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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



HUMAN RIGHTS IN ISLAM

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I. BACKGROUND

1. The item “Human Rights in Islam” was included in the agenda of the AALCO at the initiative of the Kingdom of Saudi Arabia at its 41st Session (Abuja, Nigeria, 2002). During the 42nd (Seoul, South Korea, 2003) session deliberations and discussions on the item were held. The resolution adopted at the Session decided to include it on the agenda of the 43rd Session (Bali, Indonesia, 2004) of the Organization. The resolution also requested Member States “to forward to the Secretariat their views and observations on the topic, so as to facilitate the preparation of an in-depth study”.¹

2. This Secretariat Report for the 43rd Session focused upon the analysis of Human Rights in Islam from the civil law perspective. It enunciated the four important sources of Human Rights in Islam, viz. *the Quran, the Sunnah* (including both Sunni and Shia perspectives), *consensus and juristic reasoning*, the distinctive characteristic of Human Rights in Islam and outlined various civil and political as well as economic, social and cultural rights as guaranteed under Islam.

3. During the 43rd Session (Bali, Indonesia, 2004) of the Organization, the agenda item ‘Human Rights in Islam’ was further discussed. The resolution adopted at the Session decided to place it on the agenda of the 44th Session of the Organization. The resolution reiterated the request made to the Member States “to forward to the Secretariat their views and observations, so as to facilitate the preparation of an in-depth study on this item.” The Secretariat, however, till the preparation of this report, did not receive the views, observations or presentations from any Member State except from Kuwait (in Arabic). Also, a letter regarding a seminar on “International Conference on Protection of war victims in the light of Islamic Law and international humanitarian law,” held in Islamabad, Pakistan from 30 September to 2 October 2004 was sent to the Member States informing them of the event. Later, a request was made to the ICRC and the host country, to forward to the Secretariat the presentations made by their respective delegates.

II. INTRODUCTION

4. The international human rights regime, comprising of universal standards and rules, was established to protect human dignity and to prevent conflicts, to ensure peace, and to promote democracy and development. These standards developed from experiences of discrimination, political repression, economic deprivation and exploitation, and war atrocities throughout history. The human rights violations committed during wartime led to further expansion of these rules.

5. The developments in human rights has been influenced by the developments in international law in general, and international and humanitarian and criminal law in particular, including:

¹ As a follow-up the Secretariat sent letters to the Member States on 25th September 2003, 30th January 2004 and 27th February 2004.

- the internationalization of human rights and the humanization of international law;
 - the protection of civilians in armed conflict and the criminalization of atrocities against civilians;
 - the emergence of the individual as the subject-and not just the object-of international law.
6. Other main developments in international human rights and humanitarian law in the last ten years, include:
- the establishment, and development of jurisprudence of the international criminal tribunals for the former Yugoslavia and Rwanda where we have witnessed the criminalization of sexual violence in armed conflict, and where rape, for example, was held respectively, to be an act of torture in the *Celibici Case*; a crime against humanity in the *Foca Case*, and war crime in the *Furundizi Case*;
 - The application for the first time in 50 years, in the *Pinochet Case*, of the Nuremberg principle of non-immunity for international crimes committed by heads of state; the first post-Nuremberg indictment of a former head of state in the *Milosevic Case*; and for the first time in 50 years, the adoption by the UN Security Council of Human Security resolutions protective of women and children in armed conflict;
 - And the most significant initiative in international criminal law, namely the Rome Treaty for an International Criminal Court, which is now a reality.²
7. Human rights laws continue to evolve in accordance with perceived threats to human dignity. Despite widespread support for international human rights agreements, one of the major debates relates to the claims that human rights are a “western” imposition on non-western countries, disregarding the cultural relativity of various countries of the Asia and Africa, in general³ and against Islamic world, in particular.
8. The uniqueness of the Islamic legal system lies in the fact that it constitutes an original legal system. In various conferences, such as the International Conferences on Comparative Law held at The Hague in 1932 and 1937, and was upheld and amply proved by the delegates of the Islamic Countries in their memoranda presented in September 1939 to the League of Nations, and on April 17, 1945, to the United Nations Conference in San Francisco, it was established that Islamic law is an autonomous legal system, and that Islamic civilization and jurisprudence are considered to be among the main forms of civilization and of the principal legal systems of the world, in the sense of Article 9 of the Statute of the Permanent Court of International Justice.

² Cotler I., *Building a New International Law: What have we learned, what must we do?*, Address to the Magna Carta Foundation, Rome, Italy, 21 January 2005.

³ Surendra L., Narayan K and Hebbar R., *Adivasis of India and Development Strategies*, A policy working paper in progress, Humanist Institute for Co-operation with Developing Countries, Netherlands, 2004, p.74.

9. Despite of this fact, Islam has been subjected to many criticisms as far as its compatibility with some human rights principles are concerned. These, in the backdrop of the recent political and ideological dispute between some Western and Muslim centres, have been aggravated. For example, one Muslim scholar has observed that the contemporary interpretation of Islamic approaches to one of the crucial objectives of human rights, *viz.* peace has been greatly influenced by the turbulent social, political and economic events of the 20th century, the most recent evident in the aftermath of the 11 September 2001 terrorist attack on the World Trade Towers of United States. Islamic social cohesion during this period has been one of decline in every aspect of life. In his article he adds that this has caused great frustration among the Muslims and contributed to the spread of violence and selective reading of the sacred texts to justify violent acts. Indeed, the increase of violence in the Muslim communities is alarming. It is, then, crucial for Muslims to realize that they have a duty and responsibility to reflect on their belief systems, contribute maximally to understanding the importance of protection of life as well as the implementation of the highest values of their religion.⁴ Although it is important to understand the reasons and root causes behind rise of violence in the Islamic societies today, it is also necessary to employ strategies to empower those Muslim groups who are working to bring peace through nonviolent means. This, in particular, to reject those groups advocating clash of civilizations, while equating and depicting the selected violence as representation of anti-democratic feature of Islamists.⁵

9 a. Further, while opening the first-ever UN seminar on confronting Islamophobia, and concerned about the situation emerging after the 9/11 terrorist attacks, the UN Secretary-General made a plea not to judge Muslims and Islam generally by the acts of violence of certain groups. Mr. Annan urged all people to condemn terrorist and violent acts carried out in the name of Islam. He further added that Muslims themselves, especially, should speak out, as so many did following the September 11 attacks on the United States, and show a commitment to isolate those who preach or practice violence, and to make it clear that these are unacceptable distortions of Islam.⁶

9.b Furthermore, the religion of Islam when spread from its source of inception, namely Saudi Arabia, to the other parts of the continents of Asia and Africa, it interacted and merged with the native traditional cultures and brought a new message of equality and brotherhood. This has been reflected in the statement made by the Minister of External Affairs, Government of India at the 12th Lal Bahadur Shastri Memorial Lecture, on 'India and Islam: the consolidation of a composite culture and the challenge of contemporary politics.'⁷ He stated that the interaction and dialogue between

⁴ S. Ayse Kadayifci-orellana, "Religion, Violence and the Islamic Tradition of Nonviolence", 2003 *The Turkish Yearbook of International Relations*, vol. XXXIV, pp.23-62.

⁵ Caroline Fourest, "The War for Eurabia", *Wall Street Journal*, Feb. 5, 2005, writes, "and on the other hand, can these liberties be weakened without abandoning the ideals that make us different from the enemies of democracy".

⁶ "Annan opens Islamophobia meet", *The Bangkok Post*, December 2, 2004, p.9.

⁷ Mr. K. Natwar Singh, Minister of External Affairs, Government of India, "India and Islam: the consolidation of a composite culture and the challenge of contemporary politics," *12th Lal Bahadur Shastri Memorial Lecture*, 15 January 2005, National Museum Auditorium, New Delhi.

administrators, scholars, architects and craftsmen between the Islamic culture with the indigenous cultures progressively influenced the indigenous cultural ethos. The Islamic influence was not perceived as coerced or imposed foreign influence, rather the tolerant and accommodating nature of the two cultures lead to enrichment of both through their profound interaction.⁸ The lecture focused on reaffirming and reinforcing the integral status of Islam in the tapestry of the Indian culture. He highlighted the composite culture of India, which has interacted with and imbibed diverse peoples, communities and religions over several centuries. By the same token, he acknowledged that the arrival of Muslims into Indian subcontinent during the 16th century did not replace the established traditional culture, rather it gave a fresh shape and character to the prevailing ethos, philosophy and scholarship and invigorated every aspect of the society. The various segments of Muslim community in India interacted with other groups in Indian society transcending caste and religious boundaries. It resulted in Indian ethos to broaden its circumference and understand and assimilate the values and traditions, which came with these people. Also, the Minister also condemned the contemporary threats to the Muslim community by the proliferating communal conflicts and increasing religious bigotry and called it as the greatest perversion of inherited values of Indian polity.

10. Therefore, in this backdrop, it is proposed that the Islamic scholars, writers and religious leaders shall make efforts to recover the Islamic tradition of nonviolence and explore ways in which it can be applied meaningfully to resolve conflicts and restore justice and harmony. This is of high relevance as the actual situation has lead to an unjust critical approach towards Islam, in particular from civil and criminal law perspective.

11. In light of the above, an attempt was made in the report of the 43rd session to focus on the Human Rights in Islam from civil law standpoint. However, the present report analyses the criminal law jurisprudence of Islam through the prism of human rights. Human Rights from criminal law perspective is a broad area of concern and its subject matter ranges from the areas of national penal legislations, *inter alia* torture, extra-judicial executions, fair trial etc. to the international humanitarian law. However, this report, in continuum of the report of 43rd session, endeavours to explore the human rights aspects of various criminal law principles under the Islamic Law. Part I of the report briefly provides the contextual framework of Criminal law in general, both

⁸ The Hon'ble Minister stated that in the face of the challenge of the Islamic *Ulema*, Hindu scholars vigorously recalled their own traditional philosophy and scholarship, and at the same time, after deep introspection, identified and reviewed that which needed reform. On their part, Muslim scholars were influenced by Hindu thought and belief. From these shared experiences emerged two of the most influential and widespread movements in India, namely – the *Bhakti* movement and the Sufi tradition. Both of these movements believed in the idea of a personal God who could be approached directly by the meaneast of His believers. They rejected barriers between religious groups and exalted God who saw no barriers of religion, region or caste. Over centuries, Indian Sufis and *bhaktis* loved and preached side by side, at times differing from each other, but generally over time, moving on to co-existence, and finally in tolerance and understanding. He recalled the names of *Ulema* and temple priests who preached love for the fellow beings and love of a personal Almighty, like Khwaja Muinuddin Chisti, Khwaja Nizamuddin Auliya, of Meera Bai, Kabir, Krishna Chaitanya, Sant Dyananeshwar, Namdeo and Tukaram. Much of the beauty and sophistication of life which could be enjoyed in common by Hindus and Muslims was represented by the emergence of Urdu, which became a symbol of the common culture that emerged out of the prevailing political chaos of the 18th and 19th century.

international and national. Part II of the report discusses the Islamic criminal law through human rights perspectives. However, the criminal procedural laws will be dealt in the brief for the 45th Session (2006).

PART I

I. INTERNATIONAL CRIMINAL LAW

12. In all the domestic legal systems, one of the important branches of law is the criminal law/penal law, the prime object of which is essentially to provide for the security of life, liberty and property through maintenance of law and order of the targeted society. Similarly, at the international level, international criminal law has developed as a common regime resulting from the international co-operation in the field of criminal law.

13. One of the primary objectives of the United Nations is ensuring human security, securing universal respect for human rights and fundamental freedoms of individuals throughout the world. The main purposes of the International criminal law are:

- i) the attainment of international criminal justice
- ii) prevention and redress of war crimes, genocide, war of aggression and crimes against humanity
- iii) ending the culture of impunity
- iv) preservation, restoration and maintenance of peace
- v) providing victim redress, strengthening individual rectitude

14. The various aspects of criminal law shall be discussed at a length in the later sections, however the following section dwells on the various aspects and principles of the international criminal law.

A. Sources of International Criminal Law

15. Most legal scholars agree that a recognizable body of international criminal law does exist. However, the precise parameters of this body of law are often unclear, perhaps due to the rapid and complex developments of our global society. International legal system is a complex legal discipline consisting of overlapping and current sources of law and emanating from the international legal system and from national legal system.

16. The international legal system's sources are enunciated in Article 38 of the International Court of Justice Statute, of which only the first three sources apply to International Criminal Law, namely: conventions or treaties, customs and general principles.⁹

a) Treaties, Conventions and agreements relating to International Criminal Law

⁹ Bassiouni, M.C., *International Criminal Law*, vol.1 (New York, Traditional Publishers Inc., 1999), p. 4.

17. There are a wide range of treaties, conventions and agreements pertaining to international criminal law, some of them are:

- Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948),
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984),
- Rome Statute of the International Criminal Court (Rome, 17 July 1998),
- The Four Geneva Conventions of 12 August 1949 and the two Additional Protocols to the Geneva Conventions of 8 June 1977,
- Hague Convention on the Protection of Cultural Property in the Event of Armed Conflicts, 1954 and its two Protocols
- Statute of the International Criminal Tribunal for former Yugoslavia, 1993
- Statute of the International Criminal Tribunal for Rwanda, 1994
- United Nations Convention against Transnational Organized Crime (New York, 15 November 2000),
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000),
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000),
- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (New York, 31 May 2001),
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000),
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (New York, 25 May 2000),
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (New York, 21 March 1950),
- Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (New York, 21 March 1950),
- UN Convention against Corruption, 2003
- Sectoral conventions against terrorism

18. In its widest context, the source of international criminal law might be derived from the general principles of international law; and also, found in the customary law accepted by states, the general principles of criminal law derived from national laws of the legal systems of the world, and the treaties which govern particular conduct.

B. General Principles of International Criminal Law

19. As the mobility of individuals and capital increases, especially in the context of the global market, so too do the opportunities for international crime. Drug-trafficking,

terrorism, fraud, war crimes and money laundering are among the many offences which cross state boundaries. Furthermore, crimes such as crimes against humanity or genocide, even when occurring within the borders of one state, offend the international order. Governments throughout the world are actively promoting international co-operation in response to these problems, thereby creating a new and rapidly expanding field of law, viz. international criminal law.

20. The establishment of the four *ad hoc* international criminal tribunals, viz. International Military Tribunal of Nuremberg, the International Military Tribunal of Tokyo, the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), have developed enormously to the principles of international criminal law, in particular in the field of individual criminal responsibility (not organizational or State criminal responsibility) in war crimes, crimes against peace and crimes against humanity

21. The main principles of the International Criminal Law are as follows:

b. i) Principle of Legality: One of the most important principles of criminal justice in the principle of legality. The Permanent Court of Justice in its advisory opinion on the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, 4 December 1935 touched on the principle of legality as follows:¹⁰

“The problem of the repression of crime may be approached from two different standpoints that of the individual and that of the community. From the former standpoint, the object is to protect the individual against the state: this object finds its expression in the maxim *Nulla poena sine lege*. From the second standpoint, the object is to protect the community against the criminal, the basic principle being the notion *Nullum crimen sine poena*... It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.”

22. This principle is also enshrined in human rights instruments such as Article 11(2) of the Universal Declaration of Human Right (UDHR),¹¹ the International Covenant on Civil and Political Rights of 1966.¹² ‘No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it is committed. Nor shall a heavier penalty be imposed than the one that was application at the time the penal offence was committed.’

¹⁰ (1935) PCIJ Rep., Series A/B, No.65, 3 at 514.

¹¹ Adopted 10 December 1948, UN GA Res. 217A (III), *UN Doc. A/810 (1948)*, at 47.

¹² Adopted 16 December 1966 (1967) 6 *ILM* 368.

(article 11(2) of UDHR). Further, the above principle has been provided in Article 22¹³ and 23¹⁴ of the ICC Statute.

b. ii) Rules of Interpretation of Law: There have been four occasions in which *ad hoc* international criminal tribunals were set up to prosecute international criminals, namely, Nuremberg and the Tokyo Tribunals established after World War II and the ICTY and the ICTR. Each international criminal tribunal interprets law in accordance with the instrument creating the tribunal itself. Similarly, the International Criminal Court (ICC) established by the ICC statute.¹⁵

23. The Appeals Chamber of the ICTY held in *Tadic* case that although the ICTY statute is legally different instrument from an international treaty, it is permissible to be guided by the principle applied by the International Court of Justice with regard to treaty interpretation.¹⁶ Therefore, although the ICTY Statute and the ICTR Statute differ from treaties in that they are concluded by an international organization and are made binding on them by virtue of the enforcement power of the UN Security Council under Chapter VII of the UN Charter, the rules of interpretation of these Statutes are mostly the same as rules of customary international law on treaty interpretation codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969.¹⁷

24. Article 21 of the ICC Statute under the heading ‘Applicable Law’ establishes the hierarchy of the rules of interpretation as follows:

(1) The Court shall apply:

- (a) In the first place, this statute, Elements of Crime and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws by States that would normally exercise jurisdiction over crime, provided that those

¹³ Article 22 of the Rome Statute provides: *Nullum crimen sine lege*

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

¹⁴ Article 23 of the Rome Statute provides: *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

¹⁵ Kittichaisaree K., *International Criminal Law*, (Oxford, Oxford University Press, 2001), p. 44.

¹⁶ *Prosecutor v. Dusko Tadic*, Case No. IT-94-A, ICTY App. Ch., 15 July 1999, para 282, quoting the ICJ Advisory Opinion on *Competence of the General Assembly for the Admission of a State to the United Nations*, ICJ Rep. 1950, 8.

¹⁷ (1969) 8 *ILM* 679.

principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

- (2) The Court may apply principles and rules of law as interpreted in its previous decisions.
- (3) The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.’

b. iii) Individual criminal responsibility: This is elaborated in Article 25 of the ICC Statute. The ICC shall have jurisdiction over natural persons only. The proposal to include criminal responsibility of legal entities did not find consensus support at the Rome Conference because not all legal systems recognise such responsibility.¹⁸ Under the Statute, a person shall be individually responsible and liable for punishment if he, with intent and knowledge, commits a crime; orders, solicits or induces the commission of such crime; aids, abets or otherwise assists in the commission of the crime; or in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting within a common purpose.

b. iv) Non-applicability of Statute of limitations: Article 29 of the ICC Statute states that the crimes within the ICC’s jurisdiction shall not be subject to any statute of limitations. However, in the case of an offence against the administration of justice, the Rules of Procedure and Evidence adopted by the Preparatory Commission for the International Court (PCNICC) in June 2000 provides in Rule 64, entitled ‘Periods of Limitation’ under Chapter 9 (Offences and Misconduct against the Court) three periods of limitations.¹⁹

b. v) Grounds for excluding criminal responsibility: These are specified in Article 31. They include mental disease or defect and a state of intoxication (unless voluntarily intoxicated), duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm, and self defence or defence of person (or property in the case of war crimes) essential for the survival of persons or for accomplishing a military mission. Article 32 provides that neither a mistake of fact nor a mistake of law is a defence unless it negates the mental element required by the crime in question. Pursuant to Article 33, a superior order is not a defence, unless the person did not know that the order was unlawful and the order itself was not manifestly unlawful. However, orders to commit genocide or crimes against humanity are deemed manifestly unlawful.

C. Specific Offences or Crimes under International Criminal Law

¹⁸ P. Saland, *International Criminal Law Principles*, 198-9.

¹⁹ Kittichaisaree K., *supra* n.15, p.32.

25. International criminal law can also be categorized according to whether the conduct in question is an international offense against the world community as a whole, or whether the act is transnational, affecting the interests of more than one state. For example, international crime would encompass acts that threaten world order and security, crimes against humanity and fundamental human rights, war crimes, war of aggression and genocide; as well as the transnational crime category would include, *inter alia* drug trafficking, transborder organized criminal activity, counterfeiting, money laundering, financial crimes, terrorism, and willful damage to the environment.

26. *Draft Code of Crimes Against the Peace and Security of Mankind*²⁰ includes the categories of international crimes as: aggression, genocide, crimes against humanity, war crimes, crimes against United Nations and associated personnel, unlawful possession of, use or emplacement of weapons, theft of nuclear materials, mercenarism, *apartheid*, slavery and slave related practices, torture and other forms of cruel, inhuman or degrading treatment or punishment, unlawful human experimentation, piracy, aircraft hijacking and unlawful acts against international air safety, unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas, threat and use of force against internationally protected persons, taking of civilian hostages, unlawful use of mail, unlawful traffic in drugs and related drug offences, destruction and/or theft of national treasures, unlawful acts against certain internationally protected elements of environment, international traffic in obscene publications, falsification and counterfeiting, unlawful interference with international submarine cables, and bribery of foreign public officials.²¹

27. International criminal law, to a great extent is influenced from an extensive development of international law of war crimes. The two fundamental notions of individual culpability for the commission of international criminal acts and the establishment of international structures and procedures for the prosecution of such acts are both firmly entrenched in international criminal law. The Rome Statute of International Criminal Law defines the international crimes namely, genocide²², war crimes²³ and crime against humanity,²⁴ which are grave breaches of international

²⁰ *Draft Code of Crimes against the Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission on its forty-eight session*, UN GAOR, 51st session, UN Doc. A/CN.4L.532 (1996).

²¹ Bassiouni C.M., *International Crimes: Digest/Index of International Instruments*, (2 vols. 1985), pp. 1815-1985.

²² Article 6 of the Rome Statute, **Genocide**: For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

²³ Article 8 of the Rome Statute, **War crimes**:

humanitarian law and also result in extensive violations of fundamental human rights of the victims. The establishment of *ad hoc* international criminal tribunals for the prosecution of serious violations of international humanitarian law in the former Yugoslavia and Rwanda and a permanent International Criminal Court and their jurisprudence have and will continue to positively and significantly contribute the

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the

following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military

necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of

a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of

fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

²⁴ Article 7 of the Rome Statute, **Crimes against humanity**:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts

when committed as part of a widespread or systematic attack directed against any civilian

population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of

fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization,

or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national,

ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally

recognized as impermissible under international law, in connection with any act referred to in this

paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or

serious injury to body or to mental or physical health.

enforcement and further development of the international criminal law and international humanitarian law.

28. Furthermore, the adoption by the international community of the conventions and treaties such as the Convention for the Prevention and Punishment of Terrorism, Convention Against Transnational Organised Crime and its three Protocols demonstrate the extending scope and content of international criminal law beyond the context of armed conflict.

II. CRIMINAL LAW

A. The definition of 'Crime' or 'Offence'

30. An eminent American authority on Criminal Law, Dr. Wechsler provided: "The purpose of the Penal Law is to express a social condemnation of forbidden conduct, buttressed by sanctions calculated to prevent it."²⁵ A crime or offence is an illegal act, omission or event, whether or not it is also a tort,²⁶ a breach of contract²⁷ or a breach of trust,²⁸ the principles consequence of which is that the offender, if he is detected and it is decided to prosecute, is prosecuted by or in the name of the State, and if he is found guilty is liable to be punished whether or not he is also ordered to compensate his victim.²⁹ Thus, following three characteristics can be said to be present in all the instances of crime:³⁰

- i) that it is a harm, brought about by human conduct, which the Sovereign power in the State desires to prevent;
- ii) that among the measures of prevention selected is the threat of punishment;
- iii) that legal proceedings of a special kind are employed to decide whether the person accused did, in fact cause the harm, and is according to law to be held legally punishable for doing so.

31. The constituent elements of crime are provided in the cardinal principle of penal liability embodied in the maxim, *Actus non facit reum nisi mens sit rea* – the act does not make a person legally guilty unless the mind is legally blameworthy.³¹ Thus, the *intent* and the *act* must both occur to constitute a crime.

²⁵ P.S.A. Pillai, *Criminal Law*, Bombay, N.M. Tripathi Private Limited, 1995, p.4.

²⁶ The object of law of tort is to provide redress for breaches of duties which are owed to persons generally and do not depend on an agreement between parties.

²⁷ One purpose of the law of contract is to provide redress for breaches of legally binding agreements. The aggrieved parties may claim damages as plaintiff in civil proceedings, and the amount which he recovers is assessed on the basis of the loss he has sustained in consequence of the non-fulfillment of the contract.

²⁸ One purpose of the law of trusts is to provide redress for breaches of trust. A breach of trust occurs where someone who holds property as trustee for another fails to carry out the duties of his office.

²⁹ Jones C and Card, *Introduction to Criminal Law*, London, Butterworths, 1988, p.1.

³⁰ *Ibid*, p.8.

³¹ *Ibid*, p.55.

- (1) Physical – *actus reus*, (the outward conduct which must be proved against the accused); and
- (2) Mental – *mens rea*. Guilty knowledge or intention (the state of mind which much be proved to have had at the time of relevant conduct)

B. Specific offences under national criminal legal systems

32. The offences may be classified according to:
- a) their nature, into offences against State (political offences), offences against person or body of person, offences against property, offences against public order.
 - b) their source, into statutory and common law offences
 - c) their effect on the law of arrest, into arrestable and other offences
 - d) their method by which they are tried, into offences triable only on indictment, offences triable only summarily and offences ‘triable either way’
33. Accordingly, *offences against State or Political offences* may include, *inter alia* treason,³² sedition,³³ waging a war against State, terrorism.³⁴ Further, the *offences against person* includes, *inter alia*, homicide, murder, hurt (simple and grievous), wrongful restraint and confinement, criminal force, assault, battery, kidnapping, abduction, forced labour and unnatural offences. *Offences against property* include, *inter alia*, theft, extortion, robbery, criminal misappropriation, criminal breach of trust, cheating, fraudulent deeds and dispositions of property, criminal trespass, forgery of trade and property marks, currency and bank notes.

³² In England, being a Monarchical State the highest offence against the State is *high treason* against the King or the Queen. Under the Treason Act 1351, the following acts among other constitute the offence of treason: (a) Compassing the death of the King, the Queen or their eldest son and heir; (b) Levying war against the King in his realm; (c) Adhering to the King’s enemies in his realm, giving them aid and comfort in the realm, or elsewhere. This head of treason depends on the existence of a state of war.

In general, in the above provisions, references to King/Queen may be replaced by State or Head of State.

³³ Seditious essentially means defamation of the State. As a common law offence, sedition is contained in tow offences: seditious libel, which consists of a written publication of words with seditious intention, and seditious words, i.e. an oral publication with seditious intention. For further information, please see Jones C and Card, *Introduction to Criminal Law*, London, Butterworths, 1988, pp.236-237.

³⁴ Since September 11 terrorist attack on the World Trade Towers of US, many nation states have passed national legislations on terrorism. Further, under the Draft Comprehensive Convention on Terrorism, a consensus on the workable definition of terrorist offences has not yet been reached. However, some of the proposed definitions of ‘terrorism’ are:

League of Nations Convention (1937): "All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public".

UN Resolution language (1999): "1. *Strongly condemns* all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;

2. *Reiterates* that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them". (GA Res. 51/210 Measures to eliminate international terrorism).

Also, see http://www.unodc.org/unodc/terrorism_definitions.html

C. General defences under Criminal Law³⁵

34. There are certain general defences available under Criminal Law, which are explained as below.

35. **Duress:** The defence of duress is concerned with the case where the accused commits the actus reus with the relevant mens rea but is induced to act by a threat made by another person. If the defence of duress applies, an accused who acted under it is excused from criminal liability for an offence which he has committed.

36. **Self-defence and prevention of crime necessity:** It is a case where an accused alleges that he was acting to prevent the commission of an offence, or to effect a lawful arrest, or to defend himself or another against an actual or imminent attack, or to defend his or another's property against such an attack. This defence, if successfully pleaded, render the accused's conduct lawful, as opposed simply to excusing him from liability for conduct which is nevertheless unlawful.

37. **Superior orders:** If a person acts on the orders of a superior, whether civilian or member of the armed forces, and if the orders were lawful, for instance where a soldier is ordered by an officer to use reasonable force to resist attack, reasonable force by him to do so will be justified.

38. However, Article 33 of *the Rome Statute of International Criminal Court, 1998* provides:

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

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

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.”

39. **Ignorance or Mistake:** It is often discussed in its twofold aspects namely: ignorance or mistake of law and mistake of fact. Ignorance or mistake of law is embodied in the well known maxim '*Ignorantia Juris non excusat*', i.e. ignorance of law is no excuse. Therefore, under criminal law is it no defence that the accused did not know the existence of law of the crime for which he is charged. The presumption that everyone knows the law is a conclusive presumption and will be enforced even where it could be shown that it was impossible for the accused to have known the law. Mistake of fact is considered as a defence under certain circumstances.

³⁵ Jones C. and Card, *supra* n.29, pp. 565-587

40. Article 32 of the Rome Statute provides for 'Mistake of fact or mistake of law' as one of the grounds of excluding criminal responsibility and states:

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

41. **Insanity or mental abnormality:** Insanity or dementia has been recognized as a valid defence to exempt a man from responsibility for his acts. In Criminal Law where the element of *mens rea* forms one of the constituent elements of crime, it is only natural and consistent that insanity should be recognized as a valid defence. The foundation of the defence of insanity was laid down in the House of Lords in *M'Naughten's case* (1843).³⁶ The exact rule enunciated in *M'Naughten's case* was as follows: "To establish a defense on the grounds of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."³⁷

D. Forms and Theories of Punishment³⁸

42. Punishment is one of the key components of criminal justice system. Although main theories with regard to the object of punishment are deterrence, preventive, reformatory and retributive, however, the main underlying principle remains deterrence and retribution.³⁹ A punishment is the suffering of person or property, inflicted on the perpetrator as ordained by the law. However, the gravity and quantity of punishment depends, inter alia, on the severity of crime committed. A range of penalties and punishments are as follows:

Death Penalty	Lethal injection, electrocution, exposure to lethal gas, hanging, or other method.
Incarceration/Imprisonment	Physical confinement in a prison, jail, or other locked-up facility.
Probation	A set of specific rules of conduct while in the community, and supervision of compliance with those rules.

³⁶ 8 Eng. Repts. 718.

³⁷ *Ibid.*

³⁸ See generally, P.S.A. Pillai, *supra* n.25, pp.110-277.

³⁹ P.S.A. Pillai, *supra* n.25, p.189.

Restitution	Making the offender provide financial repayment or other services for losses incurred by the victim.
Community Service	Making the offender perform public service work.
Fines	Economic penalties requiring the payment of fixed sums of money.

43. However, infliction of certain forms of extreme punishments like capital punishment or cruel and degrading punishments, for instance punishments of torture, such as drowning, mutilation, emboweling alive (to remove internal organs), beheading, public dissecting, stoning and burning alive, and all others in the same line of unnecessary cruelty, have been condemned and forbidden by the international community. The basic international human rights treaties have been completed with additional protocols that prohibit capital punishment⁴⁰ as well as the International Criminal Tribunals for the former Yugoslavia and Rwanda and the International Criminal Court have also ruled out the possibility of the death penalty, even for the most heinous crimes.⁴¹

44. Reactions to crime have been influenced by different analysis. In terms of criminology, three main kinds of reactions can be discerned in various societies. The first is the traditional reaction, of a universal nature, which can be termed *as the punitive approach*. It regards the criminal as a basically bad and dangerous element of society and the object under this approach is to inflict punishment on the offender in order to protect the society from his onslaughts.

45. The second approach, of relatively recent origin, considers the criminal as a victim of circumstances and a product of various social factors within the criminal and society. This approach is termed as *the therapeutic approach*.

⁴⁰ See e.g. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, G.A. Res. 128, U.N. GAOR, 44th Sess., Supp. No. 49, at 207, U.N. Doc. A/44/49 (1989) (entered into force July 7, 1991); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, art. 1, Europ. T.S. No. 114 (entered into force Mar. 30, 1985); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, art. 1, O.A.S.T.S. No. 73 (entered into force Oct. 6, 1993). The American Convention on Human Rights is also an abolitionist instrument because it prevents countries that have already abolished the death penalty from reintroducing it. See American Convention on Human Rights, supra note 4, art. 4, at 145 (dealing with death penalty). Thus, a state that has abolished the death penalty at the time of ratification of the American Convention on Human Rights is abolitionist from the standpoint of international law.

⁴¹ The Security Council has excluded use of the death penalty by the two international ad hoc tribunals created to deal with war crimes in the former Yugoslavia and Rwanda. See United Nations, Security Council, Statute of the International Tribunal for the Former Yugoslavia, Annex, art. 24, 1, U.N. Doc. S/RES/827 (1993); United Nations, Security Council, Statute of the International Tribunal for Rwanda, Annex, art. 23, 1, U.N. Doc. S/RES/955 (1994); United Nations, Rome Statute of the International Criminal Court, 17 July 1998, art. 77, U.N. Doc. A/CONF.183/9 (1998) <<http://www.un.org/icc>>.

46. Finally, there is *the preventive approach* which instead of focusing attention on particular offenders, seeks to eliminate those conditions which are responsible for crime causation.

47. It should, however, be considered that the three approaches are not mutually exclusive. Not only do they overlap with each other, but sometimes they may coexist as parts of the overall system in a society.

48. Further, it may be noted that under *the punitive approach*, the rationalization of punishments may be divided into two classes: based on retributive and utilitarian theories. *Retribution* has been regarded as a very important feature in the punitive scheme. According to Hegel, the great German philosopher, punishment ‘annuls’ the crime. It aims at restoring the social balance disturbed by the offender. The offender should receive as much pain and suffering as inflicted by him on his victim to assuage the angry sentiments of the victim and the community. However, the retribution theory in its purest form has lost much of its ground in the context of modern and more enlightened views on the functional value of penal law.

49. *The Utilitarians* view punishment as a means to achieve certain ends with the aid of criminal law. Punishments must serve as an instrument for reducing crimes either by deterring the offender and others from doing similar acts in future (*Deterrent theory*) or it should prevent the commission of offences by incapacitating the offenders. Reformation of offenders through punishment is also sought to be achieved, though the efficiency of the punitive approach in the reformation of the offender is extremely far-fetched.

50. A brief synopsis of **the main objectives of punishment** is provided in the table below:

Retribution	Assumes that criminals deserve to be punished, mostly by long prison terms, as legal revenge for their harm to society. They consider it proper to punish because they deserve it and the state has gone to the trouble of prescribing a punishment for them.
Incapacitation	Attempts to make it theoretically impossible, either through incarceration, execution, castration, mutilation, banishment, or other means, for criminals to prey any further upon society.
Deterrence	Assumes that fearful penalties, mostly involving swift restraint, harsh conditions, and certain guilt, will prevent people from choosing to engage in crime. Specific deterrence focuses on individual criminals, and general deterrence focuses on potential criminals.
Rehabilitation	Emphasizes the possibility of change, mostly involving training and treatment programs, that has as an end result the ideal of being able to convert criminals into

PART 11

1. This part of the report deals with sources of Islamic criminal law; Islamic law on crimes and punishment; and key objectives of Islamic criminal law and punishment namely, prevention of crime and protection of human rights and fundamental freedoms.

I. SOURCES OF ISLAMIC CRIMINAL LAW

The Sources of the Islamic law are the following.

A. The Holy Quran

2. The Holy Qur'an is the divine word of God revealed to His prophet Muhammad⁴² by the Angel, Gabriel, from 610–632 A.D. in the Arabic language to verify that Muhammad is God's Messenger. It is the chief source from which Islamic law is derived and it is the root of all the other sources of Islamic legislation.

The Qur'anic rules may be divided into two groups:

- (1) **Rules of worshipping (Hugghugh-al-Iah):** such as daily prayers, fasting, almsgiving, pilgrimage, which are meant to discipline man's relationship with his God.
- (2) **Rules dealing with everyday life (Hugghugh-on-nus):** These are practical and ethical rules, namely, business transactions, modes of individual behavior, and everything other than of worshipping, disciplining mostly the relationship between Muslims and Muslim communities on one hand and non-Muslim communities on the other hand; everyday dealings and lastly to his own body and spirit. These rules vary according to relevant issues. Crime rules are those related to acts of crime committed by adult Muslims and the punishments they deserve in order to protect life, property, honour and rights of the individual and the relationship between the victim, the criminal and the community.

3. The Holy Qur'an has stated the rules regarding fixed punishment (*hudud*) and *qisas* meted out to those charged with adultery, theft, and defamation. Reference is made in the Qur'an to the punishment assigned to intoxication. The Qur'an refers to some acts of disobedience and the relevant punishments. Some of these acts of disobedience are explicitly stated in the Qur'an. Others are inferred from other Qur'anic verses.

B. *Sunnah*: Prophet's traditions

⁴² Prophet Muhammad was born in 570 AD in Makkah and died in 632 AD in Medinah

4. The *Sunnah*, meaning reported Prophetic practice,⁴³ is what the Prophet said, did or agreed to. The *Sunnah*, of course, comes next to the Qur'an in Islamic legislative sources. A scholar resorts to the *Sunnah* only if he cannot find a relevant commandment in the Qur'an. There are three kinds of the *Sunnah*:

- (1) Whatever Prophet Muhammad⁴⁴ uttered on different subjects and occasions.
- (2) The actions performed by the Prophet.
- (3) Prophet's implicit approval of the sayings and deeds of his Companions.

5. As regards the criminal law, the *Sunnah* is the second source according to which the general terms for judicial procedures practiced in cases for a cause, fighting back the assailant in self-defence, and methods for evidence of crimes, punishable by *qisas* has been explained. The *Sunnah* explains what is meant by *qasamah* and the procedures by which judgments are ascertained on evidence or refuted on suspicion. In conclusion, the Prophet rendered the religious law crystal clear.

C. *Ijma*: Consensus of Opinion

6. *Ijma*'-Consensus of Opinion-is the unanimous agreement reached by Muslim scholars during any period after the Prophet's death⁴⁵ on any legal judgment bearing upon a particular situation or incident.

D. *Qiyas*: Analogy

7. Analogy (*qiyas*) is the inference that if two or more things agree with one another in one or more respects they will agree with yet other respects. If in a certain respect a particular judgment was passed and the reason for passing this judgment was indisputably acknowledged one way or the other, it follows that the same judgment should be applied to a similar incident provided that the cause of the incident is known. The Quran applies the principles of equality to identical cases and identical occurrences are equally judged.

8. In the Qur'an the Almighty God says:

"Do they not travel, Through the earth and see, What was the end, Of those before them, (Who did evil)? Allah brought utter destruction, On them and similar, (Fates await) those who, Reject God".⁴⁶

9. If occurrences are not identical, judgments cannot be identical either. The validity of discretionary punishments *Tazirat* in accordance with Analogy is an undisputed matter, for these punishments are exclusively left to the individual discretion of the magistrate who administers the law.⁴⁷ But can crimes punishable by fixed punishments

⁴³ According to the Shia doctrine, this includes the twelve Imams. The First Imam was Imam Ali, martyred in 662 A.D. and the last Imam, absent from public since 882 A.D.

⁴⁴ According to the Shia doctrine, this includes the twelve Imams.

⁴⁵ According to Shia doctrine after the twelve Imams at the end of the ninth century

⁴⁶ *Muhammad*, XLVII:10

⁴⁷ Shia doctrine does not accept Analogy as a source for judgment, in particular in criminal cases. But if the basis for any particular provision is clear and explicit, the same rule could govern the other identical cases.

be proved on the basis of Analogy? Because the maximum limits for crimes punishable by fixed punishments, *hudud* and *qisas*, are defined in the Qur'an

10. Some jurists maintain that they could be proved by Analogy because it is one of the methods of correct and sound deduction and just judgment. It is confirmed that the Prophet allowed Mu'ad Ibn Jabal to exercise his own individual judgement which is but one aspect of intellectual thinking.⁴⁸

E. *Istihsan*: Equity

11. Literally, *Istihsan* is to consider a thing to be equitable. In the terminology of jurists it means the rejection by the Muslim scholar of a concealed Analogy or a general judgment in preference to an exceptional judgment occasioned by evidence dawned upon his mind.

Istihsan is of two kinds, viz:

- (1) Rejection of a concealed Analogy in favor of a clearly evidenced one.
- (2) Exception of a particular item from a general judgment on the basis of clear evidence.

F. *Maslahah al-Mursalah*: Public Interest

12. In the terminology of jurisprudence *maslahah al-mursalah* means any matter of common good which does not originally exist in the Qur'an or the *Sunnah* and for which no legal reference is available to consider or neglect. It is called *maslahah* because it is not based on substantial evidence to prove its acceptability or rejection. Among such matters instituted by the Prophet's Companions were coin minting, prison installations and other matters deemed necessary for which no legal reference is available to reject or legitimize them. The difference between *maslahah* and *istihsan* is that the first one is instituted by virtue of the public good which it aspires to fulfil; while *istihsan* is not imposed by virtue of a certain element inherent in it. It rests on an evidence alien from it, which is Analogy. The exercise of Analogy through *maslahah mursalah* is part and parcel of the doctrines of Imam Ahmad and Imam Malik.⁴⁹ According to them the legal policy rests on the implementation of matters of common good at large.

13. The doctrines of Imam Hanafi⁵⁰ and Imam Shafi'I⁵¹ jurists introduced *maslahah* in Analogy, whereas Imam Malik and Imam Hanbal⁵² considered *maslahah* an independent source not necessarily attachable to other sources, provided that:

⁴⁸ In the well-known letter addressed to Abu Musa Ash'ari, Umar Ibn Khattab said: "Judge things in relation to their counterparts". The Prophet's Companions ascertained the *hudud* punishment for alcohol-drinking on the basis of Analogy.

⁴⁹ Imam Malik ibn Anas (712 -795 A.D.) was born and lived his whole life in Madina

⁵⁰ Al-Imam Al-Azam Abu Hanifah was born in kufa in 698 A.D.

⁵¹ Imam Shafi'I was born in 767 A.D. and belonged to the Quraish tribe.

⁵² Imam Hanbal was born in Baghdad in November 780 A.D. He belonged to the family of Shayban.

- (1) *Maslahah* should be compatible with the objectives of the law-maker as a whole in the sense that it should not run against any of the divine tenets or final deliberations, should be consistent with the common good meant to be achieved by the Divine Legislator, should be akin and not alien to the common good conceived by the Divine Legislator;
- (2) *Maslahah* should be formulated and implemented within the normal limits of reason and should emerge only when necessary so that it can be accepted by reasoning;
- (3) When *maslahah* is implemented it should be for the elimination of some difficulties of a religious character; in other words if it is unreasonably carried out it may pose some kind of difficulty, as God says in the Holy Qur'an: "...He (God) has chosen you, and has imposed no difficulties on you in religion;..."⁵³

II. ISLAMIC LAW ON CRIMES AND PUNISHMENT

14. The Arabic word crime "Jarimah" is derived from the root "jarm" which has two meanings: severance and profit. Therefore the word jarimah may be used for any deed contrary to right and justice. "crime" is a prohibited deed that could be punished if committed. According to some jurists there is a further difference between crime, sin and wrongdoing. Crime is punishable in this world by the legislator.

A. Major offences under Islamic Law

15. Under Islamic law major offences against life are murder, homicide, and infanticide. Offences against property include theft and misappropriation of property. Sexual Offences include sexual unchastity, false accusation of unchastity, accusation of unchastity against spouse, whoredom, and homosexuality. General and social offences include public nuisance, bribery, intoxication and gambling, violation of privacy, and abusing, defaming and spying.

B. Classification of crimes and punishment in Islam:

16. Crimes and penalties in Islamic law are of three kinds:

First, *hudud* penalties (punishment laid down by the Qur'an or Sunnah and are not subject to private claim). These are the "rights of God", which are divinely foreordained by God. Therefore no pardon or individual settlement is possible. Semantically *hudud* (sing: *hadd*) means restricted or restriction, prevention, hindrance or prohibition, and hence a restrictive ordinance or statute of God.

17. *Hudud* offences are given: (1) adultery or unlawful intercourse (*zina*), (2) slander or false accusation of unlawful intercourse (*qadhif*), (3) drinking wine (*shurb al-khamr*), theft (*sariqah*), (5) highway robbery (*qat al-tariq or qarabahb*), (6) apostacy (*riddah*), (7) rebellion (*baghy*).

⁵³ *Al-Hajj*, XXII:78

18. **Secondly, *qisas* or *qawad* and *diyah* penalties:** They differ from *hudud* in that they are the subject of a private claim; the individual victim can request for *qisas*, to be carried out or he may waive it, either gratuitously or by settlement, or he may receive the blood-money or by settlement, through receiving the blood-money (*diyah*). *Qisas* and *diyah* offences are five: (1) premeditated murder; (2) seemingly premeditated murder; (3) erroneous murder; (4) intended offences other than homicide; and (5) unintended offences other than homicide.

19. The considerable restriction of blood feuds was a great merit of Islam. According to Bedouin ideas, any member of the tribe of the killer, and even more than one, could be killed if homicide had occurred. Islam allows only the killer himself to be put to death, and only if he is really responsible and has acted clearly with deliberate intent. Islamic law further recommends waiving *qisas*. In this matter the religion brought some of its significant reforms. It taught that, instead of it being influenced by rage and revenge, true nobility and dignity lays in forgiveness, and those who restrain their anger and exercise their pardon shall receive paradise as well-doers.⁵⁴

20. **Thirdly, *ta'zir*** [punishments not laid down by Qur'an or Sunnah]. This is a punishment decided upon by a judge and it applies to punishments other than *hudud*, *qisas* and *diyah*. Semantically *ta'zir* means correction or reform. It is the prerogative of the Imam (ruler) or his representative. *Ta'zir* is inflicted on anyone who commits an offence for which there is no statutory penalty (*hadd*, *qisas*, *diyah*) or expiation (*kaffarah*). In determining the punishment of *ta'zir*, the Imam or the judge must observe

⁵⁴ *Sahifeh-Al Sajjadiye* by Imam Sajjad (Also see Treatise on Rights by Imam Ali ibn-Al-Hussain Zayn-ul-Abedin, fourth Imam for Shia (38-95 ,H) (659-715 A.D.)) Supplication 14, *Supplication when Hostility was shown to him or when he saw what he did not like in Wrongdoers*: 1. O He from whom is not concealed news of the aggrieved!

1. O He who has no need to be told about them by the witnessing of the witnesses!
1. O He who whose help is near to the wronged!
1. O He whose aid is far from the wrongdoers!
1. Thou knowest, my God, how so-and-so, son of so-and so, has harmed me in that which thou hast forbidden, and how he has violated me in that which thou hast prohibited, showing thereby ingratitude toward Thy favour upon him and delusion concerning what Thou hast denied him.
1. O God, so bless Muhammad and his Household, keep my wrongdoing enemy from wronging me through Thy strength, blunt his blade toward me through Thy power, and assign to him a diversion in that which is close to him and the inability to reach his enemy!
1. O God, bless Muhammad and his Household, let the wrongdoer not find it easy to wrong me, give me good help against him, preserve me from the like of his acts, and place me not in the like of his situation!
1. O God, bless Muhammad and his Household, and assist me with an immediate assistance that will heal my rage toward him and redeem my fury toward him!
1. O God, bless Muhammad and his Household, compensate me for his wronging me with Thy pardon and replace his evil action toward me with Thy mercy, fro every detested thing less than Thy anger is slight and every disaster next to Thy rancour indifferent!
1. O God, just as Thou hast made me detest being wronged, so also protect me from doing wrong

certain conditions.⁵⁵ Pardon (*afw*) can be granted by the ruler in *ta'zir* punishments. Provided that pardon does not affect the victim's personal rights.

C. General principles of criminal responsibility

i. Grounds for excluding criminal responsibility

21. The important aspect of criminal responsibility is that the person should have cognitive freedom- that he should be one who has ability to understand and judge between good and bad. Muslim jurists emphasize that only an adult of sound mind is criminally responsible for his acts of omission or commission. Knowledge of circumstances and intention are held to be *sine qua non* for the determination of criminal liability. Children and insane persons are not to be responsible criminally.

22. A child in view of its undeveloped mind is incapable of perceiving good or bad. To supplement this principle Muslim jurists refer to a very commonly reported tradition of the Prophet:

“God has withdrawn responsibility from a child and insane and the man asleep”

23. Lenient view is taken with respect to three more categories of people- namely, a person subject to coercion, a person compelled by circumstances, and an indigent.⁵⁶ The Holy Quran ordains:

“Any one who after accepting faith in Allah utters unbelief, except under compulsion, his heart remaining firm in faith-but such as open their heart to unbelief- on them is wrath from Allah, and theirs will be a dreadful Chastisement”⁵⁷

24. ‘Ammar, whose father Yasir and mother Sumayya were subjected to unspeakable tortures for their belief in Islam, but never recanted. ‘Ammar, suffering under tortures himself and his mind acted on by the sufferings of his parents, uttered a word construed as recantation, though their heart never wavered and he came back at once to the prophet, who consoled him for his pain and confirmed his faith.

25. All Muslim jurists are in agreement that a person is responsible for the commission or omission of an act provided he is able to make a rational judgment and

⁵⁵

- (i) The aim of punishment in *ta'zir* must be utilitarian, and never for the purpose of torture, and it should never reach the *hadd* punishment.
- (i) Establishing *ta'zir* offences and their punishments must only be carried out with the purpose of protection of the society.
- (i) *Ta'zir* punishment must be proportional to the crime.

⁵⁶ Ministry of Interior, Saudi Arabia, *Effect of Islamic Penal Legislation on Crime Prevention in Saudi Arabia*, 75(1980), cited in Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p. 125

⁵⁷ *An-Nahl*, XVI:106

can differentiate between right and wrong. If a person is unable to make judgment since, although he understands a prohibition but is unable to understand its connotation, he is not criminally responsible.⁵⁸

ii. Criminal responsibility is strictly personal

26. In the pre-Islamic era the concept of collective responsibility was prevalent in the tribal communities. Criminal responsibility in Islamic jurisprudence is declared to be strictly personal and individual. Notion of collective responsibility is absent in criminal law. No one is held responsible for the act of others, no matter how near he may be to the perpetrator of the crime. The principle of vicarious liability is absent in Islam.

The Holy Quran declares:

“...Every soul draws the meed of its acts on none but itself; no bearer of burdens can bear the burden of another...”⁵⁹

27. The above stated verse reaffirms the doctrine of personal responsibility in Islamic criminal law. A person is fully responsible for his acts and cannot transfer the consequences of someone else, nor can any one vicariously atone for his sins.

28. Personal responsibility is repeatedly insisted on as the key-note of Islam. whatever a person is, if he commits evil, he must suffer the consequences. The holy Quran ordains:

“...Whoever works evil, will be requited accordingly...”⁶⁰

29. The Prophet has specifically said:

“No father shall be responsible for the crime committed by his son, nor vice versa”

iii. Equality and equal protection of laws

30. Islam emphasis on equality and equal protection of laws. Some people may be inclined to favor the rich, because they expect something from them. Some people may be inclined to favor the poor because they are generally helpless. Partiality in either case is wrong. Be just, without fear or favor. Both the rich and the poor are under Allah’s protection as far as their legitimate interests are concerned, but they cannot expect to be favored at the expense of others, and he can protect their interests far better than any man- this is the message of Holy Quran.⁶¹ The Holy Quran ordains:

“O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do”⁶²

⁵⁸ See Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p.126

⁵⁹ *Al An'am*, VI: 164

⁶⁰ *An-Nisaa*, IV:123

⁶¹ The Holy Quran: English translation of the meaning and commentary, (King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA)p.259

⁶² *An-Nisaa*, IV:135

31. Imam Ali in his letter to al-Aswad ibn Qutbah, the Governor of Hulwan: “...All the people should be equal in right before you, because injustice cannot be a substitute for justice. Avoid that thing the like of which you would not like for yourself...”⁶³

D. Elements of a crime

i. Actus Reus

32. Effective freedom means that on the basis of ability to judge and differentiate between right and wrong, a person has sufficient volitional drive to commit a prohibited act. This is known as *actus reus* in legal language. *Actus reus* refers to the outward circumstances of the offence. Muslim Jurists have classified *actus reus* into two categories:

- (a) an act which aims at volitional infringement of law; and
- (b) infringement by mistake or neglect.

33. In the former case the violation is deliberate, in the latter case it is inadvertent.⁶⁴ Muslim jurists do not rely merely on overt act (*actus reus*); they try to assess the factors that drive the person to commit the act. The *actus reus* and *mens rea* according to these jurists should concur. The physical act is generally held by the jurists to be contemporaneous with the guilty mind.⁶⁵ According to Ibn Hazm, if a person with an intention to drown the people opens up a river dam, or spreads fire, or destroys a building and causes loss of life, he is criminally responsible for committing homicide.⁶⁶ Shafi’I, Ibn Hanbal and Malik share this view.

34. If there is no relationship between the act and the result, no responsibility shall arise.⁶⁷ For example, if a man is injured and remains bed-ridden but subsequently some other man kills him, the former is exonerated from criminal responsibility, for homicide.

35. It is a settled principle of Islamic penal jurisprudence that a desired result may be even achieved by an “omission” – whether intentional or unintentional. An “omission”, like a positive act, shall create criminal responsibility. The law relating to “omissions”

⁶³ *Nahjul Balagha*, Selections from Sermons, Letters and Sayings of Amir Al-Mu’minin, Ali Ibn Abi Talib (Sayyid Mojtaba Musavi Lari, Qom), vol.11, p.484

⁶⁴ Abd al Qadir Udah, *Tashri’ al-Jinai al-Islami*, I: 439 (1934), cited in Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p.126

⁶⁵ Ibid.

⁶⁶ *Ibn Hazm, Muhalla*, II:19-31, cited in Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p.126

⁶⁷ Ibn Qudamah, *Al-Mughni*, IX: 326 (682A.H.); *Kitab al-Maghribi, Muwahib al-Jalil*, VI:344 (954 A.H.), cited in Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p.127

with regard to children was statutorily recognized in England after the passing of the Young Persons Act 1933. The courts in England in a series of civil liability cases have upheld the scope of omission.

ii. Mens Rea

36. The blameworthy conduct is an essential ingredient of an offence. Moreover, as a general rule, there must be some thing of the kind, which is in ordinary language designated as *mens rea* or criminal intention. The prophet asserted that conduct was to be judged by the intention. Bare intention in the absence of an overt act is not indictable.⁶⁸ Imam Malik did not support “specific intention” in offences relating to person-for him general intent with respect to violation of law and its subject matter was sufficient to make a person criminally liable. Abu Hanifah, Shafi ‘I and Ibn Hanbal, on the other hand, recognized “specific intention” to be the workable principle for determining criminal responsibility. However, these jurists disagreed on the extent of applicability of “specific intent” principle. The classification of homicide into “intentional” and “by error” categories is an express recognition of the specific intent as the basis of criminal responsibility.

37. The Holy Qur’an declares:

“...But there is no blame on you if ye make a mistake therein: (What counts is) the intention of your hearts: and Allah is oft-forgiving, most merciful”.⁶⁹

38. The message of the abovementioned Quranic verse is that it is not intended to penalize an unintentional slip in the matter. It is the action of mischievous parties, which is chiefly reprehended, if they intend false insinuations. A mere mistake on their part does not matter.⁷⁰

39. Narrated Umar bin Al-Khattab: I heard Allah’s Messenger saying, “ the reward of deeds depends upon the intentions and every person will get the reward according to what he was intended”.⁷¹

E. General exceptions and defenses

i. Mistake of fact

40. Error or mistake is a valid ground in Islam to vitiate criminal responsibility. Barring the case of an un-intentional homicide, which is dealt by the Qur’an, this rule

⁶⁸ Ibn Qayyim, *I’iam al-Muqi ‘in*, III: 101-107, cited in Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p. 128

⁶⁹ *Al-Ahzab*, XXXIII:5

⁷⁰ *Holy Quran, English translation of the meanings and commentary*(King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA) p.1239

⁷¹ *Sahih Al-Bukhari*, vol-1, Hadith No.1

passes like an unbroken thread through all the provisions of Islamic criminal law. As regard homicide by error, the Qur'an expressly lays down that:

“Never should a believer kill a believer; except by mistake. And whoever kills a believer by mistake it is ordained that he should free a believing slave. And pay blood money to the deceased family unless they remit it freely...”⁷²

Therefore, the nature of responsibility of a culpable offender cannot be doubted.

41. However, in the case of *hudud* offences jurists have meticulously worked out exceptions wherein an accused may not be subjected to legal punishment. For, example it is stated that if a man in the darkness of night finds in his bed a woman other than his wife he will not be criminally responsible and shall not be punished with *hadd*. The same principle will apply to blind man, provided the woman does not expressly tell the blind that she is not his wife. It is held by Muslim jurists that where a person mistakes alcohol for water and drinks it, he does not intentionally violate the prohibition law and therefore, the responsibility of the accused is vacated.⁷³

ii. Mistake of law

42. The benefit of ignorance of law is not conceded to by Muslim jurists in favour of subjects of an Islamic state. Every Muslim in an Islamic state is under a duty to acquire legal knowledge and especially acquaint himself with legal prohibitions ordained in Shari'ah. It is, however, agreed that the aforesaid principle shall not apply where a culpable offender did not know a newly introduced law and committed an offence in ignorance of the same. This is not an exception but a rule of procedure that is a component part of rule of legality.

iii. Intoxication

43. Except in the situations of necessity and coercion, criminal responsibility flows from voluntarily consuming alcohol.

iv. Self-defense

44. The principle discernible is that there is no criminal responsibility if an offence is committed in the course of protecting life, property and honor, provided the use of force to repel the attack is reasonable. The classical sources of Islamic criminal jurisprudence do not speak about the quantum of force that may permissibly be used to repel a threat to life, property or honor; yet they manifestly point at reasonable use of force.

The following conversation between the Prophet and a companion is reported:

“ What should I do if some one by force attempts to snatch away my property?

Do not give him your property.

If he attempts to snatch it away by force?

⁷² *An-Nisaa*, IV:92

⁷³ Abd al Qadir Udah; cited in Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p.130

You also use force to protect it.
If he kills me?
You shall be a Martyr.
If I kill him?
You are not guilty and he shall go to hell”⁷⁴

45. In conformity with this tradition, Caliph Umar exonerated a girl who killed a man of Banu Hazil who had attempted at her modesty and honor.⁷⁵

v. ***Interest of the Islamic Society***

46. The general principle of jurisprudence states that every right has a corresponding duty. Some acts done for the protection of the Society by an Islamic state does not give rise to criminal responsibility even if in ordinary parlance of language it results into a criminal act.

F. **Legality in Islamic Law**

47. The rule of non-retroactivity is one of the fundamental attributes of legality. In modern law this concept has evolved from the Latin maxim *nullum crimen nulla poena sine lege*. It conveys that no man shall be made to suffer except for a distinct breach of penal law which shall be laid down before hand in precise and definite terms. This rule prohibits:

- 1) retroactive imposition of criminality;
- 2) extension of a criminal rule by random analogy to cover a case not explicitly falling within its domain; and
- 3) formulations of criminal law in excessively wide or vague terms.

48. Under Islamic Jurisprudence this principle is deductible from the Qur’an when it declares:

“And marry not those women whom your fathers married, except what is past. It was shameful and odious,-An abominable custom indeed”.⁷⁶

“Prohibited to you (for marriage) are:-your mothers, daughters, sisters;...Except for what is past:...”⁷⁷

G. **Islamic view on Punishment**

49. Islam envisages a system of punishment, which is commensurate to the crime committed.

The Holy Quran declares:

⁷⁴ Sahib Muslim, Kittab, al-Iman, cited in Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p.132

⁷⁵ Abd al –Qadir; cited in Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p.132

⁷⁶ *An-Nisaa*, IV:22

⁷⁷ *An-Nisaa*, IV:23

“If any does good, the reward to him is better than his deed; but if any does evil, the doer of evil are only punished (to the extent) of their deeds”.⁷⁸

50. A good deed has its sure reward, and that reward will be better than the merits of the doer. An evil deed may be forgiven by repentance, but in any will not be punished with a severer penalty than justice demands.⁷⁹

In Islam God is embodiment of mercy. The Holy Quran declares:

“He is the one that sends down rain (even) after men have given up all hope, and scatters his mercy (far and wide). And he is the Protector, worthy of all praise.”⁸⁰

51. Holy Quran further ordains:

“Those who avoid the greater sins and indecencies and, when they are angry even then forgive”⁸¹

52. Islam gives space for those repent their acts. However, strict conditions are laid in the Holy Quran for the acceptance of repentance.

The Holy Quran declares:

“He is the One that accepts repentance from his servants and forgives sins; And he knows all that ye do”⁸²

“Allah accepts repentance those, who do evil in ignorance, and repent soon afterwards; to them will Allah turn in mercy, For Allah is full of knowledge and wisdom.

Of no effect is the repentance of those, who continue to do evil, until death faces one of them, and he says, “Now have I repented indeed;...”⁸³

53. Narrated Ibn Masu’d: A man kissed women and then came to Allah’s Messenger and told him of that. So the divine revelation was revealed to the Prophet: And perform *As-Salat* at the two ends of the day, and in some hours of the night; (i.e. the compulsory *Salat*). Verily, the good deeds remove the evil deeds (small sins). That is the reminder for the mindful.” The Man said, “ Is this instruction for me only? The Prophet said, “ It is for all those of my followers who encounter a similar situation”.⁸⁴

54. Narrated Abu Dharr: Allah Messenger said to me: “a) Be afraid of Allah and keep your duty to him wherever you may be; b) and follow up the evil deeds with the good deeds, (verily) the good deeds remove (blot out) evil deeds; c) and behave with the people in a high standard of character.”⁸⁵

⁷⁸ *Al-Qasas*, XXVIII: 84

⁷⁹ The Holy Quran, English translation of the meanings and commentary, (King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA) p.1146

⁸⁰ *Ash-Shura*, XLII-28

⁸¹ *Ash-Ahura*, XLII-37

⁸² *Ash-Shura*, 25

⁸³ *An-Nisaa*, IV:17-18

⁸⁴ *Sahih Al-Bukhari*, vol.6 Hadith No.209

⁸⁵ This Hadith is quoted by *Al-Tirmidhi*

III. KEY OBJECTIVES OF ISLAMIC CRIMINAL LAW AND PUNISHMENT: PREVENTION OF CRIME AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

55. Before analysing the objectives of Islamic criminal law and punishment, it is appropriate to examine some of the criticism against it.

56. Islamic punishments have been regarded by the critics as the most vulnerable part of the Islamic law. They have, accordingly, been singled out for special and ruthless attack. 'Inhuman and barbaric' is how they have been designated, particularly in the West. They have been alleged to violate some of the basic human rights and to offend against the dignity of the human person and decency of human relations. They have been said to be outdated for the present hour of advanced culture and civilization, and return to them dubbed as reactionary. We shall see whether, and how far, this judgment stands the test of objective inquiry and honest evaluation.

57. Islam's penal policy is unique. It is just as well as efficient. It punishes only when punishment is due. And it punishes in the manner most conducive to the upkeep of society and elimination of crime. Its benefits, however, can be fully availed in only the strictly Islamic context. It is integral to Islam's socio-political dispensation. Its ethics can be fully understood and truly appreciated only when we understand and appreciate within its wider Islamic context.

58. It is true that certain acts that entail punishment in Islam are treated in the modern West either as non-criminal act or treated lightly. Drinking by a Muslim is an act punished in Islam. In the West on the other hand, drinking as such is not punished at all. Adultery by a Muslim, against, is the most severely punished act in Islam. In the West, on the other hand, it is wrongful in the absence of consent. Here, again, Islam takes care of the social, cultural as well as biological consequences of the offending act, instead of only the personal and private ones. The western jurisprudence apparently does not see any social, cultural or biological harm issuing from the act of adultery. The reasons for that are clear. The Western societies do not see any rights or obligations towards the Supreme Being-the God

59. The main purpose behind the awarding of penalties is to prevent the individual from committing the crime and make the offender appreciate the seriousness of violating the prohibitions of Allah so that he may keep off the prohibitions for fear of punishments (deterrence). The acts of disobedience are transgressions against the interests, which the Islamic religion wants to protect, such as religion, life, intellect, property and off springs. A theological scholar opines:

"Whoever has known dark experiences and has examined political principles knows, of necessity, that whenever men have among them a chief and a guide whom they obey, who restrains the oppressor from his oppression and the unjust man from his injustice and avenges the oppressed of his oppressor, and along with that leads them to rational principles and religious duties, and restrains them from the corruptions which cause the destruction of order in their worldly affair,

and from the evils which result in the wretchedness in the world to come, so that every individual might fear that punishment, then because of this they will draw near to soundness and depart from corruption”(*al-Babu’l-hadi ‘ashar*, Engl.transl.p.63)⁸⁶

A. Islam emphasis on furthering goodness and dissuading evil

60. The main objective of Islamic criminal law is to prevent the individual from committing crime and thereby creating a peaceful society where religion, life, intellect, property and lineage (honor) are preserved and protected.

61. Narrated Ibn Abbas: The Prophet said: “The most hated persons to Allah are three:!) A person who deviates from the right conduct, i.e. an evil doer; 2) a person who wants that the traditions of the pre-Islamic period of ignorance should remain in Islam; and 3) a person who seeks to shed somebody’s blood without any right”⁸⁷

This is also clear from the following words of Imam Al Ghazali:

“The procurement of goodness and the keeping away of harm are the objectives of creation of mankind. The goodness and best interests of the creation is in the attainment of their goals. However, by interest or goals we mean the preservation of the objective of legislation, and the objective of legislation with respect to the creation is five: that is to preserve and protect religion, life, intellect, property and lineage (honor). Thus, anything that secures these five essentials would be considered as goodness and a best interest. And anything that may cause the loss of these essentials is deemed to be mischief the eradication of which is goodness and a best interest. The maintenance of these five sources is regarded as a necessity. And it is the strongest rank of goodness...it is not possible that any creed or legislative system by which the reformation of humanity is sought would not include the interdiction of the loss of these five issues and deterrents thereto. Thus all divine messages prohibited unbelief, murder, intoxicants, theft, and adultery”.⁸⁸

62. Imam Ali while describing some of the objectives and good points of the commands of *Shariah*, held that persuasion for good and dissuasion from evil are effective ways of showing others the correct path and preventing them from wrong; if a community has no persons to perform these duties nothing can save it from ruin and it falls to an extreme depth morally and socially. That is why Islam has laid great stress on it as compared to other matters, and held disregard to it as an unpardonable sin. Imam Ali has clearly laid down the objectives of Islamic criminal law and punishment:

“Allah has laid down... persuasion for good for the good of the common people;... dissuasion from evil for the control of the mischievous;... award of penalties for the realization of importance of the prohibitions; the abstinence from drinking wine for the protection of the wit; the avoidance of theft for

⁸⁶ as cited in *Nahjul Balagha*, Selections from Sermons, Letters and Sayings of Amir Al-Mu’minin, Ali Ibn Abi Talib(Sayyed Mojtaba Musavi Lari, Qom) ,vol.II,p.659

⁸⁷ *Sahih Al-Bukhari*, vol.9 Hadith no.21

⁸⁸ Al Ghazali, *Al Mustafa*, vol.I, p.287-288. cited in Sulieman Abdul Rahman Al Hageel, *Human Rights in Islam* (Supreme Council of Islamic Affairs, 2001), p.120

inculcating chastity; abstinence from adultery for safeguarding descent; abstinence from sodomy for increase of progeny; tendering evidence for furnishing proof against contentions; abstinence from the lie for increasing esteem for truth; maintenance of peace for protection from danger; Imamate (Divine Leadership) for the orderliness of the community and obedience (to Imams) as a mark of respect to the Imamate.⁸⁹

63. If established penalties are to combat crimes and criminal acts, we must prove afterwards that these penalties are capable of containing criminal acts. The consideration does not only lie in the means or objectives, but rather lies also in the effectiveness of the means to accomplish the goals. Secular laws were also determined to accomplish this end. viz. combating of crimes and criminal acts. Thus, they established specific penalties for this objective, however they failed to contain crimes. However, religion can contribute to the effectiveness of this means. Abstention from lies and falsehood has been commanded so that the standing and importance of its contrary namely truth may become prominent and in observing the benefits and advantages of truth the moral weakness of falsehood may be avoided.

64. Islamic Criminal law is unique in several aspects. One such aspect is that it has an inherent body of law for preventing crime and thereby protecting the human rights of the people.

B. Punishment for murder (Capital punishment)

65. Punishment prescribed for murder (capital punishment) has been described by the western scholars as incompatible with modern international rights law. The Universal Declaration of Human Rights, 1948 proclaims the right of every individual to protection from deprivation of life. It states that no one shall be subjected to cruel or degrading punishment. The International Covenant on Civil and Political Rights (ICCPR), 1966, Article 6 of the Covenant states that "no one shall be arbitrarily deprived of his life" and that the death penalty shall not be imposed on pregnant women or on those who were under the age of 18 at the time of the crime. Article 7 states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In 1984, the UN Economic and Social Council (ECOSOC) adopted "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty." In the same year, the Safeguards were endorsed by consensus by the UN General Assembly. The Safeguards state that no one under the age of 18 at the time of the crime shall be put to death and that anyone sentenced to death has the right to appeal and to petition for pardon or commutation of sentence.⁹⁰ In 1989, the UN General Assembly adopted the Second

⁸⁹ *Nahjul Balagha*, Selections from Sermons, Letters and Sayings of Amir Al-Mu'minin, Ali Ibn Abi Talib, (Sayyed Mojtaba Musavi Lari, Qom), vol.II, p.654

⁹⁰ The concerns of the international community on death penalty include: imposition of capital punishment retroactively to offences for which it was not provided for at the time of the offence; sentencing to death a person below the age of 18; sentencing to death person beyond a certain age (maximum age); execution of pregnant women; execution of mothers of young children; sentencing to death a person who became insane after the commission of the offence and is still insane at the time of his or her trial; execution of a person who has been sentenced to death and who subsequently becomes insane; sentencing of a person suffering

Optional Protocol to the ICCPR. Its goal is the abolition of the death penalty. In 1990, the Protocol to the American Convention on Human Rights was adopted by the General Assembly of the Organization of American States. It provides for the total abolition of the death penalty, allowing for its use in wartime only.⁹¹

66. However, Islam envisages a society free of crime by giving deterrent punishments thereby protecting the fundamental human rights. The holy Quran declares that life is sacred. It is not only that human life is sacred, but all life is sacred. Even in killing animals for food, a dedicatory formula “in the name of Allah has to be employed, to make it lawful. Holy Quran declares:

Say: “Come, I will rehearse what Allah hath(really) prohibited from you from”...Take not life, which Allah hath made sacred, except by way of justice and law...”⁹²

67. Holy Quran further ordains:

“Nor take-life-which Allah has made sacred-except for just cause. And if anyone is slain wrongfully we have given his heir authority (to demand Qisas or to forgive): but let him not exceed bounds in the matter of taking life; for he is helped (by the Law)”⁹³

68. Narrated Caliph Abu-Bakr: The Prophet delivered to us a *Khutbah* (religious talk) on the day of *Nahr* (10th of *Dhul Hijjah*). He said, “No doubt, your blood and your properties are sacred to one another like the sanctity of this day (day of *Nahr*) of yours, in this month (month of *Dhul-Hijjah*) of yours, in this town (town of Makkah) of yours, till the day you meet your Lord. No doubt! Haven’t I Conveyed Allah’s message to you? We said, “ “Yes”. He said, “O Allah! Be witness. So it is incumbent upon those who are present to convey it (this information) to those who are absent because the informed one

from mental retardation or extremely limited mental competence; whether the offender charged with a capital offence have a right in all circumstances laid down in substantive law, in the law of criminal procedure or guaranteed by the Constitution; procedure in place to ensure a fair trial for persons facing capital punishment if convicted; ensuring the right for a person sentenced to death to seek commutation of the sentence or a pardon from the State authorities; whether the defendant is given a choice of method of execution and any procedures employed to minimize the suffering of the person to be executed. UNODC, *Seventh Survey on Capital Punishment and on the Implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty*, <http://www.unodc.org>

⁹¹ The International War Crimes Tribunal in 1993 stated that the death penalty is not an option, even for the most heinous crimes known to civilization, including genocide. In 1995, the UN Convention on the Rights of the Child came into force. Article 37(a) prohibits the death penalty for persons under the age of 18 at the time of the crime. In 1999, the UN Commission on Human Rights passed a resolution calling on all states that still maintain the death penalty to progressively restrict the number of offenses for which it may be imposed with a view to completely abolishing it. In April 2001, the UNCHR approved a European Union motion asking countries to halt executions as a step toward the eventual abolition of the death penalty. In February 2002, the Council of Europe's Committee of Ministers adopted Protocol 13 to the European Convention on Human Rights. Protocol 13 is the first legally binding international treaty to abolish the death penalty in all circumstances with no exceptions. When it was opened for signature in May 2002, 36 countries signed it.

⁹² *Al-An'am*, VI:151

⁹³ *Al-Israa*, XVII:33

might comprehend it (what I have said) better than the present audience, who will convey it to him. Beware! Do not renege (as) disbelievers after me by striking the necks (cutting the throats) of one another”.⁹⁴

69. In order to restrict the scope of capital punishment, firstly, Islam made it strictly individual responsibility; secondly, under Islamic criminal law the whole penalty can be remitted if the aggrieved party agrees, out of brotherly love. In meeting that demand the culprit or his friends should equally be generous and recognize the good-will of the other side. The Holy Quran instructs:

“O ye who believe! The law of equality is prescribed to you in cases of murder: The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave chastisement”⁹⁵

70. The Holy Quran ordains:

“The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his rewards is due from Allah; for (Allah)”⁹⁶

“But indeed if show patience and forgive, that would truly be an affair of great Resolution”⁹⁷

C. Prohibiting infanticide and abortion: to protect the rights of the child

71. Islamic law took care of the rights of the child. Islam has protected the rights of the unborn child by prohibiting abortion. It has taken pro-life approach. Therefore does not accept abortion as an individual right of women. Islam has also made infanticide a severe offence. Those people who commit infanticide due fear of poverty, the Holy Quran declares:

“Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin”⁹⁸

72. In the pre-Islamic period Arabs were addicted to female infanticide. In a society perpetually at war a son was a source of strength whereas a daughter was a source of weakness. Even now infanticide is not unknown in other countries for economic reasons. This crime against children’s lives is here characterized as one of the greatest of sins.

D. Punishment for theft and breach of trust: to protect property and honor

⁹⁴ *Sahih Al-Bukhari*, vol.2, Hadith No.797

⁹⁵ *Al-Baqarah*, II. 178

⁹⁶ *Ash-Shuraa*, XLII:40

⁹⁷ *Ash-Shuraa*, XLII: 43

⁹⁸ *Al-Israa*, XVII:31

73. Punishment for theft has been criticized by some scholars for its cruel and degrading treatment. Punishment for theft is subject to fulfillment of several conditions. The extreme severity of this Qur'anic punishment can be understood only if one bears in mind the fundamental principle of Islamic law. Qur'an imposes the severe punishment as deterrence for theft in a community or State.

74. Islam has given prominence for preserving and protecting the property of a person. Islam considers it as a serious crime and orders severe punishment so that people can live without fear of theft or misappropriation of their property.

The Holy Quran declares:

“O ye that believe! Betray not the trust of Allah and the Messenger, nor misappropriate knowingly things entrusted to you.”⁹⁹

75. Trusts may be of various kinds: 1) property, goods, credits etc.; 2) plans, confidences, secrets etc.; 3) knowledge, talents, opportunities, etc. which we are expected to use for our fellowmen. Men may betray the trust of Allah and his Prophet by misusing property, or abusing the confidence reposed in them, or the knowledge or talents given to them.¹⁰⁰

76. However, Islam has given the culprit a chance to repent and change his or her behavior, so that further crimes can be prevented. The Holy Quran provides:

“But if the thief repents after his crime, and amends his conduct, Allah turneth to him in forgiveness; for Allah is oft-giving, Most merciful.”¹⁰¹

77. In Islam, punishment really does not belong to mortals, but to Allah alone. Only in order to keep civil society together, and protect innocent people from crime, certain principles are laid down on which people can build up their criminal law. But we must always remember that Allah not only punishes but forgives, and forgiveness is the attribute which is more prominently placed before us. It is not our wisdom that can really define the bounds of forgiveness or punishment, but his Will or Plan, which is the true standard of righteousness and justice.¹⁰² Also one may safely conclude that the punishment for theft is applicable only within the context of an already existing fully functioning Islamic social security scheme, and in no other circumstances.¹⁰³

E. Punishment for Adultery and Sodomy: to protect the right to family and ethical values

⁹⁹ *Al-Anfal*, VIII: 27

¹⁰⁰ The Holy Quran: English translation of the meaning and commentary, (King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA)p.476

¹⁰¹ *Al-Maidah*, V:39

¹⁰² The Holy Quran: English translation of the meaning and commentary, (King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA) p.295

¹⁰³ The Message of Quran, pp.149-50, as cited in Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p.74

78. Adultery and sodomy have been prohibited in order that lineage may be regulated and the human race may continue and prosper. The issues by adultery are not regarded legitimate for the purpose of lineage and consequently they are not entitled to inheritance, the deprivation of such rights has been another reason for criticism against Islamic criminal law.

79. The protection of family overrules all other concerns in the Islamic criminal law. Adultery is not only shameful in itself and inconsistent with self-respect or respect for others, but it opens the road to many evils. It destroys the basis of the family: it works against the interests of children born or to be born; it may cause murders and feuds and loss of reputation and property, and also loosen permanently the bonds of the society.¹⁰⁴ Besides, as a consequence of these practices one contracts such diseases which cause ruination of life in addition to discontinuity of progeny.¹⁰⁵

The Holy Quran ordains:

“Nor come nigh to adultery: for it is an indecent (deed) and an evil way”¹⁰⁶

Holy Quran further declares:

“The woman and the man guilty of 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”¹⁰⁷

F. Prohibiting alcohol: to protect and preserve individual, family and societal values

80. Although secular legal regimes do not prohibit consuming alcohol, Islam in order to prevent severe crimes being committed and to preserve the mental faculties of human beings prohibits consuming alcohol. There may possible be some benefit in any intoxicating liquor or drug, but the harm is greater than the benefit, especially if we look at it from a social as well as an individual point of view. The prohibition of drinking is based on the following verse of the Qur’an:

“O ye who believe! Intoxicants and gambling, sacrificing to stones, and (divination by) arrows, are an abomination,-of Satan’s handiwork: Eschew such (abomination), that ye may prosper.

Satan’s plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of Allah, and from prayer: will ye then abstain?”¹⁰⁸

81. The Holy Quran ordains:

“They ask thee concerning wine and gambling. Say: “In them is great sin, and some profit for men; but the sin is greater than the profit.” They ask thee how

¹⁰⁴ Ibid, p.785

¹⁰⁵ *Nahjul Balagha*, Selections from Sermons, Letters and Sayings of Amir Al-Mu’minin, Ali Ibn Abi Talib, (Sayyed Mojtaba Musavi Lari, Qom),vol.II,p.658

¹⁰⁶ *Al-Israa*, XVII:32

¹⁰⁷ *An-Nur*, XXIV:2

¹⁰⁸ *Al-Maidah*, V:90-91

much they are to spend; say: “what is beyond your needs”. Thus doth Allah make clear to you his signs: in order that ye may consider-¹⁰⁹

82. Islam has explicitly prohibited human beings from consuming certain select things, including alcohol. Let us see the logic of giving severe punishments for intoxication. Intoxication drives human beings to commit sins and crimes resulting in severe punishment both in this life and in the hereafter. It affects human mind and changes its rational mood in one way or another. Also it is harmful to health as it damages important systems of the body such as brain, nerves, liver, lungs and respiratory system. It also destroys family links and destroys the institutions of marriage and family and unnecessary expenditure which could be used for education, health, shelter and providing charity. In sum, Islam prescribes severe punishment for intoxication only to prevent a person committing from larger crimes and protecting the basic institutions of the society i.e. for a higher goal. Hence a careful understanding of the Islamic law refutes the notion that the prescribed punishment for intoxication violates the rights and freedoms of the human beings.¹¹⁰

G. Discouraging apostasy: to preserve the basis of the Islamic value system

83. Faith is the basis of the Islamic system. Therefore, preservation of the religion is the first stipulation in objectives of legislation and is obligatory. Secular law never considers apostasy as an offence. The relevant verse of the Qur’an does not refer to any punishment by the Islamic State for apostasy (riddah):

“...And if any of you turn back from their faith and die in unbelief, heir works will bear no fruit in this life and in the hereafter; They will be companions of the fire and will abide therein”¹¹¹

It is defined by the Prophet’s hadith:

“It is not permissible to take the life of a Muslim who bears testimony (to the fact) that there is no God but Allah, and that I am the messenger of Allah, but in one of three cases: the married adulterer, a life for a life, and the deserter of his din (Islam), abandoning the community”.

H. Punishment for slander or scandalous allegation: to protect the right to personal reputation and honor

84. In Islam, most serious notice is taken of people who put forward slanders or scandalous allegations about women without adequate evidence. If anything is said against a women’s chastity, it should be supported by evidence twice as strong as would ordinarily be required for business transactions, or even in murder cases. That is, four witnesses would be required instead of two. Failing such preponderating evidence, the

¹⁰⁹ *Al-Baqarah*, II:219

¹¹⁰ Suleiman Hageel, *Human Rights in Islam*, p. 149. According to Shafi’I, Malik, Ahmad and the Shi’ah Imamiyah it is any beverage that induces intoxication when taken in great quantity – whether called wine (khamr) or not-even when only small quantity is taken. The fact of taking it involves an application of the definite prescribed penalty.

¹¹¹ *Al-Baqarah*, II:21

slanderer should himself be treated as a wicked transgressor and punished. Not only would he be subjected to punishment, but he would be deprived of the citizen's right of giving evidence in all matters unless he repents and reforms, in which case he can be readmitted to be a competent witness. Chaste women have been specifically mentioned, because slandering them is more abhorrent.¹¹² The Holy Quran provides

“And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations),-flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors;- Except those who repent thereafter and mend (their conduct); for Allah is oft-forgiving, most merciful.”¹¹³

85. The Holy Quran ordains that people, who make slanders, are guilty of gravest spiritual offence:

“Those who slander chaste, indiscreet and believing women are cursed in this life and in the hereafter: for them is a grievous chastisement”.¹¹⁴

I. Punishment for violation of privacy: to protect the right to privacy

86. Violation of privacy is an offence under Islamic law. The convention of propriety and privacy are essential to a refined life of goodness and purity. The Muslim principle of asking respectful permission and exchanging salutations ensures privacy without exclusiveness, and friendliness without undue familiarity. Even if the house is empty, a person has no right to enter it until he obtains the owner's permission, wherever he may be. The fact of not receiving a reply does not entitle a person to enter without permission. If a person is actually asked to withdraw, as the inmates are not in a condition to receive him, he should *a fortiori* withdraw, either for a time, or altogether, as the inmates may wish him to do.¹¹⁵

87. The Holy Quran ordains:

“O ye who believe! Enter not houses other than your own, until ye have asked permission and saluted those in them; that is best for you, in order that ye may heed (what is seemly).

If ye find no one in the house, enter not until permission is given to you: if ye are asked to go back, go back: that makes for greater purity for yourselves: and Allah knows well all that ye do.

It is no fault on your part to enter houses not used for living in, which serve some (other)use for you: and Allah has knowledge of what ye reveal and what ye conceal.”¹¹⁶

¹¹² The Holy Quran: English translation of the meaning and commentary, (King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA)p.1003

¹¹³ *An-Nur*, XXIV:4 -5

¹¹⁴ *An-Nur*, XXIV:23

¹¹⁵ The Holy Quran: English translation of the meaning and commentary, (King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA)p.1011

¹¹⁶ *An-Nur*, XXIV:27-29

J. Punishment for defaming and spying: to ensure the right against defamation and spying and thereby protect personal integrity and honor

88. A person can make a public scandal of evil in many ways. 1) It may be idle sensation-mongering; 2) it may be malicious gossip of a foolish, personal kind; 3) it may be malevolent slander or libel; and 4) it may be a public rebuke or correction or remonstrance, without malice, either by a person in authority or by a person not vested with authority, but acting either from motives of public spirit, or in order to help some one who has been wronged. 1, 2 and 3 are absolutely forbidden. If the motive is different, the exception does not apply to the fourth category also. Then an affected person has every right to seek public redress.¹¹⁷

The Holy Quran declares:

“Allah loveth not the shouting of words in public speech, except by one who has been wronged, for Allah is he who hearth and knoweth all things.”¹¹⁸

89. Allah has protected and honored humanity and prohibited the touching of an individual’s person, skin, or honour. The Holy Qur’an says:

“O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not on each other, Nor speak ill of each other behind their backs. Would any of you like to eat the flesh of the dead brother? Nay, ye would abhor it...but fear Allah: for Allah is Oft-Returning, Most Merciful”¹¹⁹

90. There are also other instances. For example, Ibn Mas’ud, when he was governor of Iraq, was told that Walid ibn ‘Uqbah’s beard is dripping with wine. He replied: We have been prohibited from spying, but if something should become obvious to us, we will take him to task for it. It is related that once ‘Umar ibn al khattab was informed that Abu Mihjan al-Thaqafi was drinking wine in his home with some friends. ‘Umar went straight to Abu Mihjan’s house, walk inside, and saw that there was only one other person with Abu Mihjan. This man said to ‘Umar: “this is not permitted to you, Allah has prohibited you from spying.” At that, ‘Umar turned and walked out. “Abd al-Rahman ibn ‘Awf related:

“I spent a night with ‘Umar on patrol in the city (Madinah). A light appeared to us in the window of a house with its door ajar, from which we heard loud voices and slurred speech. ‘Umar said to me: this is the house of Rabi’ah ibn Umayyah ibn Khalf, and right now they’ are in their drinking, what do you think? I replied: ‘I think we are doing what Allah has prohibited us from doing. Allah said not to spy, and we are spying. So Umar turned away and left them alone.’”¹²⁰

91. Clearly, the privacy of the individual and all other types of privacy must be respected and preserved. This is true unless something occurs that requires otherwise.

¹¹⁷ The Holy Quran: English translation of the meaning and commentary, (King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA)p.264

¹¹⁸ *An-Nisaa*, IV:148

¹¹⁹ *Al-Hujurat*, XLIX:12

¹²⁰ Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p.271

92. The meaning of “suspicion” in the above Qur’anic verse is “accusation”. The famed authority on legal interpretations of the Qur’an, Qurtubi, said that what was being prohibited in the verse is an accusation that has no basis in fact, such as accusing someone of adultery or drinking wine in the absence of any supporting evidence. He wrote:

“And the proof that the word suspicion in this verse means accusation is that Allah then said: And spy not on one another: This is because one might be tempted to make an accusation and then seek confirmation of one’s suspicion via spying, inquiry, surveillance, eaves dropping, and so on. Thus the Prophet prohibited spying. If you wish, you may say that what distinguishes the kind of suspicion that must be avoided from all other kinds of suspicion is that the kind of suspicion for which no proper proof or apparent reason is known must be avoided as haram. So, if the suspect is well known for goodness and respected for apparent honesty, then to suspect him/her of corruption or fraud, for no good reason, is haram. The case is different, however, in relation to one who has achieved notoriety for dubious dealings and unabashed iniquity. Thus there are two kinds of suspicion: that which is brought on and then strengthened by proof that can form the basis for a ruling and, secondly, that which occurs for no apparent reason and which, when weighed against its opposite, will be equal. This second type of suspicion is the same as doubt, and no ruling based on it may be given. This is the kind of suspicion that is prohibited in the verse.”¹²¹

93. This indicates that an individual may not be subjected to a search of his/her person or home, surveillance, the recording of conversations over the phone or elsewhere, the invasion of privacy in any manner, or the disclosing of any confidences merely on the basis of a dubious suspicion that he/she may have committed a punishable crime.

94. Based on these principles, the Shari’ah does not allow the searching of a person or of one’s home, the surveillance of personal conversations, the censorship of personal mail, and the violation of one’s private life unless there is legally valid evidence to show his/her involvement in a crime. Such evidence must be considered by the authority responsible for carrying out the Shari’ah rulings.

K. Right to peace

95. It can be said that security and stability are always sought by people at any time and at any place. No human being could achieve these objectives, unless he lives in a secure society where he/she can find security for himself, his religion, his family integrity, his property, and intellect.

96. The Holy Quran declares:

“The punishment of those who wage war against Allah and his messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the hereafter;

¹²¹ Tahir Mahmood (ed.), *Criminal Law in Islam and the Muslim World*, p.271

Except for those who repent before they fall into your power: in that case, know that Allah is oft-forgiving, most merciful.”¹²²

97. *Salam* means peace and peace loving and it is obvious that peaceful attitude is a successful way of protection from dangers and prevention of war and fighting. Generally, commentators have taken the word *salam* to mean mutual greetings and well-wishing but the context and the fact that it has been mentioned in the series of obligations does not support this interpretation. However, according to this interpretation *salam* is a means of safety from dangers because it is regarded as a way of peace and peace loving. When two Muslims meet each other they offer *salam* one to the other, it means that they announce the wishes of each for the welfare of the other where after each feels safe with the other.

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IV. GENERAL COMMENTS

1. Apart from its religious and moral aspects, Islam envisages a unique legal system, which governs all aspects of human life, including relationship with God, fellow human beings, animals, birds, nature and even with himself/herself. The Islamic legal system is pragmatic and takes into account the basic human nature. Individual redemption and the attainment of social values are the ultimate aims.

2. Islamic law is considered as divine law. The division between cannon law and secular law does not exist in Islam. It limits the power of the State and governs the relationship between the State and its citizens. Human rights and fundamental freedoms provided by the modern international human rights instruments had been guaranteed in the Islamic law, centuries ago.

3. Objectives of international criminal law, national criminal law and Islamic criminal law are fundamentally similar. Main objectives are prevention of crime, ensure justice, maintenance of peace and security and protection of human rights and fundamental freedoms. Islamic criminal law intends to create a peaceful society where religion, life, intellect, property and lineage (honor) are preserved and protected.

4. Principles of criminal responsibility, elements of crime, principle of legality, general exceptions and defences are mostly alike in international criminal law, national legal systems and Islamic criminal law. Individual criminal responsibility is the general rule. The notion of vicarious liability is absent in Islam. The legal maxim *Actus non-facit reum nisi mens sit rea*, which applies in national legal systems, is applied in Islamic law as well. Criminal intention is necessary to constitute a crime in Islamic law. The rule of non-retroactive application of criminal law, which is applied in the international and domestic legal systems, is a cardinal principle of Islamic law as well. In Islamic criminal law an adult of sound mind is criminally responsible for his acts of omission and commission. General defences and exceptions which are applicable in the secular

¹²² *Al-Maidah*, V:33-34

¹²³ *Nahjul Balagha*, vol.II Sermons, Selections from Sermons, Letters and Sayings of Amir Al-Mu'minin, Ali Ibn Abi Talib (Sayyed Mojtaba Musavi Lari, Qom), vol.II, p.658

criminal law such as mistake of fact, involuntary intoxication, self defense, unsound mind, duress or necessity are accepted as exceptions under Islamic criminal law as well.

5. One means by which crimes can be prevented in the society is by awarding punishment to the culprits. This view has been recognized in all major systems of criminal law, including, international criminal law, and also Islamic legal system. However there are differences in major legal systems regarding acts which are punishable. The acts that require punishment in Islamic criminal law are treated in other legal systems either as non-crimes or treated lightly. Islamic punishment can be understood only if one bears in mind the fundamental principles of Islamic law. For instance, voluntary intoxication is an act punished in Islam. Also, adultery attracts severe punishment in Islam. Here Islam takes care of the individual, social, cultural and biological consequences of the offending act.

6. Islamic penal policy also has a scheme for reformation and rehabilitation of the culprit. In Islam an evil deed may be forgiven by repentance, subject to conditions. Under Islamic criminal law the whole penalty can be remitted if the aggrieved party agrees, out of brotherly love. However, in meeting the demand the culprit should equally be generous and recognize the good-will of the other side. Islam also ensures that a habitual offender should not take the advantage of this policy.

7. From the present report it is clear that Islamic criminal law has an inherent body of law for preventing crime and thereby protecting human rights and fundamental freedoms of the people. Human rights and fundamental freedoms ought to be protected are: right to life (punishing murder); rights of the child (preventing infanticide and abortion); protection of property (punishing theft); right to family (punishing adultery and sodomy), health and honor (prohibiting intoxication); right of orphans; right to personal reputation and dignity (punishing slander or scandalous allegation); right against corruption (prohibiting corruption); right to privacy (punishment for violation of privacy); right against defamation and spying; right to peace; equality and equal protection of laws; and justice and equity. These are the select human rights, which the Islamic criminal law ought to preserve and protect.