CHAPTER THIRTY

THE MECHANISMS OF THE TRIAL

1. The Legal/Moral Qualification of the Court

Islamic international criminal law speaks of several principles which are fundamental for the cultivation of justice and prevention of evils. These include as the principle of legality, *nullum crimen sine lege*, *nulla poena sine lege*, *ne bis in idem* and *ex post facto* law. For the application of law, Islamic criminal justice also exercises a considerable number of cautions in the time of its implementation. Among these are the quality of the judges, prosecutors and the house of the trial in which the seat of the court takes place. According to it, the locality in which the proceedings of the jurisdiction of a court are carried out must be free of any illegal nature and should have not been occupied by force. All these refer to the spiritual qualification of the house of the court and its imperative function for the finding of truth. Essentially, the law seeks to discover the truth and the finding of the truth cannot be initiated in a house which is itself build on illegal, unlawful, immoral and evil behaviours. But, this does not necessarily mean that the court has to have its seat in the same locality permanently. The Court may be held in any place, as long as, certain conditions are respected. For instance, the court may, not only be established in public locations, but may also have its jurisdiction in other places such as a house of charity, mosques and also churches. In other words, an appropriate seat for the court plays a very valuable function for judgment, even though it has a physiological function and not necessarily a juridical effect.

Apparently, a consideration of the theoretical foundations of the concept of the qualification of the house of the court in Islamic justice system overlaps with the concept of the house of the court in the system of international criminal law. Due to the provisions of the Statute of the ICC, the seat of the Court is at The Hague in the Netherlands.¹ The Court may even

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¹ Article 3 (1).
sit elsewhere, whenever it considers it desirable.\(^2\) All these imply the fact that the Court has an international legal personality which creates a range of rights and duties for the Court in order to exercise its jurisdiction over the perpetrators of international crimes.\(^3\) Furthermore, the proceedings of the Court do not contradict with Islamic criminal justice based on the fact that Islamic states/nations have signed and ratified the Statute of the Court. This implies the fact that the legal and moral quality of the Court is acceptable to them.

The legal quality means here that the legal structure of the Court is equivalent to Islamic requirements for criminal justice including rules, provisions, norms and principles. It secures fundamental guarantees for individuals by expressing the definitions of crimes and their application under the authority of the Court. The legal quality of the Court therefore makes it clear that the law can only be applied to those who have committed the crimes, but not those who have committed the same crimes, but before the creation of the Court. This means that the Court has no legal authority over crimes which have been committed before its establishment or before coming into force. The judges of the Court do not have the power of criminalizing acts which were not foreseen in the written text. Therefore, under the procedures of the trial, the coordination of the Court jurisdiction with the principles of the Statute is regarded as being one of the main duties of its judges.

The moral quality of the Court refers to the functions of the Court which are not necessarily enforceable due to the legal provisions of the Court, but are recommended not to be ignored under the procedures of the Court. For instance, the Court should not be located in premises which are notoriously bad or occupied by force. This principle is not formulated in the Statute of the Court, but is derived from the general principle of justice and from the theory of fairness. The Court is not thus bound to this principle, but, its disrespect does not create the equivalent good for the court. The principle is supported by the philosophy of Islamic law in order not to embarrass the quality and object of criminal jurisdiction.

\(^2\) Article 3 (4).
\(^3\) Article 4.
Under Islamic law, justice has to be carried out with right and just persons. The judge has a duty to observe certain rules, norms and provisions and not to violate rules regarding testimony of witness or evidence. According to the main source of the law “We have appointed you as a vicegerent in the earth; therefore judge between mankind with justice, and do not follow desires lest they should lead you astray from the way of God.” The respect of those rules is in particular important in the case of serious offences such as crimes against humanity, war crimes and genocide. These mean that a judge must in addition to the required qualifications to be a judge, also have sufficient knowledge of criminal justice. Therefore, there are certain conditions without which a person cannot be accepted to sit in the chair of justice. Some of the below requirements may, more or less, be found under the system of international criminal justice that have significant values for the implementation of fair and equal justice in Islamic criminal jurisprudence. These are inter alia:

i) One of the requirements is the moral qualification. Both legal systems put considerable weight on the moral character of a judge. Accordingly, a judge must have a high moral standard such as an ethical reputation, well recognised, an honourable record, and respectable personality. He should not have been engaged in bribes or gifts. These qualifications do not necessarily mean that a slave or a poor person cannot be a judge. None of these positions decrease the qualifications of a person to be a judge.

ii) A judge should have a recognised wisdom.

iii) A judge should have a recognised intelligence.

iv) A judge should have an awareness of Islamic religion. This does not mean necessarily that a judge of the ICC must be a Muslim, but, he/she should respect all religious cultures of the world. The respect of different cultures constitutes also one of the basic principles of the Declaration of Human Rights.

v) A judge must be impartial regarding the case. This means that he/she must not have any interest in the case and he/she must keep his/her objectivity throughout the case.

The Qur’an, 38:26.
viii) Islamic criminal justice insists on the relevant knowledge of a judge. He/she must have sufficient capacity to understand criminal law, proceedings and judgments.

ix) According to the Statute of the ICC, a judge must be competent on international law, human rights law, humanitarian law, and have a professional legal capacity. Whilst Islamic international criminal law does not necessarily list the above qualifications, it is obviously a case that those qualifications are an integral part of Islamic jurisprudence.

x) He/she should have not been involved in lending money.

xi) The judge should protect the public or international welfare.

xii) It is good if a judge is a specialist in the protection of the rights of abandoned children, orphans and children as a whole. The interpretation of this segment to the contemporary standard means a judge should protect the rights of child victims of crimes during war or peacetime. A good knowledge concerning the provisions of the conventions on the rights of children may not be necessary, but, may obviously be of great advantage.

xiii) Under Islamic jurisprudence, there was no appeal court in the contemporary meaning. But, a defendant may appeal to the ruler after the implementation of the sentence. If it is proved that the punishment of the defendant was unlawful and the findings of the judge were not accurate, the judge could be subjected to the equivalent punishment and removed from his/her position. A false appeal by the defendant was also subject to punishment. Although, all these regulations cannot be found under the Statute of the ICC and are not necessary either, it is obviously the case that the rules of the Appeals Chamber are not against Islamic jurisprudence and its establishment is quite fair and just. This is also owing to the fact that the Islamic nations established appeal courts long ago. The conclusion is that neither the Islamic jurisprudence, nor the ICC system, wants an innocent person to be convicted.

3. Prosecutors

According to Islamic criminal justice, there was no difference between the function of a prosecutor and the function of a judge. Both these legal positions had similar functions and were carried out by the same person. This means that the judge was also responsible for all other matters
concerning the administration of justice and gathering of information including the location of the judgment. A prosecutor/judge therefore had a very difficult task regarding the application of impartial judgment. The difficulty of this task and the gathering of the necessary information have however altered the administration of justice and the law speaks about two different legal bodies. Accordingly, the prosecutor may therefore initiate investigation concerning the commission of a crime and see whether there are sufficient reasons to initiate an investigation. There are however several conditions for recognizing a person as being qualified as a prosecutor. These are:

i) A prosecutor must he of high morals or have a fully respectable character.

ii) He/she should have a recognised wisdom.

iii) He/she should have a recognised intelligence.

iv) A prosecutor should keep his (her objectivity regarding the development of the case.

v) A prosecutor should have awareness of Islamic religion. This does not mean necessarily that a prosecutor of the ICC must be Muslim, but should respect all religious cultures of the world. The respect of different cultures constitutes one of the basic principles of Declaration of Human Rights.

vi) The prosecutor must have full knowledge of criminal cases.

vii) He/she should be chosen due to the provisions of the law.

4. Evidence

One of the chief principles of Islamic justice is that the burden of proof is one of the duties of the prosecutor. This means that Islamic justice puts a heavy weight on the principle of accused is presumed innocent unless the contrary is proved. Yet according to Islamic law, the conviction of the accused must also be without any reasonable doubt. Accordingly, one cannot be convicted for the acts that are not proved under criminal jurisdiction. Comparatively, the Statute of the ICC recognizes similar principles to the above. Due to the provisions of the Statute, the presumption of innocence constitutes as an element. Equally, it provides that it is the onus of the prosecutor to prove the guilt of the accused under the criminal justice system.5

5 Article 66 of the Statute.
In addition, a pure Islamic criminal justice does not put any weight on evidence which is obtained by spying on the accused. This means that “evidence discovered in the course of an unauthorized search will generally not support the issuance of a warrant and is inadmissible at trial.”6 This applies to the fact that evidence must be obtained by legal terms and not illegal terms through violating the legal privacy of the accused. Therefore, evidence obtained by bugging the accused person’s room or spying through a window cannot be recognised as legal evidence.7 The main source of the law reads that “Avoid much suspicion, for verily suspicion in some cases is a sin, and do not spy.”8

All these denote the fact that the criminality of the accused must be proven upon evidence and therefore no one is guilty of the commission of a crime as long as authentic evidence has not been presented and examined under an authorized criminal jurisdiction. The sources of Islamic law also denote the above facts and principles. Accordingly, those testimonies which are false and accuse a man or woman of the commission of a crime are not tolerable and the accusers are punishable due to the provisions of the law.9 This means that evidence has an important function in the history of Islamic jurisprudence and it should be authentic and not false. The same philosophy is also encouraged under the principles of the ICC. The following sections examine the role of evidence under the procedure of justice.

4.1. Nature

The nature of evidence has had an effective function in the procedure of Islamic jurisprudence. But what does and does not constitute evidence is subject to some debate. This is because the Qurʾān has in one case referred to evidence as constituting the testimony of witnesses. This means that in criminal cases, the basis of proof may rely solely on the testimony of witnesses. However, the above interpretation may not be correct and is indeed subject to criticism. Evidently, the main source does not limit the borderline of evidence. This is because the restriction of evidence solely to the testimony of witnesses diminishes the value of justice and justice will not be achieved. More significantly, the nature of the evidence

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7 Id.
8 The Qurʾān, 24:12.
9 The Qurʾān, 24:4.
cannot exclusively rest on the testimony of witnesses. The reason is that the proof of criminality would be very difficult when there is no witness but only other materials proving or disproving the guilt. The nature and substance of evidence therefore varies from case to case depending on the circumstances of each case. The nature of the evidence may be the following: i) A woman, b) A man, c) that which proves the guilt or innocence of the accused. The credibility and weight of the evidence must be assessed and it should determine that guilt has been established beyond any reasonable doubt.

Yet, there are some rules concerning the nature of evidence and the testimony of witnesses. In other words, there have been some regulations concerning the testimony of men and testimony of women. Both have been used, but, sometimes in different degrees and at different levels. Therefore, the nature of evidence and its validity has sometime suffered from the question of gender.

4.2. Confession through Consent

Consent appears to be one of the most significant principles and subjects of criminal justice in Islamic jurisprudence and the ICC as a whole. Both legal systems emphasise on the value of evidence which is expressed by free consent. In other words, a confession which is extracted by use of threat, force, torture, and any other unjustified means cannot have any legally binding effect in the criminal procedure and applies to the irrational nature of justice.

Yet, in the light of new evidence, a confession may loss its evidentiary value if it is proved that the confession which was given by the accused was due to a particular personal coercion and not of free mind. Again, a confession which is given by a person who has lost his memory or is mentally ill cannot be presented as evidence in the proceedings of justice. Any doubt in the value of the confession may be a reason for its invalidity.

Under Islamic law confession constitutes a cornerstone in the proceedings of justice and finding a truth. Thus, one of the most necessary and reliable forms of evidence under the provisions of Islamic criminal jurisprudence has been the confession of the accused. This is particularly valuable in the case of serious crimes. The theoretical “reasoning behind this principle is to render and promote justice by means of confession in order to avoid mistakes or consider unfair and inflamed evidence. However, an accused may not be condemned based solely on his confession of guilt; there must exist appropriate and legitimate evidence of
confession.”10 In addition, a confession does not involve the criminal responsibility of any other person who, aids abets, assists in, or attempts the commission of a crime. The confession only implies the acceptance of responsibility on the part of the accused. Any other person, who has, in one way or another, participated in the commission of the crime, must confess by his/her own free will.

It is also significant to mention that new evidence could be a reason to revise judgment under Islamic law. The Statute of the ICC has also foreseen the situation in which the conviction of a person has, for one reason or another, been wrongly delivered by the Court because of incorrect or insufficient evidence. According to the Statute, the revision of judgment or sentence may be possible by the Appeals Chamber if it founds that:

(a) New evidence has been discovered that: (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

 Apparently, both legal systems have aimed at the protection of the accused and the validity of the authentic evidence. A confession which is taken by resorting to force and unlawful measures is not valid and null. One cannot disagree with the fact that each system may put emphasis on the different values of evidence, but, this cannot prevent the maintenance of appropriate judgment under the provisions of the ICC or the historical evaluation of the Islamic jurisprudence. In other words, the provisions of the ICC regarding this matter do not conflict with Islamic criminal justice and are rather identical.

4.3. Testimony of Witnesses

As a general rule, all persons can give testimony before the jurisdiction of a court. Under Islamic law, a witness must be sane and should have reached the age of fifteen. A testimony may be given by women, men, old or young. A blind person may also be a witness. But the value of the testi-
mone of witnesses may vary from case to case and at the discretion of the judges. There is not any particular restriction to this element in Islamic law. But, testimony must be correct and not misleading. In other words, all witnesses are morally and legally responsible for their testimony. The moral responsibility is mostly based on the strength of beliefs and the legal responsibility on the principle of asserting truth in the court of justice and not violating the integrity of jurisdiction. Although, the ICC does not speak of the moral responsibility of witnesses, it is axiomatic that moral responsibility is also integrated into the legal responsibility before the Court, even though, a witness is an unbeliever. Obviously the Court does not judge on Islamic principles, but, on the standard of international human rights principles. This means that the Court does not necessarily put any weight on the theological part, but on the ethical understanding of rendering a fair judgment.

Under Islamic criminal justice, witnesses must pass the following qualifications:

A) The witness must not be mentally ill. This includes the time when he/she observed the incident and when he/she testifies in the court.
B) The witness must, in one way or another, be capable of expressing his/her view in a language. If he/she cannot speak, he/she should write it and if he/she is not capable of writing, he/she should demonstrate it by signs or symbols.
C) The testimony given by a minor is subject to circumstances and the tendency of other evidences.
D) A competent witness must not have any problem with his/her memory when facing the incident and when giving testimony.
E) The testimony of a blind person may be accepted by a court if he/she is capable of hearing.
F) The testimony of a witness must be based on his/her view. If he/she gives testimony to what he/she has heard from another person, the validity of the testimony may rapidly decrease.
G) The witness must not be notorious for scattering false news. The validity of such testimony may decrease.
H) There is no condition that the witness should be Muslim.\(^{11}\)
I) A judge who rules a case, cannot be a witness in the same case.

\(^{11}\) The Qur’an, 5:106.
4.4. Testimony of Judge

According to common and civil law systems, the conviction of the accused must be established by documents or the testimony of witnesses or both. Yet, this conviction should also be carried out publicly and in a courtroom. The reason for this policy of jurisdiction and administration is to hinder a judgment based on the personal knowledge of a judge. It is even possible that a judge disqualifies himself/herself from approaching the case based on the fact that he/she has extra knowledge concerning the proof or disproof of criminality. This means that the civil and common law system may reject the entire procedure concerning a case because of the circumstances of the case. In other word, the testimony of a judge is not acceptable when he/she is involved in the judgment of a case. The Statute of the ICC also refers to the above matters.\(^{12}\)

The Islamic jurisprudence has, however, taken rather different measures and policies concerning the above theme. There are three different opinions. According to one opinion a judge is permitted to rule even though he has prior knowledge concerning the case. This view is based on the interpretation of the following verse: “O ye who believe! Stand out firmly for justice and be witnesses for Allah, even though it be against yourselves, or against your parents, or your kindred. Whether he, against whom witness is borne, be rich or poor, Allah is a better protector to them than you are. Therefore follow not your low desires that you may be able to act equitably. And if you distort your witness or refuse to give it, verily, Allah is ever well-acquainted with all what you do.”\(^{13}\) Due to another view, the judge is strongly prohibited to rule a case based on prior knowledge which governs hudūd offences. These are crimes against the foundation of mankind such as theft or murder. This means, in other criminal matters the judge may benefit from his prior knowledge. The second view is, in fact, another interpretation of the above verse.

But the most prevailing view is the view which prohibits the judge from ruling on the basis of prior knowledge. However, he/she may testify in the court, but not judge. The third view does not separate the provisions of the above verse, but, it interprets it in the light of public interest and, particularly, rightful justice. This is because “stand out firmly for justice” and give “witness” does not necessarily mean to loss objectivity and harm public trust in the machinery of justice. Furthermore, the phrase “if you

\(^{12}\) See Article 41 concerning excusing and disqualification of judges.

\(^{13}\) The Qur‘ān 4:135.
distort your witness or refuse to give it” means simply do not hide and contribute to justice with a good heart and good ambition. In other words, the whole verse in the above encourages the positive contribution of all individuals to the body of justice and condemns hiding the truth.

4.5. Testimony of Women

One of the greatest problems of Islamic criminal jurisprudence has been the principle of inequality of sex. This means that men have been given a very high position within the criminal jurisdiction and women did not enjoy the same position as men. The problem was, thus, not of the substance of humans but in the manner of the interpretation of the Qur’ān. As a whole this source did not mean to create injustice but because of the historical background of Arab nations and their poor civilisation, the law was presented in a manner to teach, stage by stage, the Arab nations the real value of mankind by the Prophet who belonged to the same race. The task was not, therefore, easy. It was likewise in changing the attitude of the population to the respect of equality of gender i.e. women and men. Furthermore, the laws of other nations at that time did not give respect to the equality between men and women. Unfortunately, women had an inferior position to men almost within all civilized and uncivilized societies.

Casting stones at women, female infanticide, cutting sexual organs or preventing their social conducts have, more or less, all been practised by most nations of the world. Thus, the question was not concerning the rules of the law within the provisions of the Qur’ān, but, the way in which a woman was treated within different social relations in the majority of nations in the world. A woman was mostly seen for sexual relations and accepting her as having an opinion in the court of justice was indeed a very difficult question.

Consequently, it was in this context that the Islamic system could survive within the Arab World until a gradual change to the deep rooted culture concerning the position of women took place, and a correct

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14 For an international aspect see generally David Wingeate Pike (ed.), Crimes Against Women (2010).

15 This is true even today, in most recognised democratic countries. Even here in Sweden, it was only, twenty five years ago that the first woman was accepted as a professor of law, in a faculty which has had, at least, five hundred years of historical development. This was not based on an equal footing. It was worked out after many mental, social and underground academic exchanges. Thus, the position of women in the Islamic Court of justice, of almost fifteen hundred years ago, should not be regarded as a surprising issue.
definition and scope to their testimonies was given. Thus, it must be expressed that any practice regarding the testimony of two women as equivalent to the testimony of one man is against the present development of Islamic law and should be regarded as a violation of the instruments of the international human rights law including the Cairo Declaration on Human Rights in Islam. Furthermore, due to the second source of Islamic law “Whatever wrongs took place in the days of ignorance are abolished by Islam [...] and whatever wrongs take place in Islam may be abolished by repentance (istighfar).”16 This statement clearly points to many facts. Firstly, severe punishments have been abolished in Islamic law because of the modern development of international criminal human rights law. Secondly, the testimony of a woman and a man are equal and should not be interpreted differently. The Arab Charter on Human Rights has also referred to the equality of women and men. The Charter has even provided a positive discrimination in favour of women. It reads that:

Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.17

The spirit of the statement in the above, the Cairo Declaration on Human Rights in Islam and the Arab Charter imply the fact that the provisions of the Statute of the ICC concerning the equality of the testimony of women and men is completely correct and should not, in any way, be misunderstood by the Islamic nations or states.18 Equality of race and gender is the first principle of justice and this has to be respected by all nations of the world, not only during war and peacetimes, but also, under the proceedings of national, regional and international criminal jurisdictions.

17 Article 3 (3).
4.6. Other Evidence

The nature of evidence is not just the human being. Therefore, the term “testimony of witnesses” stated in the Qurʾān is an exemplification of criminal justice tools and not the exhaustion of other remedies. Consequently, the nature of evidence is not restrictive in the words of Qurʾān. The term “evidence” is therefore used with several propositions and offers different reasons for the proof of various matters. It says that “Our apostles came with clear evidences.”\(^\text{19}\) In another position, the term “evidence” is used as a confirmation of certain matters. It reads that “those who reject the truth, among the People of the Book and among the Polytheists, could not have broken up themselves from their ways till the clear evidence came to them.”\(^\text{20}\) Similarly, the term “evidence” exploited as the manifestation of great proof. For instance, it is stated that “nor were those people of the Book divided except after the clear evidence came to them.”\(^\text{21}\) All these mean that the content of evidence should be clear by itself and should not require crystallization by other means. In general, the presentation of evidence must not be delayed. In such case, the value of evidence may be reduced due to its content and nature.

Accordingly, all matters which may prove in one way or another, the border line of the criminal case and strengthen the proof that the accused is guilty or not may be valuable and is supported by the general theory of Islamic jurisprudence. However, the evidence must be conclusive and be, in one way or another, in conformity with other evidence depending on the discretion of the judgment. Nevertheless, it is evident that the evidence must not lose its conclusiveness before or even after the execution of judgment. Comparatively, within the law of the ICC, the Court can refer to any authentic material which can be useful for the proof of guilt or the contrary. In fact, the Rules of Procedure and Evidence open the door for a broader interpretation of the provisions of the ICC. Similar to Islamic jurisprudence, the presentation of evidence is not limited to certain already presented evidence. The discovery of new evidence may also be a reason for the change of circumstances and presentation of new facts before the Court.

\(^\text{19}\) The Qurʾān, 5:32.
\(^\text{20}\) The Qurʾān, 98:1.
\(^\text{21}\) The Qurʾān, 98:4.
4.7. Reliability of Evidence

Traditionally, evidence given a high degree of reliability under Islamic jurisprudence was eyewitness testimony, confessions and religious oaths. The question of reliability of evidence was, therefore, one of the most serious questions of justice and justice could not be done, if it was proved that evidence presented during the proceedings of jurisdiction were false, irrational or were not authentic as a whole. That is why the Islamic criminal jurisprudence presses that those who present evidence which is false and create contradiction within the criminal justice system are morally and legally responsible for the falsification of evidence. Thus, those who bring allegations which cause harm to the accused and to the body of criminal justice and Islamic law should be punished due to the provisions of law. For instance, in support of women’s rights and their integrity under criminal justice system, it reads that “And those who launch a charge against chaste women who protect their modesty while failing to bring four eye-witnesses to support their allegations, (punish them …) and you shall never accept their testimony or evidence: for such men are wicked transgressors.”22 It is axiomatic that the verse has, clearly, condemned bringing witnesses, presenting movable or immovable evidence and claiming evidence which is without proper basis. According to its provisions, wrong and evil evidence is immoral and therefore iniquitous. Similarly, it is a great sin to destroy evidence which may be useful in order to prove guilt or the contrary. Therefore, all these actions are considered offences against the machinery of justice and require punishments.

The above provisions of Islamic law may, more or less, be found in the inner structure of the ICC. For instance, the prosecutor of the ICC may with the permission of Pre-Trial Chamber “to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.”23 It is, in fact, the duty of the prosecutor “to prevent destruction of evidence”24 Furthermore, according to the Statute of the ICC, the following are offences against the administration of justice: i) providing false testimony, ii) not telling the truth, ii) presenting forged or false evidence, iv) corruptly influencing any witness in the Court, v) interfering or hampering with

22 The Qur’ān, 24:4.
23 Article 18 (5).
24 Article 18 (1).
the attendance or testimony of any witness, vi) retaliating against a witness for giving testimony, vii) interference with the collection of evidence. All these imply the fact that evidence must be reliable in both legal systems and should not contradict with the purpose of pure criminal justice jurisdiction.

25 Article 70.