizations and cultures, is conceived as an indication that the most democratic and the most prestigious places in this world tend to abolish death penalty. This alludes to the fact that there is a correlation between the civility level and adopting capital punishment, though when looking closely into this correlation, it does not seem like a steady rule. In France, for instance, the abolition took place only after aggressive debates. This proves that civility may improve human behaviour in general, but this does not mean that hate-filled criminals will disappear. No reform was useful for their case.

We will present the legislations which wholly abolished capital punishment. France is the first to abolish it, followed by the other states.

A. France :

Before the French revolution, there was no complete penal code. Penal problems were solved by virtue of monarchical orders, which were issued to stop the anti-oppression riots in the country, such as the decree of 1670 which was issued to organize mainly the penal procedures. The monarchical orders, recognizing capital punishment, have been qualified as such:

1. Capital punishment was prescribed for a huge number of crimes : As the French revolution ignited , there were a hundred of crimes which were prescribed death penalty. That is ,there was an extension in the execution of this punishment

2. Capital punishment was harshly and inhumanely carried out: They used to cut parts of the body of the convicted before executing the punishment. Adding to that, there were different ways of executing the punishment according to the crime's type and the social status of the convicted.

3. Carrying out the capital punishment a day after the announcement of the judgement, which means that the convicted is bereft of neither royal pardon nor revision of his/her sentence.

4. Only two judges from the committee of the seven judges, concerned with felony cases, vote for death sentence. This shows the arbitrariness of the law, which executes a harsh punishment agreed upon by only a minority.

All of it was harshly criticized by philosophers, thinkers and jurists in the eighteenth century, endeavouring to improve the situation. For this reason the legislators abolished capital punishment in 1775 for the crime of dropping military service ,unless it was done out of treason. The legislators intervened again in 1778 by abolishing the speciality of the High "Flander" Court which is concerned with the crime of stealing horses. This entails abolishing death sentence for this form of theft.They intervened a third time on May 8, 1788 to increase the number of judges who can decide for a capital sentence to 3 judges. In addition to that capital punishment is not to be carried out until months after the judgement was spelled out, so that the convicted can be granted royal pardon and to make sure that the judgement is in accordance with the law. However, the legislators has excluded crimes relating to security and which were punishable by death penalty or crimes which cause public worry and lead to general effervescence. For these types of crimes, capital punishment was carried out the same day it is announced. But they sooner changed this former reform for political purposes. Hence, the rule has become carrying out capital punishment the day of its announcement[295].

Reforming penal laws was among the most important issues of that time. On 14/09/1789, the Constituent Assembly of the revolution decided to form a committee concerned with preparing the draft of the penal code. On March 23, 1791, the draft was completed. The second article of the draft announced that individual imprisonment is on top of the list of corporal punishments , this means that the committee proposed the abolition of capital punishment but the national assembly did not respond to this idea . Indeed, the French penal code was passed referring to capital punishment in its first article.

From this we can draw the conclusion that the intellectual trends in the eighteenth century started pressuring the legislative movement to abolish capital punishment. This pressure took time to be endorsed because of real life circumstances.

The insecure situation of the country caused an increase in the rate of gang crimes. This was the reason for which capital punishment was kept in the French penal code of 1810.There was a proposal to abolish capital punishment before the French penal code was published on April 28, 1832. The debates, which revolved around this proposal in the French parliament, resulted in the refusal of the total abolition of the capital punishment and the tendency to gradually abolish it , so as to meet people's ethics ,the degree of threat the criminal's behaviour represents.The Council decided by the end to abolish capital punishment gradually and that the legislation of 1832 is on its way to be abolished.

From one hand, this law, which is influenced by the (neoclassical) doctrine, draws a line, in terms of punishment, between public law crimes and political crimes. Two different strata were adopted for political crimes and normal crime. The French constitution ,which was published on 04/11/1848 and which was influenced by the ideas of "Jesus" who included them in his book (Capital punishment with regard to political crime), followed the same steps and abolished capital punishment relating to political crimes (article 5) . Building on this, a law was passed on June 8^{th}, 1850 announcing that death sentence was replaced by life imprisonment[296].

On the other hand , in 1832 capital punishment was abolished in nine cases ,among which counterfeiting, theft with aggravating factor , cutting the right hand of the convicted person who is sentenced to death in case he/she kills one of his/her parents. They adopted a system of mitigating circumstances. The reforms of the law of 1832 continued, so as to ensure a less number of cases punishable by capital punishment. For instance capital punishment was abolished in case the mother kills her baby, by virtue of the law of 1901. However, the abolition of capital punishment for political crimes did not last in France. In fact the situation during the Second World War was appropriate for the re-establishment of the death penalty in 1939 in crimes threatening the national security from the outside. They also implemented in 1960 with crimes threatening the State security from the inside out of necessity to ensure the stability of the country.

We may say that 1962 was a starting point in the history of France, when it started to reconsider seriously abolishing capital punishment. This became a reality in 1981. A debate took place over the death sentence and its abolition for all the crimes, which were punishable by death penalty, before the law that abolished it in France was passed in 1981 and replaced by death sentence in accordance with the nature of the crime, whether it is normal or political.

The crimes, which were punishable by capital punishment, were spelled out in the penal code before the law of 1981. They are as follows:

1. Crimes against people, properties: That is killing: patricide or matricide, killing by poison, a murder followed by, accompanied with or preceded by another crime, killing to ensure carrying out another crime or for impunity reasons, putting a child's life on the line and he/she dies, using violence which leads to the death of the victim even in case it is unintentional. Moreover , there are other forms such as arresting a person ,illegally detaining him/her and torturing him/her physically , kidnapping a minor leading to his/her death, perjury causing the death of an innocent person , intentionally putting fire in an inhabited place and causing the death of a person or serious damages.

2. Crimes against the State security : These crimes are treason , espionage , armed attempts to

attack and conspire against the State , the acts which lead to genocide and total destruction , managing or leading armed gangs aiming to cause a general state of confusion through genocide and subversion, Organizing an armed insurrection movement, as well as crimes which take place during war time such as robbing an inhabited place or a deserted one, joining the enemy , participating in conspiracy, soldiers? disobedience of military commands , aggressing a wounded or a sick soldier so as to steal him/her ,targeting a military fortification or national defences , destroying a site facing the enemy without exhausting the military means, putting one?s own country in danger , treason ,spying or urging to surrender to the enemy[297] .

The reactions of the people after the abolition was passed in France prove that it was a response to a political reason and not to the public opinion298. The French people did not accept this abolition, for they believe that capital punishment is the only sentence which lessens the feeling of taking revenge and deters them from so doing. It is worth mentioning that in February 17^{th}, 1986, France joined the Charter of the European Community number (6) regarding human rights. This Charter commits the members to abolish capital punishment in five years after their entry, unless in case of war or in case it might happen.

The other States which entirely abolished capital punishment, They are as follows:

1. Luxemburg :

   After its independence, the legislative motion of the death penalty in Luxembourg had been influenced by the special circumstances in the country. In fact, the death penalty concerning political crimes had been nullified according to its constitution issued on 18/10/1866.This decision continued with the following constitutions and ultimately the one issued in 1972. Concerning law crimes, Luxembourg had kept the death penalty in its criminal legislation for the year 1879 until it was abolished in 1979. Before the issuance of the criminal legislation in 1879, Luxembourg used to apply the 1810 French penal law which acknowledged the death penalty. But, after gaining its independence, Luxembourg's movement towards the legislative independence from France had raised the issue of whether to maintain the death penalty or cancel it for the parliamentary negotiation. The major argument that was advocated by the abolition proponents was that the death penalty had not been applied -in real- in Luxemburg for the last sixty years. Moreover, the following punishment caused the same effect on the citizens? consciousness as did the death penalty. And for practical experience had proved that the social system could do without the death penalty, there's no need to maintain it in law.

   Death penalty supporters believe that this punishment ensures national and individual security .It is enough that the feeling of fear of this punishment exists, even if it is not carried out ,be-

cause criminals are afraid of this punishment more than any other punishment . Moreover, the public opinion cannot be disregarded as they believe that capital punishment is the most just punishment for certain criminals, such as the case of a criminal who kills a child to get some money out of it.

This debate was over and the supporters of the death penalty won with a great majority in Parliament (24 votes over 3, and the reluctance of abstention), and that was on March 20, 1879, which resulted in the text on the death penalty in Luxembourg legislation issued on June 18 of the same year[299].

Luxembourg have abolished the death penalty for political crimes to its constitution in 1866, but World War II conditions led to the decision on November 6, 1944, to implement the capital punishment in offenses against state security threatened by the outside, on the one hand, and then a decision coming two years after, the 9th of August, 1946, legislating the penalty for crimes against state security from the inside of the state, then it decided to contain the war crimes, this law was issued on August 2, 1947.

The stability of the internal situation after the war was appropriate to rethink the abolition of the death penalty, which count the number of cases in which the death penalty activated the over 75 years (from 1900 to 1975) and found nine cases: eight of them for political crimes, and one for an offense in law, He called to the issuance of a ministerial decision on October 23, 1974 to form a special committee to study the future of the death penalty in the country, and offer suggestions to the government in the form of a bill, and ended this committee its proposal to abolish the death penalty in all materials to which it refers, and that is work the following sentence has a direct (hard labor) until the issuance of special legislation and alternative sentencing.

On September 5, 1975 the Cabinet decided to refer the bill without amendment to the State Council ballot, on May 17, 1979. Yet, the project was carried out in parliament, where he defeated the pro direction to abolish the death penalty - in all the crimes and by a small number (bet 32 and 59 votes).

2. Monaco

The Penal Code, issued in Monaco on December17, 1874, adopted almost all the texts of the French penal code of 1810, so that the amendments to this law was in consistence regularly with the legislative evolution of the sanctions in France.

The (Article 6) from Monaco law stated that corporal punishment that are against honor are the following: execution, hard labor for life, temporary hard labor, imprisonment. Actually,

Monaco remained implementing the death penalty until it is decide to be abolished under the Constitution of December 17, 1962 in (Article 20). On June 8, 1964, law N° 763 was issued declaring the abolition of the death penalty by the text of the Constitution, and the amendment of article VI of the death to become hard labor for life at the top of the list of sanctions.

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However, the abolition of the death penalty in Monaco lead to stir public opinion because of the absence of the deterrent effect of the death penalty, and a weak deterrent to serious crimes such as murder, as the intentional murder penalty, in Monaco, was the imprisonment with hard labor, and death if the crime is accompanied with aggravated circumstance and premeditation, before the abolition of the death penalty, whereas after the abolition of the death penalty the punishment of an intentional crime of murder becomes temporary hard labor, which is of lasts no less than 10 years and do not exceed 20 years[300].

This has led delegated in Monaco to the adoption of a new progressive scale in the new Penal Code N 829 dated September28, 1967, where the inclusion of the penalties provided for in Article (6) of the repealed law in one sentence the and replace it by the penalty of imprisonment, and then created a kind of internal progression as follows: life imprisonment, the temporary imprisonment up to a maximum period, imprisonment (from 10 to 20 years), imprisonment (from 5 to 10 years).

As outlined above, we note that the legislator in Monaco tried to respond partially- by this new peace sanctions - to the public opinion trends, and to achieve an element of deterrence of serious crimes such as murder after an absence of deterrent effect of the death penalty.

3. The Republic of St. Maria

This republic did not implement the death penalty in its criminal legislation issued on September 15, 1865, where (article 141) divided sanctions into: original sanctions, and other dependency. Furthermore, (Article 142) stated the Public Works for life to be on top of its original sanctions[301].

The Republic of Santa Maria has kept the abolition of the death penalty in its new criminal legislation of 1975.

It is worth noting that the issuance of this law was - in its spirit - inspired ideas from the traditional school along the lines of the repealed Penal Code as it adopted the principle of moral responsibility, the trio division of offenses, and specified penalty for each offense. Additionally, it was taking sanctions that are relatively deterrent to serious crimes such as murder, whereby the legislator sentence with imprisonment from seventh grade on a simple intentional murder with no less than 14 years and no more than 24 years, and a prison sentence of the eighth grade if combined it is a premeditated murder, such as or a severe murder accompanied by means of violence or poison or means reflecting the treachery, here death penalty could not be less than 20 years and would not exceed 35 years. NB! He who is sentenced to prison from the eighth grade may not be submitted to conditional release unless he serves 25 years of the sentence from the date of execution.

There is no doubt that the punishment of 35 years is an eradicative penalty in essence, so that we can say that the abolition of the death penalty in Santa Maria has not led to the development of alternative punishment, effective and humane together for execution.

4. Greenland

   Greenland Act was passed on March 5, 1954, and it was radically committed to social defense policy, as the legislator adopted the directives of Filippo Gramatica around the idea of ??"personal Penal Code or self" LE DROIT PENAL SUBJECTIVE ", which resulted in the legislator's lack of monitoring penalty for each a crime, but it was stipulating and mentioning the acts that reveal the deviation in the character of the offender. Then, the magistrate judiciary was released in the selection of one of the measures provided for in (Article 85) of this law which is consistent with the state of the offender and the degree of severity, because the behavior of the offender in the eyes of the legislator is a sign (UN SYMPTON)) of delinquency that enables the judge (the magistrate) to select the appropriate measure for the corrupted person/pervert.

   Accordingly, it is logical from the mention above arguments to find out that the legislator omits and writes-off the measures of the death penalty from the list of its legislation as it is sought to be an eradicative punishment which contradicts with its logic of reform[302].

   Probably, the motive to commit the social defense policy in Greenland is its limited population on the one hand and its political and social stability on the other hand.

5. Vatican

   The Vatican canceled the death penalty by the Act of January 15, 1971, and the cancellation was a tool of acknowledgment and endorsement to the reality of the death penalty in the Vatican[303].

   In fact, The Vatican's position is a clear response to the trends in the contemporary church

linked to the logic of (guidance) in the mission of the Church stance on the death penalty, and the purpose of this logic - in the eyes of the church - is the salvation of mankind through the reformation and rehabilitation not by dragging them to death.

6. Portugal

   The history of the abolition of the death penalty in Portugal is coming to the date of the criminal law in 1867, as the cancellation was legislated in its current criminal law which is issued in 1886.

   Some admit that Portugal sentenced to death a small number of criminals over its overseas territories, in the late era of the Prime Minister SALAZAR[304]. But, since the announcement of the new constitution in 1976, it became unlawful to be sentenced to death for any crime, as (Article 25) of the Constitution states that:

   (a) Human life has sanctity. (Sanctity of life)

   (b) Any punishment should not be that much of the death penalty.

   Also in (Article 30) the constitution eliminate and set aside all sanctions and measures of indefinite period. As consequence, it becomes not permissible to realize the death penalty in crimes made according to Military Penal Code in time of war.

7. Federal Republic of Germany The legislative evolution of the death penalty specialized in Germany by three distinct legislative stages:

   The first phase is therefore the phase that precedes the German reunification of 1871; it is done under the initiative of the Grand Duchy from Oldenburg, Anhalt and Nassau, in order to abolish death penalty in 1848. As stipulated in the Constitution of the German Empire which is issued on March 28, 1849, the abolition of the death penalty was declared in peacetime, which was considered by most of the German duchies in domestic criminal legislation.

   The second phase extends from the date of the German unification at the hands of BISMARK until the end of World War II, as it was issued a united penal code in 1871, taken from Prussia law, and the latter was regarded as an image of the French penal code in 1810 in terms of form and content. This law has - along the 30's , especially after the spread of positivism school ideas - followed by a number of amendments that were considered as normal sophistication for legal concepts, but the embrace of Germany in the Nazi era with the ideology of- national - socialism led to the increase in the number of crimes punishable by death. Hence, it includes every act in through which the perpetrator aimed to injure the damage over the interests of the German people, and thus underwent manipulative Boycott and moneylenders for the death penalty.

The third stage comes after the surrender of Germany and its subjugation of the division, along with the Declaration of the West German Federal Republic under the 1949 Constitution (with the approval of the three occupying powers: the United States, Britain and France). Actually, the text of the Constitution stipulated the abolition of the death penalty.

It is worth mentioning that the Democratic Republic of Germany survived on the application of the death penalty without being influenced by the position of West Germany.

8. Austria Austria hesitates between the abolition of the death penalty and retaining it, till it finally agreed on the abolition in 1950 except for emergencies. Mainly this reluctance was reflecting the country's stability or disorder.

   In 1968, death penalty is abolished, also, in case of emergency, which makes Austria joining the range of countries that have abolished the death penalty altogether.

9. Iceland

   Iceland was adopting the death penalty in its legislation issued in 1866, and then, in 1928, a law was passed to cancel it. On this basis, this cancellation remained until framing the current law in February 12, 1940.

10. Norway

    In its criminal legislation promulgated in 1842, Norway adopted the death penalty for a number of serious crimes, and then it stopped retaining it effectively since 1875, until the legislator abolished in its current criminal law of 1902, which was implemented from January 1, 1905, wherein the text of the constitution consider imprisonment on top of the original list of sanctions in to be sentenced to according to the rule of law. Actually, Norway has continued to retain the death penalty in the military penal code in time of war until it was canceled by the year 1979[305].

    It is noted that Norway had preceded the legal abolition period of time (20 years), along which the death penalty were not implemented effectively, as it is difficult to make a real comparison between the period before the legislative abolition and the period that followed it - because these two periods represent - in fact - the same period .

11. Sweden

    Swedish criminal legislation abolished in 1921 the death penalty, with the declaration on its inadmissibility in wartime on condition issuing a law on this. This, indeed, was stipulated in the current law issued, in 1962, and applied starting from January 1, 1965. It was said that Sweden had stopped the work of the death penalty in the period that preceding the legal abolition since 1910 to be canceled then by the year 1921.

12. Finland

Some people admit that Finland is stopped the implementation of the death penalty effectively by 1826, but it cited the text in its criminal legislation later in 1889. It was thought that it wanted to keep the deterrent effect of the death penalty but it was not implemented.

Finland has decided to abolish the death penalty in peacetime under the Act of 1949, and then followed by another law released, in 1972; it is, also, prescribed to be abolished in time of war, to be replaced by the imprisonment as a punishment which is the following sentence to execution in (Article 1 of Chapter II) in Finland sanctions law.

It is worth noting that Finland is included in the Geneva Convention, held in 1947, which decided the neutrality of the Scandinavian region about what lies in the future of the wars. And this actually seems to be the Finnish legislature acted on its basis when it abolished the death penalty.

13. Denmark

The Danish law of 1866 was legislating the death penalty, and since 1892 there has been no implementation of the death penalty i.e. it was authentic. Then, a new penal code was passed in 1930, yet it was abided by 1933 and it did not include provision for the death penalty, and so Denmark canceled this punishment after the effective authentic cancellation that lasted for forty-one years.

However, the events that resulted from World War II and the conditions of the Nazi occupation required intervention by the legislature to impose the death penalty in the field of state security offenses. The law released in 1946 prescribed the punishment to death in war crimes and Nazi cooperation crimes[306]. We notice that the reality of the death penalty - in Denmark - has declared and believes in for a long period of time (1892-1933) but it was not implemented. In fact, the legislative cancellation was successful as the crime rate did not entail any consequent increase since then. Some believe that the lack of change in the crime rate - and serious ones in particular - should not be attributed to the abolition of the death penalty , but the general level of ethics, education, and economic and social conditions in Denmark, all limited the criminality of serious and non-serious factors[307].

Subsequently, after having learned about the countries that have abolished death penalty altogether, we will look at countries that have abolished the death penalty partially, which are actually of a limited number in the scope of death penalty implementation, as they keep the execution in the field of political crimes and the field of military law, and restrict the cancellation for the field of common law crimes.

States that have abolished the death penalty in part are as follows:

1. **Switzerland**

   Anyone who has followed the legislative movement in Switzerland about the death penalty can notice that this movement began in its very first steps to echo the public opinion by considering it, however, by the end it approved the attitude of punishment without paying attention to the call of public opinion.

   Swiss constitution issued in 1874 planned to abolish the death penalty (Article 65) thereof excluding its military crimes in time of war, but the abolition of the constitutional legislator to this punishment without deciding an alternative equal penalty won't reflect neither the development of the penal systems in Switzerland or the civil ones, on the grounds that the abolition of death penalty may be taken into account. Therefore, we believe that just two years after the cancellation, a series of heinous crimes occurred in various parts of Switzerland which suffered from the scourge of Swiss society.

   Under the influence of a stressing majority, Constitution was amended for the cancellation in 1879, and then it returned to the controversy over the legality of the death penalty and its necessity. From 1918 until 1937, the majority agreed together on the abolishment of the death penalty under the Penal Code of 1937, which is implemented into effect in 1942, and under this law, the death penalty was replaced to life imprisonment.

   Obviously, this new experience has arisen and went through a long debate along with two opposite positions; first, the position of the federal government on the relationship between the abolition of the punishment and the crime rate, Second, the position of public opinion about the same relationship. According to the viewpoint of the federal government, which annexed the memorandum submitted by them to the British Committee[308], there is no relationship between the abolition of the death penalty and the crime rate, as stated in the note: "the Minister of Justice concluded that the experience of Switzerland does not provide any reasonable evidence to handle the problem at hand, which is related to the value of deterrence achieved by the death penalty, even so he tends to believe that the abolition of the death penalty has nothing to do with the number of crimes of culpable homicide "[309]. In the other hand, the public opinion is moving to the idea that the death penalty is the only sentence that can provide people with the necessary protection to face the escalating crime rate and serious crime in particular. Owing to the fact of the abolition, just six years after, Switzerland suffered a series of violent crimes sparked panic in the hearts of the citizens, the crimes varied between armed robbery, kidnapping, murder, and crimes of sexual abuse of women and children and killing, which led to stir public opinion and

make pressure on the federal government to restore the death penalty. Again in 1951 raised the problem of the death penalty and emerged as a matter for debate in the National Assembly, to be ended - in the session of 26^{th} May, 1952- wherein the government is rejected to meet the call of public opinion, and decided to treat the problem of criminality lies on the development of the means of identification of the offenses and the advancement of the scientific and cultural level of police, as well as the application and implementation of the courts justice over the penalty prescribed in the law on serious crimes, and then working on making the offender mind hardly the implementation of life sentence.

It seems from the foregoing that the Swiss government does not tend to recognize the moral and ethnic differences among the members of society, and its insistence on punitive policy revolved around the fact that any criminal is irreparable, besides its objective to make punishment of an educational goal, which was opposed by the public opinion, from time to time, by admonishing from the seriousness and impact of this policy on the society security and justice.

2. **England**

During the nineteenth century, England were - one of the countries that impose death penalty on a large number of minor offenses, which has led to a wide gap between the penalty as set in the law - and the reality of the crimes and criminals. Indeed, this lacuna makes jurors working to fix it in several ways, even if it was inconsistent with the law. As it is known, the Anglo-Saxon law depends on the judicial precedents and customs. For the reason of the rigors of the law and lack of flexibility, and as a natural reaction the public opinion become a compressive strength on the parliament to push them reconsider punishable by death crimes and the report of less severe penalties for minor offenses that are sentenced by death. Consequently, the abolition of death penalty began for certain crimes, for example: in 1832, cattle, horses and sheep theft crimes is no longer sentenced by death, and in 1833, also crimes to enter homes without right and then crimes of the desecration of churches and theft of postal employees of the letters were reconsidered, in 1835, in addition to crimes related to counterfeiting (drain money) and promoting it, in 1936. In fact, advocates of abolition in England had been able to achieve the bulk of their goal of total abolition of the death penalty, as within a short time from 1837 till 1861 the number of crimes punishable by death has decreased to only four[310].

England Conducted careful studies on the impact of the abolition of the death penalty for the crime rate in states that have abolished it- on a trial basis for five years in the Act of January 8, 1965, to put the results of the experiment on the English Parliament for final decision either by the ratification of the cancellation or the re-realization of the Law. On the basis of the experi-

ment, the parliament approved abolition of the death penalty once and for all on December 18, 1969 with the exception of the following offenses: high treason, piracy, igniting the fire in the military and defense ships.

Finally, it is worth mentioning that the contemporary public opinion in England was supporting death penalty by a percentage of 67% to 83%, the difference between these two percentages was caused by a dispute over the quality of the crimes that deserve the death penalty.

3. **Italy**

The movement of the abolition of the death penalty in Italy has emerged since the year 1786, exactly when "Tuscany" initiated the abolition of death penalty in the reign of King "Leopold II". Late in the wake of Italy's unification in 1860, controversy erupted about whether to consider death punishment or to cancel it in its unified criminal law, especially after the fact that some provinces had abolished capital punishment in domestic criminal legislation, which support the stream of the abolition and ensures its victory by the release of the Italian Penal Code of 1889 without any provision for death penalty, this law is known as "ZANARDELL"[311] law.

Actually, This law has been considering (ERGASTLO) punishment (which means to judge the sentenced person, at least three years in solitary confinement, after the expiry of this period, he/she is allowed to work in the Foreign workshops (ALL APERTO) with night insulation) as alternative punishment of execution for crimes of violence to life such as murder with malice aforethought, kill a parent, murder by poison, and compromising the security of the state on the one hand the outside and inside, offenses directed against the unity of Italy and territorial integrity, and contacting a foreign country aim of provoking a war against Italy that resulted in the outbreak of war, the assault on the lives, safety or freedom of King or Queen or Crown or guardian.

After the outbreak of World War I, Italy had witnessed a tidal wave of serious crimes, as in order to strengthen and consolidate the great fascist regime, the death penalty has been reconsidered in the field of state security crimes. In this regard a law was issued on November 25, 1926 and jurisdiction of such crimes has assigned to the special court -NB! Reconsidering this penalty reflects reasons of state security - politically - more than taking into account the need of public security - morally -so under the latter's proposal presses to decide the introduction of the death penalty in crimes of violence to life albeit in a narrow range referring to the Act of October 19, 1930.

After the surrender of Italy in the Second World War, in 1943, the legislation of the introduction of the death penalty was passed on July 27, 1944 on the absence of constraints with the men-

tioned above (ERGASTLO) punishment. Then decreed a law abolishing the death penalty on August 10, 1944, in all the crimes stipulated the death penalty and bringing the (ERGASTLO) one, as consequence death penalty has become only scheduled in the following transgressions:

- Crimes punishable by death in the military laws.
- Fascist crimes punishable by death in their own laws.
- Crimes punishable by death in the special economic censorship laws.

Eventually, Italy has returned back to the abolition of the death penalty laws in 1948 with the exception of crimes stipulated by the military laws in time of war, and still the Italian government believes that the death (ERGASTLO) penalty is a successful deterrent against criminal activity.

4. **Spain**

Spain considered the death penalty in its criminal legislation promulgated in 1870. Hence, in 1928 a new Penal Code has released in the era of the dictator " PRIMO DE RIVERA " - this latter become effective from January 1, 1929, under the influence of the doctrine of the world of political criminality " SALDANA " who believes in the idea of the offender's reformation and rehabilitation through the criminal and realistic policy of social defense - the former law was not implemented, and the rise of the fascism Republic and the accompanied disorder in the political life led to the discontinuation of the legislation of 1928 until December 1, 1932. Then, the new penal code issued on December23, 1944 provided for the death penalty.

The power struggle in Spain has led to the devastating civil war that ended with "FRANCO" accession to power ruling the dubbed "Falange" Party known also as (Phalanx). The Falangists did not differ a lot from the other fascist movements, this implies the establishment of harsh principles of a dictatorial government, and during this turbulent period in Spain, the recourse to death penalty bequeathed, on a large scale, a lot of hatred and suppression of freedoms.

Ultimately, as named to be Franco's personal successor, after the death of Franco, Prince "Juan Carlos" became the king ruling Spain after Franco's death. The matter of death penalty abolition is reconsidered on the grounds that it is part of the national and social reform along with the popular demand supported by public referendum on December 6, 1978 that came after the ratification of the Legislative Council on the constitution on October 21, 1978, which stipulates (Article 15) thereof provides that "everyone has the right to life and the integrity of the body and mind, and prohibits undergoing torture or punishment inhuman or degrading his dignity," the death penalty is declared to be abolished except for crimes stipulated in the military Penal

Code in time of war.

5. **Netherlands**

Netherlands stopped the death penalty effectively since 1850 before the criminal legislation implemented on September 1, 1886 which stated in (Article 9) to sentence by prison on top of the original list of sanctions as a major sanction in the rule of law, and that, according to (paragraph 1 of Article 10) this punishment is divided into: life imprisonment* and the death temporary** imprisonment[312].

The Netherlands has kept on the agenda of the death penalty in crimes punishable by the Penal Code in the military in time of war.

In the report presented by the Dutch government for the "British Committee" - referred to earlier - the abolition of the death penalty in the normal penal law, indeed, did not lead to increase the rate of crime or serious ones. Typical of this, if we held a comparison between the crime rate in the period before the cancellation - a period that has not seen no implementation of the death penalty - the period which amounted to 26 years, and the rate in the period after the cancellation, it is noted that the index predicts that there is no increase or decrease, due to the fact that these two periods were declared, in fact, within the same period; wherein the 1^{st} period the punishment has not been realized practically, whereas the 2^{nd} one has not been implemented by legislation.

6. **Some US states**

a. The state of "Rhode Island":

This state abolished the death penalty, in 1852, with the exception of murder crimes committed by imprisoned during his imprisonment period for any other crime.

b. The state of "New Mexico":

This state abolished the death penalty, in 1969. Yet, it implemented death penalty for the following crimes:

- 1^{st}: In some images of murder:

  - Killing a police officer during or because of the service.
  - Murders committed against another imprisoned.
  - Murders committed in prison against a prison guard.

- 2^{nd}: If the crime is punishable by death and the jury recommended the work in the body, such as the case of the culprit.
- 3^{rd}: Commission of serious crime during the period through which he was allowed him to

wait a bit before daring to commit other crime.

c. The state of "Vermont":

This state abolished the death penalty, in 1965, with the exception of these cases:

- 1^{st}: A situation where a person is accused of committing a first degree murder and then commits another murder which is not linked to the first.

- 2^{nd}: killing one of the judicial police officers or prison users while assuming the duties of their job.

d- The state of "North Dakota":

This state abolished the death penalty, in 1915, and kept implementing them in:

- 1^{st}: Treason.

- 2^{nd}: Murder committed during his imprisonment for life for the crime of first degree murder.

It is worth mentioning that some US states went to the abolition of the death penalty partially and then returned to it entirely and these states are:

a- The state of "Tennessee":

This state abolished the death penalty, in 1915, except for the crime of rape, but it returned to it by 1919.

b- The state of "Arizona":

This state abolished the death penalty in 1916, except for the crime of treason and then returned to implement it in 1918.

d- The state of "New York":

This state abolished the death penalty in 1965, and kept implementing them in:

- 1^{st}: commission of murder against police officer while performing his functions.

- 2^{nd}: Commission of murder against Prison guard or imprisoned by an imprisoned during the period of his imprisonment, or even for trying to escape.

- 3^{rd}: This state has returned to the agenda of the death penalty in 1978.

Conclusion and recommendations

" The International criminal law and the way for the abolition of the death penalty " , through this research we found that the human societies and peoples lives, throughout its different time phases (moving from one period to another), had faced cruel and barbaric life, especially in the early ages where they were moving to get nourishment (food and water) for the purposes of grazing. Later on, people became aware about Agriculture which assures their stability and establishment of cities. This stage, actually, was characterized by frequent invasions and conflicts among folks within their communities. Gradually, the empires evolved and the most ancient civilizations emerged in all direction; in the east emerged civilizations such as the Babylonian, the Egyptian and the Pharaonic ones, and in the West, namely, the Romanian, the Anglo-Saxons and the Greek civilizations.

Furthermore, these civilizations witnessed the establishment of a judicial system and legislated laws in order to regulate these people's lives, by the imposition of sanctions on the people of perpetrators with its different kinds and nature. Thereafter, the penal system was characterized by its cruelty and severity, and the criminal intent was entered to identify the death penalty for murder, adultery and banditry, also crimes against state security from the outside as well as from the inside, offenses against the gods, etc. these sanctions did not distinguish between young and old neither in death penalty, nor in petty crime.

The Period of the emergence of monotheistic religions was characterized by divine justice, despite passing through different time phases in the establishment of legal rules governing human life originating from the Almighty Creator by imposing sanctions against the perpetrator. For example, in Jewish law the death penalty is implemented for crimes of (murder, adultery, disbelief in God (Atheism), murders attempt treacherously, hitting parents and beaten to death), and methods of executions in Judaism were (stoning, burning, decapitation, hanging).

In Christianity, the religion came to establish the law of God in the earth, and to achieve social justice, compassion, tolerance, freedom and equality, and raise the idea of spirit immortality and emphasizing the dignity of each individual and how important he is. About the subject of killing, Jesus (peace be upon him) says: "everyone who is angry with his brother will be liable to judgment"$^{Mathew 5:22}$.

Likewise, women have been given rights, even those that commit adultery, as Lord Jesus Christ says:" Let him who is without sin among you be the first to throw a stone at her".*John*8:7. On the basis of these arguments, we can figure out that the Christian law prohibits the killing as a punishment against human and that adultery is punishable by stoning.

We have broached also, The Islamic Sharia and its way in dealing with the mentioned above matter (death penalty). Hence, we find out that Islam takes the principle of retribution punishment (Qisas) in the border crimes (Hudud) and retribution/retaliation (Qisas), which proved its origin in the Holy Quran along with the Sunnah. There were a distinction between death penalty sentenced according to each of the punishment as retaliation (Qisas) is adhering the right of God, while border crimes (Hudud) is adhering the right of the human being, and the penalties that combine the two rights were tackled by discretionary punishment (Ta'zir).

By the progress of time, nations developed, and the states as well as some of empires emerged, which led to the birth and producing of such stable urban society. Moreover, cultural renaissance were held in a way that deepens education and awareness among the people, so the scientific and technical progress had spread in all fields of life. Accordingly, States have established national legislation (constitutions) to regulate the lives of their people through laws showing the individual's rights and duties, in addition to laws and penalties against the perpetrators of crimes in different kinds.

In fact, through the historical development laws have evolved, and yet evolved with it the international criminal justice along with the systems and the rules of war, neutrality and violation against the rights of civilians. As since the crimes committed in the First and Second World Wars, and the gravity and the human and material losses inflected by the use of new sophisticated weapons, such as the use of internationally banned and nuclear weapons. It is, actually, during this period when the special and temporary courts where established and created by the victorious powers and its allies in the covenant of (the League of Nations, and the United Nations).Its aim was to prosecute perpetrators of war crimes of the Germans, the Nazis and the Japanese, and despite all the flaws, legal errors and criticisms that accompanied these courts (e.g.: Treaty of Versailles, the Leipzig court, Nuremberg Court, and the Court of Tokyo) they have contributed to the evolution of the legal rules of international criminal law. By the same token, the cold war came in the era of (UN Security Council) where it established (two international temporary tribunal courts) in the former Yugoslavia and Rwanda to try the perpetrators of: brutal war crimes, crimes of genocide, crimes against humanity, and crimes of racial and ethnic cleansing. Besides, these courts contributed in determining individual responsibility for war crimes and crimes against humanity, as they defined the concept of international crime, and legalization of the rules of international humanitarian law, and international criminal law. Finally, the international community through (United Nations Organization) come to create the Rome Statute of the inter-

national Criminal Court on July 17, 1998, and help in determining the jurisdiction of the Criminal Court, which is objective, personal, temporal, and applicable law, also in determining the criminal liability to natural persons only, without legal persons, and the authority delegated to the authority of the Security Council based on chapter VII of the Charter through a number of the Statute of the Court of materials, which dominated on the court a political nature in line with the desire and interests of the great powers, particularly the United States, and this was one of the court's flaws and legal errors in terms of system, thus this weakening the judicial role in exercising its jurisdiction in absolute neutrality to achieve international justice.

Throughout the research, we faced different means of implementing the death penalty in international criminal law, either by hanging, or guillotine, or electric chair, or firing squad, or gas asphyxiation, or lethal injection. And we found that many countries all over the world are still legislating and implementing the death penalty, whereas others canceled it. Some other are legislating the abolition but do not apply it. Conversely, many Arab countries adopted it not only provisionally, but also in application. There is also legislation in European and Eastern countries that have abolished it completely. Yet, others partially canceled it, taking into account the humanitarian aspect and respecting the human person as an honored and exalted creature of God Almighty.

In essence of this research the author recommends some points:

1. The need to increase the cultural, religious and legal awareness for people in various countries around the world, because it is the only way to protect the rights and ensure vaccinated to avoid the problems and obstacles that can lead him to drive and to commit the crime. And that would be done through the adoption of all the means of education and audio-visual and print information, newsletters, and holding seminars to raise awareness to this end.

2. The need for the introduction of material law in the curricula for students in middle and high school in all countries of the world. And that should be presented and prepared in a simplified manner without diving in legal theories. Besides, it is necessary to ensure its spread in various colleges with a little expansion of legal information in order to increase legal awareness among students, who represent an important and influential segment in the community.

3. Many countries still retain the death penalty in their national legislation, so it is necessary to try to find alternative punishments deterrent for the perpetrators of crimes punishable by the death penalty, such as replacing life imprisonment with hard labor or severe confinement, which begins in prison in solitary for a period ranging between (15-20 years) with the descent prisoner to daytime workshops and returned to his cell at night or other penalties that respects human subhuman and reduce human waste and based on the principle of tolerance and forgiveness, which brought him the heavenly religions and called for international humanitarian legislation and at the same time achieve its goal in

killing the desires of evil within the offender and try to refine and make him regret his offense.

4. Some sides may consider the legislation of the abolition of the death penalty and replace it with another penalty a matter that may burden them. Yet, it is necessary to find beneficial and effective ways to shift this burden, for example by bringing to attention the advantages of these criminals if making them productive people indirectly; they can accomplish a lot of business in the community, such as building complexes residential or doing the sewage cleaning or cleaning the city from garbage or paving streets and alleys and so on and so far. Certainly from this, we will need to tighten security on them and this process is much lighter than the execution and the violation of the sanctity of humanity.

5. The abolition of the death penalty may not be absolute, because it was originally implemented in the obscene and influential negatively crimes in communities such as treason crimes, and crimes of spying for the State of the enemy, crimes of international terrorism and other crimes in which the offender did not leave room for clemency or taking into account his humanity., we are certainly supporting the abolition of the death penalty, but In such case we would rather call for making the decision after minding, in first place, the public interest and urgency.

6. We proposed to repeal the Article (13 / b) and Article 16 of the Statute of the International Criminal Court, which would be given the power to intervene by the Security Council in the exercise of the court's jurisdiction and the right to disrupt the judicial role. By doing so, we can reach a proper legal impartial practice, and ensure international justice in all the international community, accordingly a goal that help the court to get rid of political pressure.

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