

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). Since then the item is being deliberated upon during AALCO’s successive sessions. The resolution adopted during the 44th (Nairobi, Kenya, 2005) Session of AALCO urged 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 on this item”.

2. The 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 Holy 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. The report of the 44th Session analysed 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. The present report in continuum of the 44th Session attempts to analyze the criminal procedural laws from human rights perspective. The Report is divided into two parts. First part analyses the international and national criminal procedural laws from a human rights perspective. The second part analyses the criminal procedural laws and principles of Islam through the prism of human rights.

II. INTRODUCTION

3. The essential object of criminal law is to protect the society against criminals and law breakers. Criminal law in its wider sense consists of both the substantive criminal law and the procedural criminal law. Substantive criminal law defines the offences and prescribes punishments for those offences and the procedural criminal law determines proceedings concerning the enforcement of substantive law. In other words the established methods and practices used to resolve criminal cases are embodied in a set of rules referred to as "criminal procedure". The rules of criminal procedure are designed to ensure that an accused is given due process of law. The rules of criminal procedure should be strictly followed because a person charged with a crime can be subjected to a loss of liberty or subjected to a fine.

4. Substantive criminal law is not self operative. A person accused of an offence is not punished instantly, even if the accused confesses his guilt. The procedural law looks after the process of administering and enforcing the substantive criminal law. The procedural law controls and regulates the working of the machinery set up for the investigation and trial of offences. It has to give adequate wide powers to make the investigation and adjudicatory processes strong, effective and efficient, and it also have

to take precaution against errors of judgment and human failures and to provide safeguards against probable abuse of powers by the police or judicial officers.

PART I

I. INTERNATIONAL CRIMINAL LAW

5. International criminal law is of topical interest with the emergence of international Criminal Court and Ad Hoc Criminal Tribunals such as International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). Apart from the substantive law that governs the definition of crime and general principles, there are procedural laws which cover the operative part of these courts. Report for the 44th Session has elaborately dealt with the sources of international criminal law; general principles of international criminal law; and specific offences or crimes under international criminal law. As a continuum of the previous report, this part would deal with the human rights provisions of the procedural laws of the International Criminal Court and Adhoc Tribunals, namely, ICTY and ICTR.

6. The ICC Statute does not distinguish between a suspect and an accused.¹ The Statute uses the term 'person' until the charge against a person is confirmed by the Pre Trial Chamber under Article 6, from which the person becomes an 'accused'.² As stated in Rule 2 of the ICTY Rules of Procedure and Evidence and the ICTR Rules, an accused is a person against whom one or more counts in an indictment have been confirmed pursuant to the relevant provision of the Rule, whereas a suspect is a person about whom the Prosecution possesses reliable information which tends to show that he may have committed a crime over which ICTY has jurisdiction. So, an accused is a 'suspect' from the time of his arrest until the indictment against him is confirmed and his status is changed to become an 'accused'. Since the Prosecution has the authority to start the entire legal process, from investigation and submission of an indictment for confirmation, it has the duty to exercise due diligence to ensure that, within the scope of its authority, the case proceeds to trial in such a way that respects the rights of the suspects and the accused.³

A. RIGHTS OF THE SUSPECTS

8. A suspect is entitled to a guarantee of his fundamental rights, including the right to be informed promptly of the reasons for his arrest and the charges against him, and the right to be brought to trial without undue delay. There is no requirement that the suspect be informed in any particular way.; he need not be notified in writing, and the

¹ For a detailed account on the procedural laws, see Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press, 2001)

² The word 'accused' is used from Art.61 (9) onwards

³ *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-1, ICTR App.Ch., 3 Nov.1999

information may be given to the suspect in stages, as long as it is provided promptly. Whether this requirement is met is to be determined on a case-by case.⁴

9. While the ICTY and the ICTR Statutes do not contain provisions on the rights of the suspects, the Rules of Procedure and Evidence of these Tribunals safeguard such rights. For example, Rule 42 lays down rights of suspects during investigation, while Rule 40 *bis* (D) limits the provisional detention of a suspect.

10. With regard to the ICC Statute, a person arrested on a request of the ICC Prosecutor shall be brought promptly before the competent judicial authority in the custodial State which shall determine, according to the law of that State, among other things, that the person's rights have been respected. That person also has the right to apply to the competent authority in the custodial State for interim release pending his surrender to the ICC. Article 85(1) of the ICC Statute specifically provides that a victim of unlawful arrest or detention 'shall have an enforceable right to compensation'.

Following are the basic principles which are guaranteed under the international criminal law.

1. Protection against Double Jeopardy

11. The Civil Law principle of *ne bis in idem* and the corresponding Common Law principle of double jeopardy entitle the accused not to be tried twice for the same crime or offence. Double jeopardy is a double exposure to sentencing which is applicable to all the different stages of the criminal justice process in the same legal system: prosecution, conviction, and punishment.⁵ Unlike double jeopardy, *ne bis in idem* averts the possibility of repeated prosecutions for the same conduct be it in the same system or in different legal systems.⁶

12. Article 10 of the ICTY Statute and Article 9 of the ICTR Statute incorporate the principle of *ne bis in idem* to protect a person tried by the ICTY from subsequent prosecution by a national court. A person already tried by a national court may not be tried by the ICTY or the ICTR, as the case may be, unless the original charge was categorized as an ordinary crime, or the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not prosecuted diligently. In considering the penalty to be imposed on a person convicted of a crime under either Statute, the Tribunal concerned shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served. In *Tadic* case, the accused raised an objection to the ICTY's jurisdiction contending that he was being prosecuted in

⁴ Ibid

⁵ See the authorities cited in Prosecutor v. Zlatko Aleksovski, Case No.IT-95-14/1-A, ICTY App. Ch.,24 Mar.2000 (hereinafter 'Aleksovski (App. Ch.)'),n.363.

⁶ M.C. Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke J. Comp.& International L.235 at 288. Cf. Prosecutor v. Dusko Tadic, Case No.IT-94-1, ICTY T. Ch.II, Decision on Defence Motion on the Principle of Non-bis-idem, 14 Nov. 1995, para 9.

Germany at the time of his transfer to the ICTY. His objection was rejected on the ground that he had not yet been tried in Germany and once he was tried by the ICTY no State could try him for the same alleged conduct.⁷

13. Article 20 of the ICC Statute recognizes the principle of *ne bis in idem*. It provides no person shall be tried before the ICC with respect to conduct which formed part of crimes for which that person has been convicted or acquitted by the ICC. However, no person shall be tried before another court for a crime within the ICC's jurisdiction for which that person has already been convicted or acquitted by the ICC. However, in two circumstances, the ICC may try a person who has been tried by another court for conduct also proscribed as a war crime, an act of genocide, or a crime against humanity under the ICC Statute. The ICC may try such a person if the proceedings in the other court were intended to shield the person from criminal responsibility for crimes within the ICC's jurisdiction, or otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice. This provision replicates Article 10(2) (b) of the ICTY Statute and Article 9 (2)(b) of the ICTR Statute.

2. Right to a fair trial

14. Rights to a fair trial are guaranteed by all the international criminal statutes. The rights under the ICTY and ICTR Statutes and Rules are based on Article 14 of the International Covenant on Civil and Political Rights and are similar to the ones incorporated in Article 6 of the European Convention on Human Rights.⁸ The rights under the ICC Statute include the presumption of innocence as provided in Article 66, and the detailed provision on the rights of the accused as appeared in Article 67.

a). *No trial in absentia*: Article 21(4)(d) of the ICTY Statute and Article 20(4)(d) of the ICTR Statute stipulate that the accused is entitled to the right to be tried in his presence. Article 63 of the ICC Statute provides that the accused shall be present during the trial, except where the accused continues to disrupt the trial, in which case the accused will be removed. However, the removed accused can still observe the trial and instruct counsel from outside the courtroom through the use of communications technology, if required.

b). *Equality of Arms Between the Prosecution and the Defense*: The principle of equality of arms falls within the fair trial guarantee.⁹ It obligates a judicial body to

⁷ Tadic, Decision on Defence Motion on the Principle of Ne-bis-in-idem, para 13.

⁸ Prosecutor v. Kanyabashi, Case No. ICTR-96-15-I, ICTR T. Ch., Decision on the Defence Motion on Jurisdiction, 18 June 1997, 44.

⁹ See, e.g. Art. 21 of the ICTY Statute and Art. 20 of the ICTR Statute, which provide, inter alia, that the accused shall be entitled to a fair and public hearing, as well as other minimum guarantees, including the right to a legal counsel; the right to have adequate time and facilities to prepare his defence; and the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. See also Tadic Appeals Judgment, para. 44.

ensure that neither party is put in a disadvantaged position when presenting its case.¹⁰ Thus, in *Furundzija*, Trial Chamber II of the ICTY, cognizant of its duty to search for the truth and applying the ‘interests of justice’ test, decided to re-open the proceedings to allow the Defense to remedy the prejudice it suffered as a result of the late disclosure of Prosecution evidence that prejudiced the strategy of the whole Defense case.¹¹ The Trial Chamber expressed its grave concern over the Prosecution’s failure to comply with its obligations under the relevant provisions of the ICTY Rules of Procedure and Evidence in this respect, and declared that it was appalled by this ‘conduct close to negligence’.¹²

C). *Specificity of the Indictment:* The right of the accused to a fair trial includes the requirement that there be sufficient certainty to enable an adequate defence to be advanced.¹³ Nonetheless, in some cases it may not be possible to be precise as to exact events, especially during the period of widespread chaos. Therefore, it is not necessary for the Prosecution to prove an exact date of an offence where the date or time is not also a material element of the offence.¹⁴ The date may be a material element if an act is nominal only if done, or only if the consequences of the act manifest themselves, within a certain period of time, or if the date is an essential element of the offence, or statute of limitations or its equivalent is applicable.¹⁵ However, where timing is of material significance to the charges, then the wording of the indictment concerned must be specific.¹⁶ The precision in the indictment therefore varies from case to case and depends on nature of the alleged crimes in question.¹⁷

D). *The Prosecution Case:* An accused is to be acquitted if the Prosecution cannot prove the accused is guilty beyond any reasonable doubt of the crime he is charged with. However, if after the Prosecution’s presentation of its case-in-chief the court considers that there is lack of sufficient evidence to substantiate the charge against the suspect, then there is no case for the Defence to answer, and the accused must be released. Thus, in *Jelistic*, after the Prosecution had come to the end of its presentation of evidence against the accused, and Trial Chamber I of the ICTY had considered that the evidence was not sufficient to substantiate the charge of genocide against the accused. The Trial Chamber ruled that the accused could not be found guilty of genocide. This was despite the fact that the Defence still had not commenced its case. In order to ensure, good

¹⁰ .Tadic Appeals Judgment, para 48.

¹¹ .Prosecutor v. Anto Furundzija, Case No.IT-95-17/1-T, ICTY T. Ch.II, 10 Dec. 1998, paras 90-3, 107. The late-disclosed material was relevant to the issue of credibility of the testimony of the key witness and victim of the accused’s alleged crimes.

¹² .Ibid. paras 10-11, 15,22.

¹³ .Ibid., paras.81,83

¹⁴ .Ibid., para, 85; Tadic Judgment, para.534 Cf. also Prosecutor v. Rutaganda Case No.ICTR-96-3, ICTR T.Ch.I, 6 Dec.1999, para.201.

¹⁵ .Tadic Judgment, para 534.

¹⁶ .Kayishema and Ruzindana, paras 85-6

¹⁷ .(bid. For instance in Tadic, the indictment which was amended twice by the Prosecutor before trial. no reference to the accused’s alleged murder of two Muslim policemen in the custody of a group of paramilitary forces. Yet, the Trial Chamber found the accused guilty of this murder on the ground be list of acts alleged in the general prosecution charge was preceded by the word ‘including’. Tadic ____ para. 393. See also Prosecutor v. Dusko Tadic, Sentencing Judgment of 14 July 1997

administration of justice in this instance, the Trial Chamber proceeded to pronounce its official ruling orally without having to wait until its decision could be put into writing.¹⁸

e). Guilty Plea: By virtue of Rule 62(B) of the ICTY as well as the ICTR Rules of Procedure and Evidence, the Trial Chamber is to be satisfied that the guilty plea entered by the accused was made voluntarily in cognizance of the consequence of the plea, was not equivocal, and that there is a sufficient factual basis for the crime and the accused's participation in it. That a plea must be voluntary and has been interpreted to mean that the plea is made by an accused who is mentally fit to comprehend the consequences of pleading guilty without any threats, inducements, or promises.¹⁹ An unequivocal plea is one which is not accompanied by words amounting to a defence contradicting an admission of criminal responsibility.²⁰

f). Abuse of Process: An international tribunal may exercise its discretion to apply the 'abuse of process' doctrine to decline jurisdiction over an accused if to proceed with his trial would amount to an act of injustice. Under this doctrine, proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are used in pursuing an otherwise lawful process. It is irrelevant which entity or entities within the tribunal were responsible for such injustice resulting from serious and egregious violations of the accused's rights that would prove detrimental to the tribunal's integrity.²¹ The tribunal may exercise its supervisory powers over judicial proceedings to rely on the abuse of process doctrine, in the interests of justice, in two distinct situations; '(1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the [tribunal's] sense of justice, due to pre-trial impropriety or misconduct.'²²

h). Impartiality of Judges: What is required of a judge of the ICTY and the ICTR is that he or she 'shall be persons of high moral character, impartiality and integrity'.²³ The same requirement appears in paragraph 3 of Article 36 of the ICC Statute regarding qualifications of judges of the ICC. A judge is not impartial if it is shown that actual bias exists.

¹⁸ .Prosecutor v. Goran Jilistic, Case No.IT-95-10, ICTY T.Ch.I of the ICTY, Oral Judgment of 19 Oct., 1999 (<http://www.un.org/icty/brcko/judgement/judgement191099.htm>). See also written judgment of 14 Dec. 1999, paras 14-17.

¹⁹ .Prosecutor v. Drazen Erdemovic, Case No.IT-96-22-A, ICTY App. Ch., 7 Oct. 1997, Joint Sep. Op. of Judge McDonald and Judge Vohrah, para. 10; Jean Kambanda v. Prosecutor, Case No.ICTR 97-23-A, ICTR App. Ch., 19 Oct. 2000 (hereinafter 'Kambanda Appeals Judgment'), paras 61-4.

²⁰ .Joint Sep. Opinion of Judge McDonald and Vohrah in Erdemovic, para. 31; Kambanda Appeals Judgment, para 84.

²¹ .Barayagwiza. Paras.72-77

²² .Ibid., para 77.

²³ .Art.13(1) of the ICTY Statute, and Art.12(1) of the ICTR Statute.

B. RIGHTS OF VICTIMS

15. The definition of victims was subject to lengthy debate at the PCNICC. As adopted finally, ‘victims’ for the purpose of the ICC Statute and the ICC’s Rules of Procedure and Evidence means ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC’. The term may include ‘legal entities that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.’²⁴ Victims or their legal representatives may participate in the proceedings to present their views and concerns.²⁵

1. Protection of victims and witnesses

16. The rights of the accused have to be balanced with those of victims and witnesses. For example, Article 20(1) of the ICTY Statute and Article 19(1) of the ICTR Statute provide that the Trial Chamber shall ensure that a trial is fair and expeditious, ‘with full respect for the rights of the accused and due regard for the protection of victims and witnesses’. Article 22 of the ICTY Statute and Article 21 of the ICTR Statute then stipulate that their respective rules of procedure and evidence will provide for the protection of victims and witnesses with measures including the conduct of in camera proceedings and the protection of the victim’s identity. In practice, Trial Chambers have extensive powers to determine the right balance between the rights of an accused and the rights of the victims or witnesses.

17. In practice, protective measures include use of pseudonyms, non-disclosure of witness identities to the media and the public, giving evidence via video-conference link, accommodating witnesses during their presence at the seat of the international tribunal in safe houses where medical and psychiatric assistance is available, giving testimony in closed session, use of image-distortion, and redaction.²⁶ While the protection of victims and witnesses may be permitted to affect the public nature of trial, it must not be allowed to affect the fairness of the trial.²⁷ For example, trial testimony of a victim may have to be disclosed to the Defence to the extent that it is relevant for the preparation of the Defence’s case, but without thereby jeopardizing the safety of the victim.²⁸

18. The ICC will have a Victims and Witnesses Unit within its Registry. The Unit will provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling, and other appropriate assistance to witnesses, victims who appear before the ICC, and others who are at risk on account of such testimony

²⁴ .Rule 85 (Definition of Victims) of the Rules of Procedure and Evidence.

²⁵ .Rules 89-93 of the Rules of Procedure and Evidence.

²⁶ .See, e.g., Furundzija, paras. 16, 20, 28, 31; Akayesu, para. 143; Tadic judgment, paras. 21, 29, 30-2.

²⁷ .Furundzija, para 93.

²⁸ .Ibid., para.31

given by such witnesses.²⁹The ICTY and the ICTR also have a Victims and Witnesses Unit set up under the authority of the Registrar.

2. Compensation for victims

19. The ICTY and the ICTR do not award reparations to victims of crimes within their jurisdiction. Article 24(3) of the ICTY Statute and Article 23(3) of the ICTR Statute permit the Trial Chambers to order restitution of property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners after convicting the perpetrator of that criminal conduct. Rule 106 of the Rules of Procedure and Evidence governs compensation to victims. Under this Rule, the Registrar is to transmit to the competent authorities of the States concerned the judgment finding the accused guilty of a crime which has caused injury to a victim. The Victim or person claiming through that victim may then bring an action in a national court or other competent body to obtain compensation pursuant to the relevant national legislation. For the purposes of such a claim before the national court or other competent body, the judgments of the ICTY or ICTR, as the case may be, shall be final and binding as to the criminal responsibility of the convicted person for such injury.

20. The mechanism to provide remedies for victims under the ICC Statute is more direct in the sense that it does not require enforcement through a national court or other competent body. Under Article 79 of the ICC Statute, the ICC may order money and other property collected through fines paid by a convicted person or forfeiture of that person's proceeds, property, and assets derived directly or indirectly from his crime, to be transferred to the Trust Fund established for the benefits of victims of crimes within the ICC's jurisdiction and their families. In addition, Article 75 of the Statute provides that the ICC may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation. Where appropriate, the ICC may order that the award for reparations be made through the Trust Fund.

II. NATIONAL LEGAL SYSTEM

21. Adversary system is a system based on the accusatorial method. In this system the prosecutor representing the State accuses the defendant (the accused person) of the commission of the crime. And the prosecutor has to prove his case. The accused is also given fair opportunity to defend his case. And the judge/judges decides the case on the basis of the arguments leveled by both the sides.

A. THE RIGHTS OF THE ACCUSED.

22. It has been universally accepted as a human value that a person accused of any offence should not be punished unless he has been given a fair trial and his guilt has been

²⁹ .Art.43(6), ICC Statute.

proved. The notion of fair trial is a subjective concept. It depends on the gravity of the accusation, the quality of the resources available and the prevailing social values. The major attributes of fair criminal trial are enshrined in the Universal Declaration of Human Rights (UDHR).³⁰

1. Presumption of innocence

23. The accused has a right to be presumed innocent until proven guilty in a fair trial. Generally, criminal procedure puts the burden of proof on the prosecution – that is, it is up to the prosecution to prove that the defendant is guilty, as opposed to having the defendant prove that he is innocent; any doubt is resolved in favor of the defendant. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the court can not record a finding of the guilt of the accused. Criminal trial begins with the presumption of innocence in favour of the accused. The trial should begin and during the proceedings should be governed by this presumption. This provision is known as the presumption of innocence. Article 11 of the Universal Declaration of Human Rights provides:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The Right to Counsel

24. All jurisdictions allow the accused the right of a counsel and it must be a competent lawyer.³¹ The legal systems in some countries ensure that poor defendants have a lawyer provided by the state³² or public defender system (which is in some countries called a "court-appointed lawyer"). The accused have the right to confer with their attorney before a police interrogation, during the trial and at any other critical stage in the proceedings against them, such as a preliminary hearing or appeal. The accused may waive the right to counsel but it must be an intelligent one where the defendant recognizes the consequences of this action.

3. The Right to Fair Trial

a). Independent and impartial judges

³⁰ Articles 10 and 11 of Universal Declaration of Human Rights adopted and proclaimed by the General Assembly on December 10, 1948.

³¹ Article 22(1) of the Indian constitution provides that no person who is arrested shall be denied the right to consult a legal practitioner of his choice.

³² In India, The state is under a constitutional mandate to provide free legal aid to an indigent accused person, and this constitutional obligation to provide legal aid does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate as also when he is remanded from time to time: *Khatri (II) v. State of Bihar*, 1980 SCC; *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*, 1980.

25. The judges should be independent and impartial. Persons with sound knowledge of law and with requisite experience and qualifications are to be appointed as judges. The judge should take a neutral or impartial position as far as the merits of the case are concerned.

b). The Right to Defense

26. Every accused has the right to any and all defenses the law recognizes and permits—e.g., insanity, mistake of fact, or self-defense. An accused having the right to resort to several defenses may make an election as to the one on which he or she will rely. The fact that one undertakes a crime on the advice, or as the agent, of another is not a defense; on the other hand, except in the case of homicide, an act that would otherwise constitute a crime may be excused when committed under duress or compulsion that is present, imminent, and impending, and that produces a well-grounded apprehension of death or serious bodily harm if the act is not done. Religious belief is not ordinarily a justification or excuse for the commission of a crime.

c). The right against self-incrimination.

27. The burden of proof in a criminal case is on the prosecution. The accused do not have to supply the police or prosecution with any evidence that could be used against them. This right against self-incrimination protects the defendant from being forced to reveal incriminating facts. This deters the use of torture or other means to coerce confessions from the accused.

d). The right to information.

28. This includes the right of the accused to know about the charges or accusations that have been alleged against him, to be able to confront the witnesses testifying against him and to have access to the evidence collected against them. To help ensure a fair trial, the defendants and their attorneys are allowed access to the evidence that will be used against them in court. In some systems, the defence has a right to have access to all evidence collected, irrespective of whether it is used by the prosecution.³³

e). Right to examine the witness.

29. This includes the ability of the accused to present facts and evidence, to cross examine prosecution witnesses during the trial and to compel the attendance of witnesses to testify for the defence. It also includes the ability to have independent expert witnesses. The rights of the accused include the right to confront their accusers in court. This means that the witnesses show up in person and are available for cross-examination. . The

³³ Information that can be kept from the defence in most systems includes information on the identity of confidential police informants, information that could affect an ongoing police investigation, information on confidential police techniques, and government classified information. All other evidence is usually disclosed.

defence also has the right to call witnesses in their defence and to compel their attendance in court. The prosecution and the defence each have a right to present their case in the trial for examination by the judge and jury. A fair trial gives the defence the right to confront and cross-examine prosecution witnesses. This is a safeguard for the defendant against conviction based on faceless informers. It gives the defendants the ability to hear the testimony against them, to see the evidence submitted against them and to fully challenge the witness by cross examination through their attorney.

f). The right to a speedy trial

30. Justice delayed is justice denied. Thus this provision requires a speedy trial to protect the defendant against the uncertainties of a criminal prosecution and to make sure that the testimony of the witnesses is still available. Witnesses can move or their recollections can fade. Delays may be required, but these should not be prejudicial to the defendant.

g). Right to public trial

31. Most systems have an open system where the trial can be attended by the public and press. A public trial is seen to promote public confidence, and protects both the accused and the general public against a secret and abusive criminal justice system. Article 10 of the Universal Declaration of Human Rights provides:

Everyone is entitled in full equality to fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations of any criminal charge against him.

h). Guilt established beyond reasonable doubt

32. The purpose of a trial is to determine whether the accused is innocent or guilty of the crime. The standard for determining guilt for a criminal offense is usually "beyond a reasonable doubt." The prosecution must persuade the judge or jury that the evidence provided proves guilt beyond a reasonable doubt. The beyond a reasonable doubt standard is to safeguard the accused against a dubious conviction and to allow the judge and jury to be as certain of the decision as humanly possible.

i). The right to an appeal

33. Human judgment is not infallible. Despite efforts for ensuring a fair trial and a just decision, mistakes are possible and errors cannot be ruled out. The right to an appeal is part of the checks and balances within the judicial system. This mechanism protects the defendant against a biased or flawed prosecution, and gives the losing party a chance to argue errors of law or procedure. The grounds for appeal are found in the legal framework of each country. Appeals can only be heard by a court authorized to review the decisions of inferior courts. In some countries, this could be a constitutional counsel or a supreme court.

4. Doctrine of ‘ autrefois acquit’ and ‘autrefois convict’

34. According to this doctrine, if a person is tried and acquitted or convicted of an offence he cannot be tried again for the same offence or on the same facts for any other offence. This is a right available to the accused against double jeopardy.

5. Rights of those in detention and prison

35. People held lawfully in detention or imprisonment forfeit for a time the right to liberty, and face restrictions on other rights such as the right to privacy, freedom of movement and freedom of assembly. Although detainees are to be presumed innocent until they have been convicted, both detainees and prisoners are inherently vulnerable because they are under the control of the state. Detainees are not to be subjected to any hardship or constraint other than that resulting from the deprivation of liberty. The rights of persons in detention includes, humane conditions of detention; provision of basic needs including food, washing and sanitary provisions, bedding, clothing, and medical care; access to natural light, recreation and physical exercise facilities; allowing religious practices; and communications with others, including those outside prison.

PART II

I. CRIMINAL PROCEDURAL LAWS OF ISLAM: HUMAN RIGHTS PERSPECTIVE

A. Introduction

36. It may be recalled that the Report for the 44th Session dealt with the 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. 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.

37. Respect for the individual is the central precept of Islam. The individual is the “prize creation of Allah” and must be treated with justice and dignity. The warning against persecution of individuals is repeated 299 times in the Holy Qur’an.³⁴ The word “justice” is used at least fourteen times; and the phrase “justice and equality” (*al-qist*) appears at least sixteen times.³⁵

38. Islam, which seeks to protect the rights of the individual, also seeks to protect the rights of society as a whole.³⁶ Therefore, no individual may presume to overstep the rights of society while hiding behind the veil of personal rights and freedom, and society may not trample on the rights of the individual or deprive him/her of his/her rights on the pretense of some alleged peril. Islam honors and exalts humanity and has given human beings many rights, above all the right to life, physical well-being, honour and respect, personal freedom, freedom of movement, and many others. Thus an individual’s home and personal life are sacred. No one has the right to enter another person’s home without permission or to look inside his/her home, to eavesdrop on private conversations, to open one’s mail, or to do anything else that infringes upon those rights.

39. The *Shari’ah* is concerned with the circumstantial state of a person’s innocence, and jurists have based several legal rulings upon it. Moreover, this principle may only be overruled due to irrefutable evidence or, in other words, evidence about which there is doubt. Thus, it is connected closely with the principle that certainty may not be erased by doubt. Indeed, the relationship of one principle to the other is as the relationship of a branch to a trunk, for the two are found together throughout jurisprudential literature. In addition, they must be reconciled to the principle of protecting society, by implementing preventive measures, from perceived dangers with a high likelihood of occurrence.

³⁴ M.Charif Bassiouni, “Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice”, p.19

³⁵ Osman Abd-el-Malek al-Saleh, “The Right of the Individual to Personal Security in Islam”, p.80

³⁶ Taha Jabir Al-Alwani, *Judiciary and Rights of the Accused in Islamic Criminal Law*, in Tahir Mahmood (Ed.) *Criminal Law in Islam and Muslim World: A Comparative Perspective*(Institute of Objective Studies, New Delhi), p. 267

40. A governmental or judicial decision must conform to the *Shari'ah*, otherwise it is a nullity. The Holy Qur'an urges:

“Follow (O men!) the revelation given unto you from your Lord and follow not, as friends or protectors, other than Him.”³⁷

“If any do fail to judge by [the light of] what God hath revealed, they are no better than those who rebel.”³⁸

B. Principles of Criminal Procedure

1. Non-retroactivity of Law

41. Law is not to be applied retroactively. The Holy Qur'an states:

“Nor would we visit with Our wrath until we had sent a messenger to give warning.”³⁹

42. This has been interpreted as requiring that individuals should be informed of the law before they may be prosecuted or punished. The Prophet Mohammed(PBUH) did not apply the *Shari'ah* retroactively to those who, prior to their acceptance of Islam, violated Holy Qur'anic prohibitions against being married to two sisters at the same time, marrying their father's former wives, or practicing usury. However, most jurists contend that a law that benefits the accused may be applied retroactively.⁴⁰

2. Presumption of Innocence

43. The accused is presumed innocent until proven guilty. The burden of proof rests upon the accuser, and doubt is to be resolved in favour of the accused. The Prophet Mohammed(PBUH) stated:

“Had men believed only according to their allegations, some persons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof.”⁴¹

Aishah, the wife of the Prophet Mohammed(PBUH), reportedly admonished Muslims so:

“Avoid condemning the Muslims to *hudud* whenever you can, and when you can find a way out for a Muslim then release him for it. If the *Imam* errs it is better that he errs in favour of innocence (pardon) than in favour of guilt (punishment)”⁴²

³⁷ VII:3; This is added in order that men might not be puffed up with such little knowledge as they possessed, for there are great heights to be scaled in the spiritual kingdom

³⁸ V:44

³⁹ XVII:15

⁴⁰ Osman Abd-el-Malek al-Saleh, “The Right of the Individual to Personal Security in Islam”, p.188

⁴¹ Ibid, p.67

3. Equality and Equal Protection of Laws

44. Islam emphasizes 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 Qur'an.⁴³ The Holy Qur'an 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”⁴⁴

45. 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...”⁴⁵

46. All free men are equal before the law and are entitled equally to its protection. The law is to be applied uniformly to individuals regardless of religious or economic status. The Prophet Mohammed(PBUH) said

“Men are equal as the teeth of a comb. No Arab individual is superior to a non-Arab except in piety.”⁴⁶

47. The Prophet Mohammed(PBUH) promised that if his own daughter committed theft she would be treated as any other criminal and subjected to punishment.⁴⁷

C. Rights of the Accused

48. If the Shari'ah allows the investigator or the judge to place certain restrictions on the accused's rights to maintain the principle of the society's rights, it has also placed restrictions on the power of the investigator, which represents guarantees to the accused. The authority enjoyed by the investigator in relation to one concerning whom there is doubt is limited and, if it encroaches on some of the rights of the accused, it certainly

⁴² M.Charif Bassiouni, “Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice”, p.26

⁴³ The Holy Qur'an: English translation of the meaning and commentary, (King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA)p.259

⁴⁴ *An-Nisaa*, IV:135

⁴⁵ *Nahjul Balagha*, Selections from Sermons, Letters and Sayings of Amir Al-Mu'minin, Ali Ibn Abi Talib (Sayyed Mojtaba Musavi Lari, Qom), vol.11, p.484

⁴⁶ *Ibid.*, p.80

⁴⁷ Muhammad Salim al-Awwa, “The Basic Principles of Islamic Penal Legislation”, p.140

does not extend to any of his/her other basic rights. It was for the reason that the Prophet Mohammed(PBUH) called such a person a “prisoner.” This also establishes that the accused will be maintained at the expense of the state.

49. Ibn al-Qayyim defined detention as “preventing the individual from dealing with others in any way that would lead to their being harmed”.⁴⁸ Other jurists considered detention as being in the same class of punishments as the hudud. Accordingly, they opined, it should not be prescribed on the basis of suspicion alone. In fact, the overriding principle here is that the individual is guaranteed personal freedom and the right of free movement.

50. A person cannot be detained or deprived of freedom of movement without a legally valid reason. Islam has shown a great deal of consideration for the imprisoned and his/her affairs. The Prophet Mohammed(PBUH) once left a prisoner in the care of a certain individual. He ordered the latter to care for and show respect to the former and, thereafter, often visited the man and inquired after the prisoner’s welfare. ‘Ali ibn Abi Talib used to make surprise visits to the prison in order to inspect its condition and listen to the inmates complaints.⁴⁹

51. It is the state’s responsibility to provide ample food, clothing, and medical treatment for all prisoners and to ensure that their rights are protected. Moreover, Shari’ah scholars have ruled that a judge’s first responsibility, upon assuming his position, is to go in person to the jails and free all who have been detained unjustly. He should go to each prisoner and ascertain the reasons for his/her imprisonment. In certain cases, he may meet with the accusers to determine whether the reasons for imprisonment are still valid and if justice was done. When someone is imprisoned, it is the responsibility of the sentencing judge to record the prisoner’s name and ancestry, the reasons for imprisonment, and the beginning and ending dates of the period of imprisonment. Likewise, when a judge is retired and another takes his place, the new judge must write to the old judge and ask him about the people he sent to prison and why he did so.⁵⁰

1. No torture during interrogation

52. The Holy Qur’an explicitly prohibits the use of beatings, torture or inhumane treatment to extract a confession. Such treatment is condemned because it violates the accused’s dignity, may lead to a loss of faith and confidence in Islamic justice, and increases the likelihood that he will at a future time engage in criminal activity. Torture is a sin. The Prophet Mohammed(PBUH) warned:

⁴⁸ See Ibn al-Qayyim, *al-Turuq al-Hukmiyah*

⁴⁹ See Abu Yusuf, *Kitab al-Kharaj* and its commentary *Fiqh al-Muluk*, vol.2, 238

⁵⁰ Taha Jabir Al-Alwani, *Judiciary and Rights of the Accused in Islamic Criminal Law*, in Tahir Mahmood (Ed.) *Criminal Law in Islam and Muslim World: A Comparative Perspective* (Institute of Objective Studies, New Delhi), p. 268

“God shall torture on the Day at Recompense those who inflict torture on people in life”.⁵¹

53. And ‘Umar ibn ‘Abd al-Aziz admonished Muslims that:

“It is better that they should face God with their offenses than I should have to meet God for torturing them”.

54. Confessions must be freely, voluntarily and truthfully given. The accused is to be treated humanely and is to be encouraged to deny his guilt.

2. Investigating the accused’s residence and conversation

55. Allah has protected and honoured humanity and prohibited the touching of an individual’s person, skin, or honor. Likewise, He has declared that a person’s home is sacred and must not be violated. The Holy Qur’an says:

“O you who believe! Enter not homes 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”⁵².

56. The conventions 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.⁵³

“O you who have faith! Avoid being overly suspicious: for suspicion in some cases is wrong: and spy not on one another.”⁵⁴

57. Most kinds of suspicion are baseless and to be avoided, and some are crimes in themselves: for they do cruel injustice to innocent men and women. Spying, or enquiring too curiously into other people’s affairs, means either idle curiosity, and is therefore futile, or suspicion carried a stage further, which almost amounts to sin.⁵⁵

58. The Prophet Mohammed(PBUH) said:

“Everything about a Muslim is sacred to another Muslim: from his blood, to his wealth, to his honour”.

⁵¹ Osman Abd-el-Malek al-Saleh, “The Right of the Individual to Personal Security in Islam”, p.72

⁵² XXIV: 27-8

⁵³ The Holy Qur’an: English translation of the meaning and commentary, (King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA)p.1011

⁵⁴ XLIX: 12

⁵⁵ The Holy Qur’an: English translation of the meaning and commentary, (King Fahd Complex, Al Madinah Al Munawarah, Ministry of Hajj and Endowments, KSA)p.1592

“Those who listen to what people say about another, even when (they know) those people are unfriendly toward that person, will have molten lead poured into their ears on the Day of Judgment”.

“If the *amir* seeks to uncover the doubtful things about people, he will ruin them”.

59. The Holy Qur’an and Sunnah’s prohibition of spying is put forth in general, not specific terms. One’s previous record of having transgressed or being accused is not sufficient to violate the sacredness of his/her person or privacy in the absence of hard supporting evidence. This view was upheld by ‘Umar when he refrained from spying on Abu Mihjan al-Thaqafi and Rabi’ah ibn Umayyah, for both were well-known for their love of strong drink. The same was true when ibn Mas’ud did not spy on al-Walid ibn ‘Uqbah, although he was notorious for drinking.

60. 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. This authority, obviously, must also be able to interpret correctly the Shari’ah teachings and higher purposes, realize that these rights are guaranteed by the Holy Qur’an and the Sunnah, and that any attempt to alter or particularize them will be considered a violation of what those two sources have established. Therefore, the above actions are permitted only if they can help determine the circumstances of a crime, protect society by ensuring that criminals do not go unpunished for their crimes, and ensure that the innocent are not punished for the crimes of others.⁵⁶

61. In short the investigating authority may not go beyond what is absolutely necessary. Moreover, those in authority should always maintain proper Islamic behaviour. For instance, if the person in authority is a male, he should not conduct a body search of a woman, or enter a house where women are present. In addition personal property that has no relation to the alleged crime should not be destroyed or confiscated. The investigator may question the accused on any topic that will help to reveal the truth and may confront the accused with the accusation. The accused, however, does not have to answer those questions.⁵⁷

3. Right to Fair Trial

⁵⁶ Taha Jabir Al-Alwani, *Judiciary and Rights of the Accused in Islamic Criminal Law*, in Tahir Mahmood (Ed.) *Criminal Law in Islam and Muslim World: A Comparative Perspective* (Institute of Objective Studies, New Delhi), p. 272-73

⁵⁷ *Ibid*

62. In addition to the procedural safeguards, the qualifications and character of the *qadi* and the strict requirements of Islamic rules of evidence are intended to ensure a fair trial to the accused.

63. The *qadi* must be above reproach in his personal behavior: he should not accept bribes or gifts or attend private feasts or parties; should not engage in commerce or lend or borrow money; and should not preside over a case involving his family or enemies. Some scholars also argue that the *qadi* should belong to a noble family since such a person will be free from temptation, resist bribery and be sufficiently secure to make unpopular rulings.⁵⁸

64. The *qadi* is accountable to Allah in the performance of his duties, and the Holy Qur'an reminds him:

“We have set thee as a viceroy in the earth, therefore judge aright between mankind and follow not desire that it beguile thee away from the way of Allah.”⁵⁹

65. The *qadi* is to be:

“Strong, without being harsh, lenient without being weak; of such disposition that a strong and influential person should not expect justice from him and a weak one should not become hopeless of his justice. He should be sober, intelligent... pious and.. he should be a tyrant and snubbing.”⁶⁰

66. The *qadi* is intended to be the protector of the weak. He administers the property of missing persons, orphans, abandoned children and the mentally deficient, and may act to protect the public welfare. For instance, the *qadi* may force a speculator who is hoarding food and driving up prices to sell on the open market for a reasonable price.⁶¹

4. Right to defense

67. The accused has the right to defend himself/herself against any accusation. This may be accomplished by proving that the evidence cited is invalid or by presenting other evidence that contradicts it. In any case, the accused must be allowed to exercise this right so that the accusation does not turn into a conviction. An accusation means that there is the possibility of doubt, and just how much doubt there is will determine the amount and parameters of defense. By comparing the evidence presented by the defense with that of the party making the accusation, the truth will become clear-which is, after all, the objective of the investigation.

68. Therefore, defense is not only the right of the accused to use or disregard as he/she pleases, but is also the right and the duty of society as a whole. If it is in the best

⁵⁸ Ghulam Murtaza Azad, "Conduct and Qualities of a Qadi", *Islamic Studies* 24 (Spring 1985):55-59

⁵⁹ M. Cherif Bassiouni, "Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice", p.39

⁶⁰ Ghulam Murtaza Azad, "Conduct and Qualities of a Qadi", *Islamic Studies* 24 (Spring 1985):p.54

⁶¹ Ibid

interests of an individual not to be convicted when he/she is in fact innocent, the interest of society are no less important. It is the society's concern that the innocent are not convicted and that the guilty do not escape punishment. It is for this reason that the Shari'ah guarantees the right to defense and prohibits its denial under any circumstances and for any reason.

69. In a well-known Hadith, the Prophet Mohammed(PBUH) is reported to have told 'Ali who was just appointed as governor of Yemen:

“O 'Ali! People will come to you asking for judgments. When the two parties to a dispute come to you, do not decide in favour of either party until you have heard all that both parties have to say. Only in this manner will you come to a proper decision, and only in this way will you come to know the truth.

70. It is related that 'Umar ibn 'Abd al-'Aziz said to one of his judges:

“When a disputant comes to you with an eye put out, do not be quick to rule in his favour. Who knows, may be the other party to the dispute will come to you with both eyes put out!”

71. The basic rule in regard to defense is that it should be undertaken by the accused, as it is his/her right, if he/she is capable of doing so. If not, he/she may not be convicted. This is why some jurists have opined that a dumb or mute cannot be punished or *hadd* crimes, even when all of the conditions regarding evidence have been satisfied. Because if the mute were capable of speaking, he might be able to raise the sort of doubts that negate the *hadd* punishment (for a lesser, *ta'zir* punishment or amercement), and by means of sign language only he may not be able to express all that he may want to. So, under such circumstances, if the *hadd* punishment is administered, justice will not have been served, because the *hadd* will have been administered in the presence of doubt.⁶²

5. Right to engage counsel

72. Books dealing with Islamic procedural law (*ahkam al-qada*) and the behaviour of judges (*adab al-qadi*) do not mention this issue. This apparent omission might be due to the fact that, historically, court sessions were public. As these sessions were widely attended by legal scholars and experts, whose presence represented a true and responsible legal advisory board that actively assisted the judge in dispensing justice, there was never any need for professional counsel.⁶³

73. Nonetheless, it was the opinion of Abu Hanifah that one who appoints another to represent him/her before the court is responsible for whatever ruling is passed, even though the one represented may not be present when the ruling is made. Other jurists

⁶² Taha Jabir Al-Alwani, *Judiciary and Rights of the Accused in Islamic Criminal Law*, in Tahir Mahmood (Ed.) *Criminal Law in Islam and Muslim World: A Comparative Perspective* (Institute of Objective Studies, New Delhi), p.274

⁶³ *Ibid*

have given similar opinions. In an authentic Hadith, it was related that the Prophet Mohammed(PBUH) said:

“I am only human and some of you are more eloquent than others. So sometime a disputant will come to me, and I will consider him truthful and judge in his favour. But if ever I have (mistakenly) ruled that a Muslim’s right be given to another, then know that it is as flames from the hellfire. Hold on to it or (if you know it belongs to another) abandon it.”

74. There are many Shari’ah texts that stress the need to settle disputes by whatever means necessary. When we consider the great disparities in talent and ability (particularly the ability to argue and debate effectively) that exist between the disputants, even those brought before the Prophet Mohammed(PBUH), we realize that any method that will lead to a just settlement may be considered legally valid. Therefore, the accused’s decision to ask for help in defending himself/herself may also be considered valid, provided that the help comes from an impartial and independent counsel. With the help of such counsel, the accused may acquire a proper understanding of the charges against him/her, of what the law says, of the evidence presented, and of what may be used (and how it may be used) to rebut that evidence. When taking all of this into consideration, we may assume safely that the accused has the right to defend himself/herself and also to seek the help of someone else.⁶⁴

75. Islamic criminal justice, in general, recognizes the right of both plaintiff and accused to present evidence and to have access to counsel during pre-trial interrogation, at trial and, if the accused is convicted, at the execution of the sentence. This is based upon the Islamic theory of “protected interests” which guarantees an individual’s freedom of religion: the right to self-preservation: freedom of thought, expression and knowledge; the right to have children; and the right to property. The right of self-preservation includes the safeguarding of individual liberty, dignity and physical well-being. The theory of “protected interests” recognizes the right to receive the assistance of others in safeguarding one’s interest. This right of assistance forms the basis of the right to counsel. Osman Abd-el-Malek al-Saleh notes:

“It is clear that the principle of preservation of self is enhanced by extension of the right to counsel to those accused of crimes as it provides the accused with the means to establish innocence and to defend himself:

76. The privilege of the individual to present evidence before the *qadi* finds support in the Sunnah. The Prophet Mohammed(PBUH), when granting ‘Ali the governorship of Yemen, advised:

“If two adversaries come to you for arbitration, do not rule for the one, before you have similarly heard from the other.”

77. The Caliph ‘Umar ibn ‘Abd al-‘Aziz advised judges:

⁶⁴ Ibid, p.275

“If an adversary whose eye has been blinded by another comes to you, do not rule until the other person attends: for perhaps the latter had been blinded in both eyes.”⁶⁵

78. The accused and his attorney are to be informed of the charges and the supporting evidence, and of any evidence in the possession of the prosecution that indicates the defendant’s innocence. The accused has the prerogative of being present at all proceedings relating to the charges, is to be informed of what occurs at any proceeding that he or his attorney fails to attend. And is to be provided the opportunity to present rebuttal evidence to investigators.

6. Right to keep quiet: rules on confession

79. The accused has the right of free expression without the fear of reprisal or the use of truth serum, drugs, or hypnotism to obtain information that he/she would otherwise not give. The accused may choose not to respond to questions. If he/she does respond and it is later determined that the answers were false, he/she may not be charged with or punished for bearing false witness. If the accused acknowledges liability or confesses to a *hadd* crime, he/she may retract his/her statement and thereby nullify the earlier confessions.

80. The accused may not be pressurized to confess. Ibn Hazam writes:

“Therefore it is unlawful to subject someone to tribulation, either by blows, imprisonment, or threats. There is nothing to legitimize such treatment in the Holy Qur’an or the established Sunnah, or ijma’ and nothing may be said to be of the religion unless it comes from one of these three sources. On the contrary, Allah Most High has prohibited this and caused his Messenger to say: ‘Verily, your blood, your wealth, your reputation, and your skin are sacred to you.’ So when Allah made both the body and the reputation sacred, he prohibited the physical and verbal abuse of Muslims, except when required by law as prescribed in the Holy Qur’an and the Sunnah”.⁶⁶

81. Among the most important conditions to be satisfied before a confession may be accepted is freedom of choice. A confession submitted of one’s own volition will be considered valid, as its veracity is more probable than its prevarication. This assumption is based on the fact that it is inconceivable that a rational person would admit to something harmful unless there was a good reason to do so. If the confession or admission of guilt or liability is obtained through coercion, the probability of its being false will be considered greater than its veracity owing to the factor of duress. As it was given in the hope of avoiding a greater (or more certain or immediate) evil, it cannot be considered as having been given freely, and therefore the majority of fuqaha have ruled that any admission of guilt or liability obtained under duress is invalid and legally inadmissible.

⁶⁵ Awad M. Awad, “The Rights of the Individual under Islamic Criminal Procedure, in M.Cherif Bassiouni,ed. The Islamic Criminal Justice System (New York:1982), p.97

⁶⁶ Ibn Hazm, al-Muhalla, vol.11, p.141

82. Allah has said that compulsion is a ground for canceling the sin of disbelief and the prescribed punishment for apostasy. Therefore, it may be considered a ground for canceling other matters. Abu Dawud related that:

“Goods were stolen from the Kalai tribe, who accused certain weavers [of the crime]. When they brought the matter to Nu'man ibn Bashir, the Prophet Mohammed(PBUH)'s Companion, he imprisoned the weavers for a few days and then let them go. The tribesmen went to Nu'man and said: 'How could you let them go without beating them or otherwise subjecting them to tribulation?' Nu'man replied: 'what did you want? Did you want me to harm them? If your goods appeared [after they had been forced to confess their whereabouts] that would have been that [and you would have your goods back]. Otherwise, I would have had to take (as much skin) off of your backs [in lashing them to get a confession] as much as I had taken from theirs.' The tribesmen said: 'so that is your ruling?' Nu'man said: 'that is the ruling of Allah and His Messenger.'”⁶⁷

83. 'Umar said: “A man is not responsible for himself if he is starved, fettered, or beaten.”⁶⁸ Shurayh said: “Confinement is duress, a threat is duress, prison is duress, and beating is duress.”⁶⁹

84. It should be clear from the foregoing that the scholars never considered the authorities' use of force against the accused to be justified by *Shari'ah*. On the contrary, such behaviour was clearly prohibited by Allah, who had his Messenger say:

“Verily, every part of a Muslim is sacred to a Muslim; his blood, his wealth, and his reputation.”

7. Right to retract confession

85. In terms of the validity of the accused's retracting an admission of responsibility, rights are of two varieties: First, there are rights for which the retraction of an admission is valid. These are the *hudud*, which are the rights of Allah and may be waived whenever doubts arise in relation to them. Thus if a person accused of a *hadd* crime retracts, there is the chance that the original admission was false and that the retraction is true. All *hadd* penalties must be waived whenever doubts arise. One who has confessed adultery, for example, can have this punishment waived if he/she retracts his/her confession. All of the classical jurists agreed with this, with the exception of Ibn Abu Layla, 'Uthman al-Batti, Ibn Abi Thawr, and the Ahl al-Zahir (the literalists). Imam Malik, however, is reported to have said that a retraction is acceptable only if it leads to doubt. Actually, there are two versions of Malik's opinion on when a retraction does not lead to doubt. The best known version is that it will be accepted, while the lesser known is that it will not.⁷⁰

⁶⁷ Abu Dawud, sunan, Hadith No.4382

⁶⁸ Abd al Razzaq, al-Musannaf, vol.10, p.193

⁶⁹ Ibid

⁷⁰ Taha Jabir Al-Alwani, Judiciary and Rights of the Accused in Islamic Criminal Law, in Tahir Mahmood (Ed.) Criminal Law in Islam and Muslim World: A Comparative Perspective (Institute of Objective Studies, New Delhi), p.283

86. This difference of legal opinion occurred in regard to the *hadd* penalties for theft and intoxication. The jurists agreed generally that a retraction may not be accepted in the case of false accusation (*qadhf*). They also differed on highway (armed) robbery. One opinion held that any retraction in such crimes may not be accepted, because the rights involved were those of people in need of protection, as in the case of false accusation (where the rights of the innocent are to be protected). The second opinion is that retraction should be accepted just as a retraction in the case of adultery may be accepted.⁷¹

8. Right to compensation for mistakes in adjudication

87. Certain scholars hold the opinion that the Shari'ah gives compensation to the accused who is placed under detention as a precaution but whose innocence is later established. As proof, they cite the ruling of 'Ali for compensation (*ghurrah*) to be paid to a mother when miscarriage resulted from an official's mishandling of her case.

88. It was reported to 'Umar ibn al-Khattab that a woman whose husband was away had been entertaining male visitors. Finding this reprehensible, 'Umar sent someone to question her. When she was told that 'Umar had summoned her to explain her behavior, she exclaimed: 'woe unto me! What chance do I have with someone like 'Umar! On her way, she was overcome with fear and began to have pains. Unable to continue, she stopped at a house and immediately gave birth to a baby who after delivery screamed twice and died. 'Umar sought the counsel of several Companions. They told him that he was not responsible for what had happened. Then he turned to 'Ali, who had remained silent, and asked his opinion. 'Ali replied: if they have spoken to please you, their advice will not benefit you; my opinion is that you are responsible and must pay blood money (*diyah*); after all, you were the one who frightened her; if you had not frightened her so, she would not have given birth prematurely.' So 'Umar instructed that the money be paid.⁷²

II. FORTY- FOURTH ANNUAL SESSION OF AALCO

89. During the 44th session of AALCO held in Nairobi from 27 June to 1 July 2005, delegations from various countries presented their views on the topic. All the delegates highlighted the human rights principles enshrined in the Islamic Law. Delegations were of the view that a series of human rights had been envisaged in Islam. One Delegation proposed that an expert group meeting comprising Member States of AALCO be convened to achieve a concrete study in respect of the issue of human rights in Islam. To this end, this delegation declared the readiness to host the first meeting of the expert group in collaboration with the AALCO Secretariat and the Kingdom of Saudi Arabia, the initiator of the subject matter. The same delegation also proposed that the Secretariat

⁷¹ See al-Nawawi, al-Muhadhdhab, vol.2, p.364

⁷² Taha Jabir Al-Alwani, Judiciary and Rights of the Accused in Islamic Criminal Law, in Tahir Mahmood (Ed.) Criminal Law in Islam and Muslim World: A Comparative Perspective (Institute of Objective Studies, New Delhi), p

of AALCO submits and presents the findings and recommendations of the study of the expert group to the Member States in the 45th Session of the AALCO. One delegation proposed that as other international organizations like the OIC, League of Arab States, the AALCO should also adopt a Declaration for the Protection of Human Rights.

90. The Resolution (RES/44/S 16) adopted during the Session requested the Secretary General to take necessary steps based on the proposal made by Malaysia to convene an Expert Meeting comprising Member States of AALCO to achieve a concrete study in respect of the issue of human rights in Islam. To this end Malaysia is prepared to host the meeting of the experts in collaboration with the AALCO Secretariat and the Kingdom of Saudi Arabia, the initiator of the subject matter.

III. GENERAL COMMENTS

91. 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

92. 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

93. 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, again, 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 ensuing 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

94. 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.

95. The present report has highlighted the human rights provisions enshrined in the criminal procedural laws of Islam. If the Shari'ah allows the investigator or the judge to

place certain restrictions on the accused's rights to maintain the principle of the society's rights, it has also placed restrictions on the power of the investigator, which represents guarantees to the accused. A brief account on the international and national criminal procedural laws are given in the report, which could enable us to appreciate the human rights aspects of criminal procedural laws of Islam. Presumption of innocence, non-retroactivity of law and equality and equal protection of laws are the cardinal principles of Islam. Rights of the accused include right against torture; protection of privacy and honor; principles of fair trial, which include, right to defense; right to engage counsel; right to keep quiet; right to retract confession; and right to compensation for mistakes in adjudication.