



The Republic of Somaliland



Criminal Legal Aid Manual for Law Practitioners in Somaliland

Criminal Justice Compendium
for Somaliland

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Introduction to Legal Aid and Methodology

Introduction to Legal Aid and Methodology

A. History of Legal Aid

Historically Legal Aid has its roots in the right to counsel and fair trial movement of 19th Century continental European countries. Initially the expectation was that duty solicitors would act on a *pro bono* basis. In the early 20th Century many European countries had no formal approach to Legal Aid and the poor relied on the charity of lawyers for Legal Aid.¹ Most countries went on to establish laws that provided for the payment of a moderate fee to duty solicitors. To curb demand, Legal Aid was restricted to lawyer costs in judicial proceedings where a lawyer is mandatory. Countries with a civil law legal system and common law legal systems take different approaches to the right to counsel in civil and criminal proceedings. Civil law countries are more likely to emphasise the right to counsel in civil law proceedings, and therefore provide Legal Aid where a lawyer is required, while common law countries emphasise the right to counsel and provide Legal Aid primarily in relation to criminal law proceedings.

In the 20th Century the movement in favour of Legal Aid has been top-down, driven by those members of the legal profession who felt that it was their responsibility to care for those on low income. Legal aid was driven by what lawyers could offer, in order to meet the “*legal needs*” of those they had identified as poor, marginalised or discriminated against. Therefore Legal Aid provision was supply driven, not demand driven, leading to wide gaps between provisions that met perceived needs and actual demand. Legal service initiatives, such as neighbourhood mediation and legal services, frequently had to close due to lack of demand while others were overwhelmed with clients.

Legal Aid has a close relationship with the welfare state and the provision of Legal Aid by a state is influenced by attitudes towards welfare. Legal Aid is a welfare provision by the state to people who could not otherwise afford access to the legal system. Legal Aid also helps ensure that welfare provisions are enforced by providing access to legal advice and the courts for people who are entitled to welfare provisions (such as social housing). Historically Legal Aid has played a strong role in ensuring respect for economic, social and cultural rights which are engaged in relation to social security, housing, social care, health and education service provision. This Legal Aid may be provided publicly or privately.²

Prior to the mid-20th century, literature on Legal Aid emphasised collective enforcement of economic, social and cultural rights. As classic welfare states were built in the 1940s it was assumed that citizens had collective responsibility for economic, social and cultural rights, and the state assumed responsibility for those unable to provide for themselves through illness and unemployment. The enforcement of economic, social and cultural rights was to be collective, through policies rather than individual legal action. Laws were enacted to support welfare provisions, though these were regarded as laws for planners, not lawyers. Legal Aid schemes were established as it was assumed that the state had a responsibility to assist those engaged in legal disputes, but they initially focused primarily on family law and divorce. In the 1950s and 1960s the role of the welfare state changed and social goals were no longer assumed to be common goals. Individuals were free to pursue

1 Regan, Francis, (1999), *The Transformation of Legal Aid: Comparative and historical Studies*, Oxford University Press, pp. 89–90.

2 Regan Francis, *ibid.*

their own goals. The welfare state expanded along with Legal Aid provision, as concerns emerged over the power of welfare providers and professionals. This led to increasing calls in the 1960s and 1970s for the right of individuals to legally enforce economic, social and cultural rights and the welfare provisions they, as individuals, were entitled to. Mechanisms emerged through which citizens could legally enforce their economic, social and cultural rights and welfare lawyers used Legal Aid to advise those on low income when dealing with state officials. Legal Aid was extended from family law to a wide range of economic, social and cultural rights.

In the 1980s the role of the classic welfare state was no longer regarded as necessarily positive, and welfare was increasingly provided by private entities. This led to Legal Aid being increasingly provided through private providers, but remained focused on providing assistance in court cases. Citizens were increasingly regarded as consumers who should be able to choose among services. Where it was not possible to provide such a choice, citizens were given the right to voice their dissatisfaction through administrative complaints processes. This resulted in tension, as Legal Aid was not designed to offer advice to those seeking redress through administrative complaints processes. Tensions also began to emerge as states which emphasised individual enforcement of economic, social and cultural rights, rather than collective enforcement through polices, reduced funding for Legal Aid as a welfare state provision. Individual enforcement of welfare entitlement required the kind of Legal Aid funding that those states that emphasised collective enforcement, were more likely to provide.³

B. The Manual's Purpose and Methodology

This Criminal Legal Aid Manual aims to provide legal practitioners with a comprehensive reference tool to provide sound advice, assistance and representation to people suspected or accused of a crime, with specific emphasis on the role and responsibilities of Legal Aid providers during investigation, arrest, pre-trial detention, bail hearings, trials, appeals, and other proceedings brought to ensure that human rights are protected. Beneficiaries should also include victims of crimes. The Manual also contains specific training guidelines and aids for lawyers and Legal Aid providers for assisting women and other vulnerable groups, such as children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally or seriously ill, refugees, internally displaced persons, and foreign nationals who might be involved with the justice system either as accused persons or victims.

The Manual should be used together with training courses for lawyers, paralegals and Legal Aid providers in Somaliland.

The Manual consists of three parts. The first part contains the principles on Legal Aid and the legislative framework, as well as some models on Legal Aid application in other countries. The second part of the Manual is focused on the Legal Aid of the defendant, and comprises the techniques a defence lawyer should know (theory supported by case studies and practical exercises); and the third party is entirely dedicated to the training guidelines for lawyers defending victims and vulnerable groups such as women, children,

3 Regan Francis, *ibid.*

the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally or seriously ill, refugees, internally displaced persons, and foreign nationals.

B.1. Confronting the Obstacles to full implementation of the laws

Ignorance about the law, human rights, and the criminal justice system is a major problem in many African countries. People who do not know their legal rights are unable to enforce them and are subject to abuse in the criminal justice system, particularly vulnerable groups such as children, young people, women and refugees.

Police, Prosecutors, Judges, and defense attorneys are all basic components of the justice system and they should all become more aware of the key provisions of criminal law and procedure.

It has been reported that for some crimes it is not unusual for defendants to be convicted and punished for crimes not contained in the Penal Code or the specific criminal laws. Judges and Prosecutors sometimes apply Sharia'h law, refusing to follow the provisions of the Penal Code (PC) and those of the Criminal Procedure Code (CPC). Nor is it out of the ordinary for many cases to be resolved by customary law outside of the formal the justice. Corrupt practice may also recur, thereby confusing the path between awareness of the law and its' full implementation.

Defense attorneys have a strong interest in seeing the laws implemented. Lack of respect for the written law is the primary obstacle for defense attorneys who wish to protect their client's rights and provide an adequate defense. The effectiveness of nearly all of the defense attorney's tools depends upon the predictability and accountability created by strict adherence to the penal and procedure code. Therefore, training defense attorneys to address the divergence between, on the one hand, the legal system created by the codes and, on the other hand, actual practice, is the most promising means to close that gap.

This Manual is intended to set forth a training method that goes beyond improving awareness and towards full implementation of the written law.

It must be acknowledged that lack of awareness is not the sole impediment to the implementation of the law as written. The defense attorneys who will participate in these trainings are already well aware of many of the problems that exist in their legal system. The trainers' role is to prompt the participants to identify the obstacles that they perceive to be currently preventing implementation of specific provisions of the law, and to encourage them to describe and evaluate these obstacles.

Once a full description of these obstacles has been elicited, the participants must be engaged in a dialogue about their own motivation and ability to face and overcome these obstacles.

Developing a thorough understanding of the particular manner in which current circumstances impede steps towards implementation of the written law is essential. With this understanding, trainers and participants can work together to develop specific strategies to alter those circumstances. Only by directly confronting the assumption that nothing can be done, is it possible to build a new consensus that improvements in implementation of the law are possible.

B.2. Limits of the Manual

This Manual is not intended to address practice outside the jurisdiction of the Courts of Somaliland. Neither is it meant to be a comprehensive reference tool addressing all possible aspects of the defense in any system (formal or informal) and for any legal case; nor for all crimes prosecuted. This Manual aims to describe the principles of Legal Aid in criminal justice cases, provide a general context for the application of Legal Aid, and provide case studies to enhance understanding.

B.3. Training Goals

This Manual is designed to help participants develop a core set of practical skills necessary to be an effective defense advocate, while also conveying specific knowledge and skills related to defending criminal cases. Any legal system is subject to continuous change. As a result, what is an effective strategy today may not be of value in the near future. Further, many legal arguments which, from an international viewpoint, appear to be indisputably correct, may in a specific national setting be nullities.

Defense attorneys can and should be active agents of change within the legal system. For this reason, continual references will be made to national and international laws, and to legal principles that may not be currently implemented, but the full implementation of which is of obvious benefit to defense attorneys and their clients.

The hope is to motivate and inspire practitioners to ascend to hitherto unclimbed heights within their profession, and to set out realistic goals for the profession as a whole.

C. Overview of the training

C.1. Training method

Defense attorneys need to forcefully assert their objections, skillfully ask questions, and persuasively argue their points, and training is an appropriate time to practice these skills. This training requires the active participation of all participants in discussions, practical exercises, the use of fact patterns, and skills tests. When participants wish to object, question, or argue about any appropriate topic they should not be criticized in any way for doing so, provided they can do so skillfully using the techniques that have been taught. Trainers should receive exactly the same amount of deference that a defense attorney gives to a judge, no more and no less.

It is not the role of trainers to supply the participants with definitive answers. During each discussion, practice problem, or exercise the trainers role is to assist the participants in finding their own answers. The purpose of the training is to help the participant develop a useful approach to problems, *not to suggest specific answers*. Each participant must individually evaluate how the ideas presented can be incorporated into their own work as a defense attorney. Many problems faced by defense attorneys do not have a single correct answer.

The question of how best to defend an individual accused is not susceptible to a single correct answer. As long as the defense attorneys fulfil their mandatory professional obligations and duties to the client, there are

likely to be many correct ways of handling a case. Each advocate brings unique skills and understanding to his/her work and this training is not intended to diminish that uniqueness by suggesting that a single formula for success exists.

Instead, this training seeks to instill in the advocate both a mastery of the minimum standards of professional conduct and an understanding of those undeniable practical truths associated with their work that each must comprehend in order to make wise strategic decisions on how to best serve their client's interests.

The conclusions drawn in the text of this Manual should always be open for discussion during the trainings. If persuasive evidence or arguments show some portion to be wrong, the offending portion should be revised or removed.

During discussions, those with differing views should be encouraged to express them. However, speakers should provide some facts, reasoning, or authority to support their viewpoint. If a participant makes reference to a law or other text, the specific language of that document should be examined in order to determine whether, and in what manner, it supports the view expressed.

If no views are expressed on an issue, or only a single view is expressed by the participants, it is appropriate for the trainer to assign a participant or group of participants to argue in favor of or against a specific viewpoint selected by the trainer. *A defense attorney must be able to see clearly that most issues have at least two sides.* An effective advocate must be able to make the best possible argument in favor of whichever position is in the interests of the client and, as his or her client will be different on different days, so the advocate's argument may necessarily differ. Participants should not expect to be able to always be in the position of arguing in favor of those views to which they are personally most sympathetic.

A defence lawyer should remember that the fundamental advocacy skills are:

- seeing that more than one solution may exist to a single problem;
- being able to support a position with facts, arguments, and/or legal authority; and
- seeing how to best argue both sides of a single argument.

There are skills to be practiced consistently throughout each part of the training. The trainers should not deviate from holding themselves and participants to these principles.

With this assignment UNODC aims to provide technical assistance and advisory service to the Government of Somaliland to set up a robust Legal Aid system, supported by qualified and skilled Legal Aid providers.

C.2. Plan of the training

The training curriculum has been designed for a standard and intensive five-day training period. The training courses are structured on modules, where each module corresponds to relevant chapters of the Manual.

The chapters in the Manual are arranged in logical sequence and many of them are closely related to others. It made sense to therefore cluster several of them into a given module, and to plan to address a number

of related issues on the same day. Trainer(s) and participants in the training should therefore familiarize themselves with the overall structure of the training and how it relates to the various chapters of the Manual.

At the beginning of the training, trainer(s) should take the time to review and discuss with participants the objectives and structure of the training and the overall layout of the Manual.

The organization of the training and the Manual in a modular format is meant to introduce some necessary flexibility in the delivery of the training. Each group of participants will bring its own experience, background, and issues. The contents of the Manual are meant to support the discussions and not to dictate the direction that they take. There may be a need for a particular group to pay more attention to some issues that have become critical in their environment, or to pay less attention to a module with which participants are already familiar. The curriculum provides a basic structure, yet it also allows the instructor(s) and participants to be guided by the normal flow of the group's learning process and to decide to place more emphasis, as required, on questions and challenges with which they are struggling.

At the beginning of the training course, the instructor(s) should hold a discussion with the participants about their own learning objectives and priorities and how they can be accommodated within the proposed curriculum. A Pre-Test will be given to participants to estimate their level of knowledge, as well as a Post-Test at the end of the training in order to evaluate if the objectives of the training have been met.

A description below summarizes the main modules of the curriculum, and how they relate to the various chapters of the Manual.

Day 1

After a Pre-Test in order to evaluate participants' level of knowledge, the trainer(s) will make a presentation of the methodology of the training and of the modules and will have a discussion with the participants to guide any restructuring of the training agenda according to their needs.

Participants are reminded of their role and responsibilities as legal providers, including their role when defending vulnerable persons. A discussion is encouraged among participants of the problems and issues they face in offering legal assistance in every day practice.

Then, the definition and rationale of Legal Aid is presented by the trainer(s), and the participants become familiar with the role and responsibilities of Legal Aid providers.

Next the national, regional and international legal frameworks will be described. Consequently, participants are presented with the principles and safeguards on Legal Aid, client relations, and the procedure for complaints against the lawyer. Handouts 1 to 9 (see annex) will be given to participants in the first day of the training.

Day 2

The second day of the training will start with a description of the Legal Aid schemes, and a presentation of the Legal Aid system in Somaliland. Participants will be invited to work on which model could work best in Somaliland.

Then the participants will deal with how Legal Aid is implemented during the different stages of the criminal procedure (police stage; investigation stage, pre-trial detention stage and during the hearing). The participants will understand how to build the theory of the case. They will come to understand the audience and the clients' interests, and the importance of interpretation. Handouts 10 to 23 (see annex) will be given to participants in the second day of the training.

Day 3

In the third day of the training a special focus is given to the examination of witnesses. The participants are invited to give their input as lawyers, paralegals and Legal Aid providers working out solutions for persons in pre-trial detention. The role of the expert is presented, and the participants will come to understand the differences between experts, technical experts and witnesses. Next, the participants will learn how to successfully persuade a court to acquit the client, the role of Legal Aid during sentencing, as well as at the post-trial stage and during the appeal.

The participants will understand how to address issues related to sentencing following the verdict and the statement by the client. Handouts 24 to 26 (see annex) will be given to participants in the third day of the training.

Day 4

The morning session of the fourth day of the training is dedicated to mitigating/extenuating circumstances; to actions committed under duress and the limited role in the offence, and the appeal strategy.

The trainer(s) will explain which mitigating/extenuating circumstances lead to the reduction of punishment and make the participants understand which actions may have an impact in determining the sentence other than direct mitigating circumstances. The morning session will close with a special focus on actions committed under duress.

The afternoon session will start with the presentation of the commission of misdemeanors in and out of the court. An explanation of the theoretical and practical approach to Legal Aid during the post-trial stage will follow. The participants will become aware of the national and international legal framework which applies to Legal Aid in the post-trial phase, and will be invited to make an inventory of various problems related to access to detention centers for legal practitioners and to propose solutions. Handouts 27 to 33 (see annex) will be given to participants in the fourth day of the training.

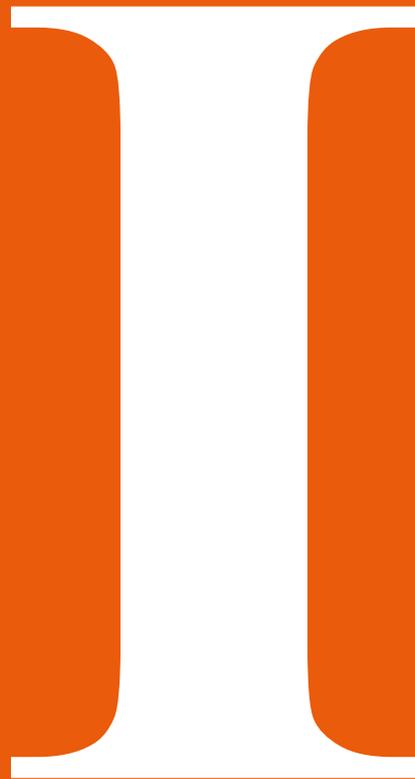
Day 5

The fifth day of the training is dedicated to presenting guidelines to lawyers and Legal Aid providers for assisting victims and vulnerable groups according to international standards. Different types of victims, and of their degree of vulnerability, will be analysed by the trainer(s), and the importance of compensation and restitution for victims will be considered. The international legal framework and the particularities of the protection of different categories are presented, focusing mainly on:

- children in conflict with the law and child victims;
- women victims and perpetrators;
- persons suffering from HIV/AIDS;
- mentally ill persons; and
- refugees, IDPs and foreign nationals.

Particular attention is given to techniques which enable better understanding of hidden victimization, methods to deal with investigation in court, and the protection of victims and witnesses. In the fifth day of training no written handouts are to be given to participants; only oral exercises are foreseen. At the end of Day five a Post-Test will be given to the participants in order to evaluate if the objectives of the training have been met.

Part I: The Framework of Legal Aid



Part I:

The Framework of Legal Aid

This part contains the framework in which Legal Aid may apply and be effective. Starting with the definition and the rationale of Legal Aid, the Manual gives the principles and safeguards for Legal Aid; the legislative framework at national, regional and international levels; Legal Aid schemes and models on Legal Aid, and examples of Legal Aid models from other countries.

Learning objectives

The participants will:

- Become aware of:
 - The meaning of Legal Aid (Definition and Rationale of Legal Aid);
 - The national, international and regional legal framework on Legal Aid;
 - The Safeguards on Legal Aid for the protection of lawyers and defendants;
 - The Principles concerning Legal Aid;
 - The Principles concerning attorneys' Ethics;
- Participants will know how to build client relations and interviews and avoid conflicts of interest;
- Participants will become aware with the procedure of complaints against a lawyer and
- Become aware of the variety of Legal Aid schemes and the present Legal Aid system in Somaliland, and
- Come out with conclusions on which model could work best in Somaliland.

Chapter 1:

Definition and Rationale of Legal Aid

Learning objectives

Participants will become aware of the definition and rationale of Legal Aid. In particular they will understand:

- what we mean by Legal Aid, and
- why Legal Aid matters.

1.1. What do we mean by Legal Aid?

Legal Aid is the provision of assistance to people otherwise unable to afford legal representation and access to the court system. Legal Aid is regarded as central in providing access to justice, by ensuring *equality before the law, the right to counsel and the right to a fair trial*.

Some argue that the right to legal assistance is the cornerstone for all other human rights.⁴ The Lawyers Committee for Humans Rights⁵ considers the right to counsel as the “*most scrutinized specific fair trial guarantee in trial observation practice, because it has been demonstrated to be the one that is most often violated ... [The right to legal assistance] is of such fundamental importance that all other rights which are relevant to the due conduct of a fair trial may be worthless if this right is not respected.*”⁶

According to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems⁷, Legal Aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. It is the foundation for the enjoyment of other rights, including the right to a fair trial, as defined in article 11, paragraph 1, of the Universal Declaration of Human Rights, is a precondition to exercising such rights, and is an important safeguard that ensures fundamental fairness and public trust in the criminal justice process. For the better implementation and effectiveness of Legal Aid, the following actors should be seen as interrelated and, thus, they should collaborate closely with each other:

- Lawyers Associations
- Ministry of Justice
- Police
- Judiciary institutions (Courts and the Attorney General)
- Custodial Corps

4 Richard J. Wilson in: National Legal Aid & Defender Association - NLADA (Nov.2010), *International Legal Aid & Defender System Development Manual. Designing and Implementing Legal Assistance Programs for the Indigent in Developing Countries*, p.15; http://hakinetwork.org/wp-content/uploads/2011/06/International_Manual_2010.pdf.

5 Lawyers Committee for Humans Rights, *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, II.A.3, March 2000, http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf.

6 Ibid.

7 E/CN.15/2012/24, Commission on Crime Prevention and Criminal Justice, Twenty-first session, Vienna, 22-26 April 2012. The text was adopted by the UN General Assembly on December 20, 2012.

- Other Governmental Institutions
- Faculty of Law and Legal Aid Centers.

It needs to be underlined that Legal Aid does not only include legal representation, but in order to be effective it also includes legal education and community awareness-raising on constitutional and legal rights.

Legal empowerment essentially means the provision of basic legal information, advice and assistance to guide people in making informed decisions, in order to enable them to navigate the available justice systems themselves (to the greatest extent possible). Legal education can empower people to apply the law to their own set of circumstances, and to be able to use the law as a tool for bringing about change to their circumstances.⁸ People can often handle matters on their own if they simply know their rights. A brief session with a lawyer or a community paralegal can help a person decide what action to take, or enable that person to submit a successful application or make a proper claim.

In terms of criminal justice, the greatest need is for immediate access to legal advice and assistance at the police station on arrest and during interview, at court on first appearance, and in the prisons. This can be provided by lawyers, but also by paralegals and law graduates. For this, Legal Aid should be defined as broadly as possible. According to the Lilongwe declaration of 2004: *“Legal Aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.... Governments should sensitize criminal justice system administrators to the societal benefits of providing effective Legal Aid and the use of alternatives to imprisonment. These benefits include elimination of unnecessary detention, speedy processing of cases, fair and impartial trials, and the reduction of prison populations.”*

Further, Legal Aid should be envisaged for both the formal and informal (traditional) justice systems. In this respect, The Lilongwe Declaration recognizes that: *“Traditional and community-based alternatives to formal criminal processes have the potential to resolve disputes without acrimony and to restore social cohesion within the community. These mechanisms also have the potential to reduce reliance upon the police to enforce the law, to reduce congestion in the courts, and to reduce the reliance upon incarceration as a means of resolving conflict based upon alleged criminal activity. All stakeholders should recognise the significance of such diversionary measures to the administration of a community-based, victim-oriented criminal justice system and should provide support for such mechanisms provided that they conform to human rights norms”.*

However, in this Manual we only focus on Legal Aid in the context of the formal justice system, and only for criminal cases, bearing in mind that each case has the possibility to be settled amicably outside the formal justice system on the condition that this process does not put into jeopardy the interests of both the defendant and the victim.

8 As example see the UNDP Strategy for Legal Empowerment for Somaliland 2012-2014.

1.2. Why does Legal Aid matter?

The rationale for the provision of Legal Aid in each era is closely linked to the social, political and legal philosophy of the time. Within the rights discourse, it is recognized that no meaningful development can ensue without the simultaneous availability of access to legal services that can be utilized to enforce all generations of rights, and thus ensure the empowerment of all persons in society. Springing from this premise, the concept of access to justice has attained the status of a right in society today as it promotes the establishment of a legal culture that contributes to development processes. Inability to access affordable Legal Aid services increases feelings of social exclusion and powerlessness.

In the case of Africa⁹, Legal Aid must be considered as a necessity given the origin of the criminal justice system and the context of operation, which is characterized by low levels of literacy, high incidences of poverty, and a sizeable distance between the criminal justice system and its users. By design, the provision of Legal Aid services is meant to assist the socially and economically disadvantaged. Poor members of society with negligible access to legal services are often disproportionately represented in the criminal justice system. The reality in many countries is that, while those with education do commit crimes, they are more likely to know their rights, and to be able to successfully defend themselves or cheat the system on the basis of their wealth. Legal Aid secures the rights of all who come into contact with the law, irrespective of their social or economic status.

Legal Aid benefits arrested persons by providing a mechanism to establish their innocence. Those accused of a crime get a fair trial under a legal standard that society can trust. When this occurs, Legal Aid benefits the victims by providing them with a legal system that addresses the gravity of the crime and the conviction of the right person. Perpetrators are also assisted. Where this fails, the results can be drastic.

The provision of basic justice services helps poor people to feel more secure in their jurisdiction and increases their confidence in the justice system. In general terms, according to the Lilongwe Declaration¹⁰, the immediate societal benefits of providing effective Legal Aid include the elimination of unnecessary detention, speedy processing of cases, fair and impartial trials and the reduction of prison populations.

The societal benefits of effective Legal Aid alluded to in the Lilongwe Declaration include:

- Speedier hearing of cases and reduced hardship to the accused and their victims' relatives
- Improved case management
- Reduction of case backlog and breaking down the remainder into manageable numbers
- Substantial savings to the judiciary in terms of judge days and the costs spent trying cases.

According to the UN Principles and Guidelines on Access to Legal Aid in criminal justice systems *“Legal Aid plays an important role in facilitating diversion and the use of community-based sanctions and measures,*

⁹ UNODC, (2011) *Handbook on improving access to legal aid in Africa*, p.10.

¹⁰ The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, Lilongwe, Malawi, November 22-24, 2004.

including non-custodial measures; promoting greater community involvement in the criminal justice system; reducing the unnecessary use of detention and imprisonment; rationalizing criminal justice policies; and ensuring efficient use of State resources”.

Especially for detained persons it is underlined that Legal Aid (both at pre-trial and post-sentencing stages) should be more enforced, since many prisoners are detained for lengthy periods of time in inhumane conditions without access to Legal Aid. Half of those who are detained at the pre-trial stage could be set free with the assistance of a lawyer or a paralegal.

Paralegal services in prisons should include:

- Legal education of prisoners so as to allow them to understand the law and the process, so that they may apply this learning to their own case;
- Assistance with bail and the identification of potential sureties;
- Assistance with appeals;
- Special assistance to vulnerable groups, especially to women, women with babies, young persons, refugees and foreign nationals, the aged, the terminally and mentally ill etc.

1.3. Responsibilities of Legal Aid providers

The UN Basic Principles on the Role of Lawyers sets out the duties of lawyers in broad terms:

- To advise clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to those rights and obligations;
- To assist clients in every appropriate way, taking legal action to protect their interests;
- To seek to uphold human rights and fundamental freedoms; and
- To loyally respect the interests of their clients.¹¹

These Principles serve as an important general statement of the role of Legal Aid providers. However, it is important to know that the main role and functions of Legal Aid providers is to deliver early access to Legal Aid, especially to suspects and accused persons in police custody or in other detention facilities, which may involve a number of particular challenges.

Persons who are arrested or detained are, as a result of that fact, in a vulnerable situation, but their vulnerability may be made worse because of their personal circumstances or because of the conditions in which they are detained, and this may manifest itself in a number of ways.

They are likely to be worried about the circumstances in which they find themselves, may not understand why they have been detained or what may happen to them, may be suffering from ill-health or the consequences of being physically or mentally abused, may be experiencing the effects of drug or alcohol abuse, or may

¹¹ *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, 27 August - 7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), Principles 13-15.

be suffering from ill-health. If they are a child, or have special needs, they will be even more vulnerable. As a result, the suspect or accused person may be suspicious of, or hostile towards a Legal Aid provider, their behaviour may be challenging and unpredictable, or they may be withdrawn or unable to understand what the Legal Aid provider is trying to do, what they are saying, or the significance of their advice.

The police or other officials involved in a person's detention may be hostile to the presence of, or intervention by, the Legal Aid provider; may treat them without respect, or may simply try to ignore them. On occasions they may even be threatening towards the Legal Aid provider.

The role of a Legal Aid provider in delivering early access to Legal Aid is to protect and advance the rights and legitimate interests of their clients. In doing so, the Legal Aid provider should:

- Loyally respect, and take any necessary actions to further, the interests of clients, having particular regard to their age, gender, ethnicity, or sexual orientation;
- Seek to ensure that their clients know and understand their rights;
- Seek to ensure that their clients are treated with dignity, that their human rights are respected, and that they are treated in accordance with the law;
- Provide advice and assistance to, and (as appropriate), representation for, their clients, taking into account their particular needs and any relevant vulnerability;
- Seek to ensure that the decisions of their clients are respected;
- Challenge, in an appropriate way, unlawful or unfair treatment of their client, and
- Seek to ensure that clients continue to receive legal advice, assistance and representation until their case is finally disposed of, including in any appeal.

In carrying out his/her role, a Legal Aid provider should take the following main steps, broadly set out in chronological order:

- Quick and appropriate response to a Legal Aid request.
 - A *quick* response is necessary for two reasons. First, having exercised their right to Legal Aid, the suspect will not know, and normally will not be told by the police, what has happened in response to their request. Delay will increase their vulnerability. Suspects may doubt that they will receive Legal Aid, particularly if they have not been arrested or detained before or the right to Legal Aid has only recently been introduced, or they may believe that any delay will prolong the period they spend in detention (a belief that may be encouraged by the police). As a result, they may change their mind about exercising their right to Legal Aid. Second, delay may be used by the police as a reason to proceed with an interview without the suspect having received legal advice.
 - An *appropriate* response refers to the method by which legal advice and assistance is provided (in particular, whether by telephone or in person), which should correspond to the needs and circumstances of the suspect (for example, whether they are a child or otherwise vulnerable), the nature and seriousness of the suspected offence or offences, and contextual factors including the prevalence of ill-treatment or bribe-taking by the police.

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- Gathering relevant information from the police:
 - about the reasons for, and circumstances surrounding, the arrest and/or detention;
 - about the evidence that is already in the hands of the police or other authorities¹², and the likely course of the investigation.
 - Gathering information from the client about their personal circumstances; about the circumstances of the arrest or detention, and about the alleged offence or offences.
 - Determining vulnerabilities and special needs¹³, including: verifying whether they are a child; determining whether they speak or understand the language in which the proceedings will be conducted, and whether they can read relevant documentation; determining whether they have any other relevant vulnerability; and taking any appropriate action.
 - Checking the legality of actions taken by the police and authorities.
 - Advising the client before, during, and after the interview.
 - Ensuring appropriate representations at any subsequent court hearing, and particularly at a pre-trial detention hearing. Liaising with the client's family and other people (subject to the consent of the client).
 - Recording all relevant information.

12 According to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, providers should be given access to the case file of the detained person, although both international courts and domestic laws have adopted a more limited approach to what is required to be disclosed during the early stages of the criminal process. For example, whilst the ECtHR has held that the prosecution authorities should disclose to the defence all material evidence for and against the accused (ECtHR 16 December 1992, *Edwards v. United Kingdom*, No. 13071/87), there is no specific case-law clarifying at what point the information should be disclosed. However, it has held that the accused should be given access to those documents in the investigation file that are essential in order to effectively challenge the lawfulness of pre-trial detention (ECtHR 9 July 2009, *Mooren v. Germany*, No. 11364/03). This is reflected in the EU Directive on the right to information in criminal proceedings, Directive 2012/13/EU, 22 May 2012, art. 7(1).

13 See Part 3 of the Manual.

Chapter 2: Legal Framework on Legal Aid

Learning objectives

Participants will become aware of:

- The International legal Framework on Legal Aid;
- The regional legal Framework on Legal Aid, and
- The national legal Framework on Legal Aid.

Legal Aid provision is guided by existing legal frameworks at both the national and international levels. The principle of Legal Aid is safeguarded by the Constitution in Somaliland. Several provisions referring to the right of defence contained in various legal texts also apply. At supranational level, even if there are no binding texts on Legal Aid, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems should be respected, together with texts that have arisen from the Somaliland's commitments at international and regional levels.

2.1. International instruments on Legal Aid

International law recognizes the essential role played by defense attorneys in protecting fundamental freedoms and human rights. Among the binding international instruments that contain provisions on Legal Aid are:

- The International Covenant on Civil and Political Rights¹⁴,
- The Convention on the Rights of the Child¹⁵,
- The Convention on the Elimination of All forms of Discrimination against Women¹⁶, and
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁷

The above texts establish the right to Legal Aid and are binding for those States that have ratified them.

14 Adopted by the UN General Assembly on December 16, 1966 and in force since March 23, 1976.

15 Adopted and opened for signature, ratification and accession by the UN General Assembly resolution 44/25 of 20 November 1989 and in force since September 2, 1990.

16 Adopted by the UN General Assembly on December 18, 1979 and in force since September 3, 1981.

17 Adopted by the UN General Assembly on December 10, 1984 (resolution 39/46). The Convention entered into force on June 26 1987.

The International Covenant on Civil and Political Rights (ICCPR) guarantees the right to a defense attorney under Article 14.3 (d):

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”.

The main international texts that focus on Legal Aid (but are of a non-binding character) are:

- The 2012 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems¹⁸ and
- The UN Basic Principles on the Role of Lawyers of 1990.¹⁹

Of course, apart from the above-mentioned two instruments on Legal Aid, many other international instruments of a non-binding character contain provisions on the right to legal assistance, such as the *Universal Islamic Declaration of Human Rights*²⁰ which holds that, “No person shall be adjudged guilty except after a fair trial and after reasonable opportunity for defence has been provided to him” (Article V (b)), a principle that is echoed in the Arab Charter on Human Rights (Article 7).²¹ Many other texts of a non-binding character contain such provisions, such as the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*²² (Art.18).

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems present a comprehensive instrument for a State to follow in its effort to draft a specific policy and legislation on Legal Aid.

One of the first principles is that Legal Aid should be provided at no cost for those without sufficient means or when the interests of justice so require.

According to the above UN Principles and Guidelines, Legal Aid should also be provided, regardless of the person’s means, if the interests of justice so require, for example in the case of urgency, complexity or the severity of the potential penalty.

18 Adopted by the UN General Assembly on December 20, 2012.

19 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, from August 27 to September 7, 1990. The right of all persons to “the assistance of an attorney of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings” is the first principle in the United Nations Basic Principles on the Role of Lawyers.

20 Adopted by the Islamic Council in Paris on September 19, 1981/ 21 Dhul Qaidah 1401.

21 The Charter was adopted by the Council of the League of Arab States on May 22, 2004 and entered into force on March 15, 2008. The Charter affirms the principles contained in the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Human Rights and the Cairo Declaration on Human Rights in Islam.

22 Adopted by the UN General Assembly on December 9, 1988, A/RES/43/173: <http://www.un.org/documents/ga/res/43/a43r173.htm>.

Furthermore, Legal Aid plays an important role in facilitating diversion and the use of community-based sanctions and measures, including non-custodial measures; promoting greater community involvement in the criminal justice system; reducing the unnecessary use of detention and imprisonment; rationalizing criminal justice policies, and ensuring efficient use of State resources. Legal Aid needs to be expressly provided for persons through alternative dispute resolution mechanisms and restorative justice processes with no exception of gender, age, or any other element.

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems do not endorse any specific model, but encourage States to guarantee the basic right to Legal Aid of persons suspected, arrested, accused or charged with a criminal offence, detained or imprisoned, others who come into contact with the criminal justice system.

The UN Principles and Guidelines are based on the recognition that States should undertake a series of measures that, even if not strictly related to Legal Aid, can maximize the positive impact that a properly working Legal Aid system may have on a properly functioning criminal justice system and on access to justice.

Recognizing that certain groups are entitled to additional protection, or are more vulnerable when involved with the criminal justice system, the UN Principles and Guidelines underline the need to provide specific provisions for women, children and groups with special needs (point 12 of UN Principles and Guidelines Preambular Part).

Since access to a defence counsel is a fundamental element of the basic human right to a fair trial, provisions of international texts on human rights also apply on Legal Aid, even if they do not expressly refer to Legal Aid, provided they refer to the fair trial principle.

Especially for detained persons and children in conflict with the law, the following texts should be taken into consideration:

- The 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment;
- The 1955 UN Standard Minimum Rules for the Treatment of Prisoners;
- The UN procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners (adopted by Council Resolution 1984/47);
- The 1989 UN Convention of the Rights of the Child and its relevant Protocols;
- The 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules or JDL);
- The 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules);
- The 1990 United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules);
- The 1997 UN Guidelines for Action on Children in the Criminal Justice System (Recommended by ECOSOC resolution 1997/30 of July 21 1997);
- The 1988 Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;

- The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders - Resolution 65/229 adopted by the General Assembly on March 16 2011 (the Bangkok Rules);
- Recommendation Rec(2008)11 of the Committee of Ministers of the Council of Europe on the European Rules for juvenile offenders subject to sanctions or measures, which was adopted on November 5 2008;
- Recommendation Rec(2006)2 on the European Prison Rules;
- Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder.

2.2. Regional instruments on Legal Aid

At a regional level, besides the African Charter on Human and Peoples' Rights²³, the African Commission on Human and Peoples' Rights (containing membership of all African countries except Morocco) adopted a series of principles and guidelines governing Legal Aid, which include:

- The Kampala Declaration on Prison Conditions in Africa²⁴ (1996) and Plan of Action (1997);
- The Kadoma Declaration on Community Service Orders in Africa²⁵ and Plan of Action (1997);
- The Dakar Declaration and Recommendations²⁶ (1999);
- The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa²⁷ (2001),
- The Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa and Plan of Action²⁸ (2002),
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa²⁹ (2003),
- The Lilongwe Declaration and Plan of Action³⁰ (2004)
- The Resolution of the African Charter of Fundamental Rights of Prisoners adopted by the African Regional Preparatory Meeting for the Eleventh United Nations Congress on Crime Prevention and Criminal Justice (Addis Ababa, March 2004), and

23 Adopted in Banjul on June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) and entered into force Oct. 21, 1986.

24 Adopted between 19 and 21 September 1996.

25 Adopted during the International Conference on Community Service Orders in Africa held in Kadoma, Zimbabwe from 24 to 28 November 1997.

26 The Resolution on the Right to a Fair Trial and Legal Assistance in Africa was adopted in Dakar, Senegal, from 9 to 11 September 1999 and were then adopted in a Resolution by the African Commission on Human and Peoples' Rights at its 26th Ordinary Session in November 1999.

27 Adopted by the African Commission on Human and Peoples' Rights, by DOC/OS(XXX)247.

28 The African Commission on Human and Peoples' Rights adopted the Declaration with its Resolution 64 in its 34th Ordinary Session held in Banjul, the Gambia from 6 to 20 November 2003.

29 Adopted by the 2nd Ordinary Session of the Assembly of the Organisation of African Unity, Maputo, CAB/LEG/66.6 (Sept. 13, 2000).

30 Adopted during the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa between 22 and 24 November 2004 in Lilongwe Malawi.

- The Abuja Declaration on Alternatives to Imprisonment³¹ (2000).

Other regional texts, such as the African Charter on the Rights and Welfare of the Child (July 1990)³², contain related provisions referring to the obligation of the States parties to ensure that every child accused of infringing the penal law is afforded legal assistance in the preparation and presentation of his defence (Article 17).

According to the Dakar Declaration (Article 9), access to justice is a paramount element of the right to a fair trial. Most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees. It is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective. The contribution of the judiciary, human rights NGOs and professional associations should be encouraged.

Further, the Lilongwe Declaration recognizes the right to Legal Aid in criminal justice, and broadens Legal Aid beyond the notion of legal advice and representation. The Declaration emphasizes the need to sensitize all criminal justice stakeholders to the crucial role of Legal Aid. It fosters the development and maintenance of a just and fair criminal justice system. The societal benefits that result from the elimination of unnecessary detention, the speedy processing of cases, fair and impartial trials, and the reduction of prison populations, are significant for a State.

The Declaration requires access to Legal Aid at all stages of the criminal justice system, including investigation, arrest, pre-trial detention and bail hearings, in addition to trial and appeal processes.

In line with the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, and the Lilongwe Plan of Action for the implementation of the Declaration, Legal Aid should follow a broad concept as followed by the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

2.3. National framework on Legal Aid

Somaliland inherited a body of law that encompasses both common law and civil law principles, and in both cases Al-Shari'ah and Xeer law continue to apply alongside the formal law. Somaliland has also adopted its own Constitution, which is now the supreme law of the land. These legal regimes are often overlapping and contradictory to each other, causing serious problems in terms of legislative clarity and predictability. It also needs to be underlined that the Somaliland is well-intentioned in terms of ratification of international norms and principles, but severely constrained in terms of resources and implementation capacity.

At present, the following legal instruments of Somaliland contain provisions related to Legal Aid:

- The Constitution of 2000;
- The Lawyers Act (Law No. 30/2004);

31 The Abuja declaration results from a national conference on alternatives to imprisonment held in Abuja between 8 and 10 February 2000.

32 OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

- The Criminal Procedure Code;
- The Law on the Organization of the Judiciary (Law number 24/2003);
- The Prisons Act (2012);
- The Juvenile Justice Law (Law number 36/2007), and
- The professional Code of Conduct of the Legal Aid Lawyers.

In addition the expected texts:

- The Legal Aid Act;
- The Code of Conduct for Lawyers,
- The Legal Aid Policy.

2.3.1 The Constitution of Somaliland

The right to free Legal Aid is safeguarded by Art. 28 (para. 3) of the Constitution of 2000 providing that: *“The state shall provide free legal defence in matters which are determined by the law, and court fees may be waived for the indigent”*. This particular right derives from the right to sue and defend in the context of which every person has the right to defend himself in a court (Art.28, para 2 of the Constitution).

The above article also applies in relation to other provisions of the Constitution which safeguard the fundamental principles of law, as well as the rights and liberties of persons such as: the principle of legality of sanctions (Art.26, para 1), the presumption of innocence (Art.26, para 3), the right to liberty (Art.25) and the rights of persons deprived of their liberty (Article 27).

The defence lawyer is needed to stand by the side of the accused person, to make sure that the implementation of the above provisions guaranteeing his/her rights during the procedure are respected by the authorities.

2.3.2. The Lawyers Act (Law No. 30/2004)

The Lawyers Act does not contain any specific provision on Legal Aid. However, some provisions apply to lawyers who offer Legal Aid, since the Lawyers Act is a more general instrument. In drafting the Legal Aid Act, one should have in mind the following provisions to check if they comply with both the international instruments and with each other.

Article 18, related to the duties and responsibilities of lawyers, provides that:

1. Lawyers shall have the obligation to apply and obey the national laws and provisions of this law;
2. Serve honestly and diligently his profession to his clients, and
3. Pay clearly the commission and taxes imposed by the law.

Article 20 on the rights and immunity of the lawyer holds that:

1. In addition to the fundamental rights of citizens, a lawyer shall have the right to be professional lawyer;

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2. Lawyers may not be arrested, restricted unless they commit a flagrant offence or the license and discipline committee authorize it, and
 3. May not be subject to search and seizure in his office, houses, correspondences and communications unless by order of the judge who has the investigating case authorizes it with reasons.

Article 14, para 1, foresees the possibility of the cancellation of the lawyer's license:

1. When one of the criteria is violated;
2. When it is proved that the license is acquired in fraud and
3. When it is proved that he works as a lawyer while he is suspended.

Article 14, para 2, foresees the possibility of *suspension* of the lawyer's license for the following reasons:

1. When it is proved that he participated in a case for which he has no permission, and
2. When the license is not renewed for the last two years or he does not pay the taxes in clear manner.

Para 3 of the above provision holds that the licensing and discipline committee shall decide the disciplinary measures provided in this law, unless it is a serious offence, in which case the committee refers it to the judiciary institution to take the case before the competent court.

Related, of course, to Legal Aid is the provision that foresees for disciplinary measures and provides for sanctions for lawyers who do not perform their duties correctly (Article 13). However, the entire Lawyers Act is to be amended, and specific provisions with regard to Legal Aid should be developed in the Legal Aid Act.

2.3.3. The Criminal Procedure Code (Legislative Decree No 1 of June 1, 1963)

The CPC (Art.15, para 1) foresees the principle of defence for the accused person: "*The accused may be defended by one or more defence counsel*".

Legal Aid is expressly provided in para 2 of Art.15, stating that in cases of serious crimes, where the punishment is life imprisonment, imprisonment of 20 years or more, or death penalty (cases indicated in Art.14 para 2 subpara (b) of the Law on Organisation of Judiciary of 1962³³), and in case the accused has not appointed his own lawyer, the State has the obligation to appoint *ex officio* a defence counsel to the accused. If the accused person cannot afford to, the government is obliged to pay the costs of the legal representation.

Further, Art.15, para 4, provides that two or more accused may be represented by a single defence counsel where there is no conflict of interests, while the injured party may be represented only by one counsel (para 6).

More principles and rights related to defence are contained in the other paragraphs of Art.15 for both the accused and the injured party, such as:

- The right for an accused who has been arrested to confer freely with his defence counsel at all stages of the proceedings (para 5).

33 It has been replaced by the Law of 1974.

The right to representation (the possibility for a counsel to act on behalf of and appear for the party he represents), except when the party must appear in person (para 7). The precise duties of a defence counsel are described in Art.16, para 1, that provides that:

“A defence counsel shall not, without reasonable cause, abandon his duties as a defence counsel nor absent himself from hearings in Court in such a way that the accused is deprived of legal assistance.”

Para 2 of Art.16 foresees the sanctions for the above behaviour of the defence counsel: if any defence counsel violates the provision of paragraph 1 of this Article,

“the Court may order him/her to:

- a) pay a sum of money not exceeding Sh. So. 5,000/- to the accused as compensation;*
- b) pay a sum of money, not exceeding Sh. So. 2,000/- to the State Treasury; or*
- c) be suspended from practicing his profession for a period not exceeding one year.”*

The above provision applies together with the disciplinary sanctions provided for the same behaviour.

Para 3 of Art.16 concerns the injured party and the case where a legal counsel has abandoned his duties. In that case, it is provided that this *“should not in any case prevent the proceedings from continuing”*.

Other articles of the CPC are relevant to Legal Aid, such as:

- **Article 91(c) of the CPC**, which provides for the nullity of the procedure if the representation of the accused is not covered correctly, in cases where representation is mandatory. The observance of this provision is mandatory, which means that failure renders the proceedings null and void.
- **Article 98 of CPC** concerning the behaviour of persons attending a hearing, and
- **Article 177 of CPC** regarding clients’ confidential material which legal practitioners are not permitted to disclose, unless with the express consent of their client (any matter which was communicated to them in confidence; or any matter which came to their knowledge in the course of their duties as legal practitioners).

2.3.4. The Law on the Organization of the Judiciary (Law number 24/2003)

The principle of Legal Aid is contained in Article 4 Para.2 of the Law on the Organization of the Judiciary, which relates to the Right to Defence:

- 1. Every person shall have the right to submit a case to the court of jurisdiction in accordance with the law.*
- 2. Every person shall have the right to defend himself before the court in the case submitted against him.*
- 3. In cases of serious crimes where the law requires the presence of a defence counsel, the State shall provide a private lawyer for individuals who cannot afford a private lawyer, to have a defence counsel. Similarly, poor people may be exempt from court fees in civil cases.*
- 4. The chairperson of the court shall determine the person in need of Legal Aid and court fee exemption.*

5. *In order to determine the court fee exemption, the following rules shall be followed:*
 - a) *The person who requests the court fee exemption shall apply in writing to the chairperson of the court.*
 - b) *And shall present two witness to witness his economical status.*

Article 20 of the above law fixes the number of advocates for both the accused and the injured party:

1. *Both parties to any case may have an experienced private lawyer (advocate) to represent them before the court.*
2. *Persons accused of criminal offences punishable with capital punishment, life imprisonment or imprisonment for more than 10 years shall be represented by a private lawyer who shall defend them before the courts.*
3. *Litigation at the Supreme Court and the Constitutional Court shall be conducted only by private lawyers (advocates).*
4. *Custodians of the accused persons who lose his/her liberty shall be allowed the access to have a private lawyer who will assist in trial, pending the investigation.*
5. *The detained person shall not be compelled to write a statement of confession in the absence of a private lawyer (advocate), and shall be allowed to meet with the private lawyer independently.*

Further, Article 36 relates to Legal Aid since it allows access to courts, which is the prerequisite for Legal Aid to exist. Art. 36, para 1, provides that “*every person has the right to have a court in the nearest location for complaints and cases*” and para 2 provides that “*every district of Somaliland has the right to have a District Court*”.

However, the problem is that there are not enough courts in Somaliland, rendering this Article void, excepting the establishment of courts in every district throughout Somaliland in the future.

2.3.5. The Prisons Act 2012

The Prisons Act, the Prison Regulation, and the Policy of Hargeisa Prison, are currently under pending. The draft Prisons Act of 2012 (replacing the Prisons Act of 1971) does not directly provide for Legal Aid, however it leaves room to further develop the existing provisions.

In the framework of the right of prisoners to receive visits, Art.46 of the Prisons Act provides that each prisoner is allowed to receive visits from a legal practitioner (among other persons). Art. 42 focuses on this type of visit (by a legal practitioner), and provides that a legal practitioner can, for the purposes of a pending court proceeding or for any “*bona fide purpose interview a prisoner who is his client at a reasonable hour, or as otherwise authorised by the Commanding Officer, within the view but not the hearing of a prison officer*”.

Further, Art.75 para 3 allows the prisoner to have legal representation during the disciplinary proceedings: “*A prisoner must be fully informed of the alleged disciplinary offence and given a proper opportunity to present his or her defense, including the right of appeal to the Commandant*”.

Given the general formulation of the provision, the fact that it only refers to the “*defence*” provides the possibility for the prisoner to appear with a defence counsel.

Unfortunately, up to now, these provisions have not been developed in a way to allow for the more specific inclusion of Legal Aid. Even the Somali Prison Regulations, as agreed in Djibouti on June 22, 2012, do not contain more detailed provisions on this issue. Art.78 of the Regulation copies Art.42 of the Prisons Act on visits by the legal practitioner.

In addition to the above, it is noted that, even if some scattered provisions on the disciplinary procedure against penitentiary officers are contained in the prison’s Regulation, there is no provision on the possibility for the prisoner to appear with a defence counsel during the disciplinary procedure held against the penitentiary officer whose behaviour/act may have violated the prisoner’s rights.

2.3.6. The Juvenile Justice Law (Law number 36/2007)

Legal Aid is not expressly included in the Juvenile Justice Law. Only the right to a defence counsel is mentioned in some provisions.

Article 14 provides that it is the responsibility of the judge to provide a lawyer for a child in conflict with the law (Art.14.3) to assist the child that is unable to express his views, and provides the possibility for the lawyer to attend in-court hearings (Art. 14.4: “*the lawyer provided in the proceeding article shall not be absent from the court hearings*”). Article 44 relates to the complaint procedures, and provides the possibility for the legal representative (together with the parents and guardians of the child) to expose the complaints of the child (Art.44.1). Article 9.1(d) of the Juvenile Justice Law provides for the right of the child “*to have legal counsel and to communicate with his/her legal advisers freely*”.

However, in the way Article 14 is formulated, it gives the impression that if the child can communicate his/her views, a lawyer is not needed; and this is also understood from the fact that the presence of a lawyer is not considered compulsory for the entire procedure. From the formulation of Art.60 (related to persons allowed to attend the preliminary hearing), it appears that the legal representative (Art.60.1[g]) of the child may be other than an attorney (Art.60.1[d]), which leads to the question: why should a child not be allowed to have a lawyer’s assistance during the entire procedure?

There is no provision directly providing for Legal Aid in child cases even for serious crimes as in the CPC for adults. However, one can understand that since there is no age limit set in the CPC, its provisions can apply jointly if there is no specific provision in the Juvenile Justice Law contradicting it.

There is no provision either for the presence of a legal counsel during the diversion procedure (Part V of the Juvenile justice Law).

Questions

1. *What are the mandatory duties in relation to publicly-funded legal services under domestic law?*
2. *What criminal services do you provide? In particular, what services do you provide prior to a suspect being charged, and during interrogation by the police?*
3. *How do publicly-funded services interrelate with other forms of dispute resolution?*
4. *Do you accept a need to provide information and public legal education?*
5. *What do you consider to be the best scheme for delivery of criminal services? Do you favour private practitioners, salaried practitioners, some form of 'public defender organisation', or some combination of the above? What are the advantages and disadvantages of each system?*
6. *What body should manage publicly-funded legal services?*
7. *How should responsibilities for management and policy be divided?*
8. *Which government department is responsible for Legal Aid policy, and how do you ensure that it obtains sufficient information about what is the effect of policy on the ground?*
9. *What should be the mechanisms for accountability of the managing body?*
10. *Do you value the co-operation of the existing legal profession and, if so, how do you obtain it?*
11. *What provisions assure the quality of Legal Aid?*
12. *How do you ensure that policy on legal services integrates within a wider access to justice policy?*

Chapter 3:

Principles and Safeguards on Legal Aid

Learning objectives

The participants will:

- become aware of the safeguards for the protection of both the lawyers and the defendants;
- understand the main principles concerning Legal Aid;
- understand the main principles concerning lawyers' ethics;
- become aware of building and maintaining trust with the client;
- become aware of how to initiate the interview with the client;
- become aware of how to avoid conflicts of interest, and
- become aware of issues of client complaints against the lawyer.

The principles of law are an important source of law, but are also the minimum basis on which the criminal procedure should rely. They should be established by the law and respected by the judiciary, law enforcement agents, and legal defenders, in order to support the correct performance of their duties and protect their clients from arbitrary decisions.

The safeguards may be classified as follows:

- those that protect the lawyers so that they may freely perform their duties with independence and security;
- those that protect the defendant, ensuring fair trial and the presumption of innocence, and
- those that should be respected by lawyers and Legal Aid providers vis-à-vis their clients and are those that concern their ethics.

3.1. Safeguards for the protection of lawyers

3.1.1. Independence of Legal Aid Providers

The first guarantee according to the UN Basic Principles on the Role of Lawyers³⁴ is the independence of the Legal Aid provider:

“Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.” (point 16).

³⁴ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7 1990.

Practice Problems-One:

- *Who must the advocate be independent from?*
- *Why is independence required?*

3.1.2. Security to perform legal duties

The security of Legal Aid providers should be safeguarded at all levels by the authorities, in order for them to adequately perform their duties (UN Basic Principles on the Role of Lawyers, Point 17).

Security comprises protection from immediate threats to the physical integrity of legal providers, and protection from threats or any type of intimidation related to their representation of a client. Lawyers are, unfortunately, often identified with their clients' causes as a result of which they may be harassed or their life and/or physical integrity be threatened. On this issue, the UN Basic Principles on the Role of Lawyers state that:

- *“Lawyers should not be identified with their clients or their clients' causes as a result of discharging their functions.” (Point 18).*
- *“No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.” (Point 19).*

Further, security relates to the immunity of lawyers. According to the UN Basic Principles on the Role of Lawyers:

“Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.” (Point 20).

3.2. Safeguards for the protection of the defendant

The right to defence expresses a principle of protection of the accused person which is common in every civilised nation.

According to the prevailing reading of the International Covenant on Civil and Political Rights (ICCPR), the right to counsel applies to all stages of criminal proceedings, including the preliminary investigation and pre-trial detention.

This right is very closely related to the presumption of innocence, and it is considered not only to comprise the right to legal assistance, but also the right to be promptly informed of all charges³⁵; the right to have

³⁵ ECtHR, *Brozicek v. Italy*, 19.12.1989, Series, no 167.

enough time to prepare a defence³⁶; the right to be informed of all information contained in the file; the right to defend oneself, and the right to examine witnesses.³⁷

3.2.1 Access to justice

Access to justice does not only mean the possibility of the defendant to have access to a competent court and a fair trial, but also to be promptly represented by a lawyer. According to the UN Basic Principles on the Role of Lawyers it also means that the competent authorities have the duty “*to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.*” (Point 21).

The right to the *presence of a defence counsel*, according to the interpretation of this international guarantee, means that an accused person should first have the possibility to have access to a lawyer from the initial stage of the criminal proceedings; so even from the time the person is only considered as a suspect and at the moment of police arrest.³⁸ The defence counsel should preferably be a *qualified professional*.

The European Court for Human Rights is of the opinion that “*it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation*”.³⁹ This is also related to the right of the accused to remain silent.

In many areas, assumptions exist that an innocent person does not need a lawyer and so that only the guilty person hires one.

As for the right to be promptly informed of all charges, we should first note that this is crucial to the defence of the accused. “*An indictment plays a crucial role in the criminal process, in that from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him/her*”.⁴⁰ The importance of this right is especially relevant during the detention, where it is not only important to be informed of the charges, but to be promptly informed. The meaning of this is that the defendant should be informed of the charges *without delay*, which may result in a longer period of informal detention.

In addition, the right to be promptly informed of all charges also includes the right to be informed in a language that the defendant understands, and in that sense it relates to the right to have an interpreter.

36 ECtHR, *Deweert v. Belgium*, 27.2.1980, Series, no 35.

37 According to the ECtHR a State should enable the accused to examine or have examined witnesses against him. See, ECtHR, *Barbera, Messegué and Jabardo v. Spain*, 6.12.1988, Series A, no 146, p.33-34; ECtHR, *Sadak v. Turkey*, 10.7.2001, Applications no 29900 and 29903/96, para 67; ECtHR, *Luca v. Italy*, 27.2.2001, Application no 33354/96, para 41.

38 ECtHR, *John Murray v. U.K.*, 8.2.1996, Reports of Judgments and Decisions, 1996-I, p.54, where the Court has accepted violation of the right to legal assistance because the accused has been refused legal assistance during his detention by the police. For a similar approach: ECtHR, *Goedhart v. Belgium*, 20.3.2001, Application No 34989/97.

39 *Ibid.*

40 ECtHR, *Kamasinski v. Austria*, 19.12.1989, Series A, no 168.

Sometimes the question of redefinition of charges might arise. The right to be informed includes not only the right to be informed of the cause of accusation (meaning the acts the accused is alleged to have committed and on which the indictment is based), but also, *in detail, the legal qualification of these acts*.⁴¹ It also includes the right to have *enough time for preparing ones defence*.⁴²

3.2.2. Due Process of Law

No legal process can be considered fundamentally fair without affording an opportunity for the parties to participate in a meaningful and effective manner. The right to meaningful participation, described under the Principle of Due Process of Law, comprises the recognised right of any person accused of an offence to benefit from a fair trial, which has a wide variety of aspects including both substantial and procedural safeguards. It has to be stressed that all procedural guarantees can be protected only with competent legal guidance. The principle of due process is considered to have the status of a peremptory norm, made up of components of the principle of equality (with its sub-principles of Equal Access to the Courts and to Justice; Equal Treatment by the Courts; and Equality of Arms) and the rule of law itself.

Many of the elements of due process come into force at the moment of arrest as guarantees of the defendant such as the presumption of innocence, the right to be informed of exact charges, the right to legal assistance, the right not to be forced to confess or to give incriminating evidence for himself. The trial is not deemed to be fair if these rights are violated.

The Constitution (Article 27) and the CPC (e.g. Articles 13, 15, 91.c, 150, 203, 209), guarantee the major procedural rights for the accused person together with the provisions of international texts on human rights.

However, in practice, police, prosecutors and judges often do not respect (or at times are not aware of) procedural rights, even when explicitly provided for in the law.

Procedural protections are frequently viewed as unnecessary, or as hindrances to investigations and convictions, rather than as protections against injustices (such as the prolonged detention of innocent people).

3.2.3. Presumption of innocence

The presumption of innocence is considered to be one of the major guarantees of the criminal procedure. The principle is safeguarded by Article 11, para 1, of the Universal Declaration of Human Rights, Article 14, para 2, of the International Covenant on Civil and Political Rights, and other international instruments. It is noted that in some international instruments it is expressly referred to as a right (as is the case in Article 11 of the Universal Declaration of Human Rights and of Article 14, para 2, of the International Covenant on Civil and Political Rights), while in others it is not expressly mentioned (for example, in Article 6, para 2, of the European Convention on Human Rights or in Article 48, para 1, of the Charter for Human Rights where there is no such reference).

41 ECtHR, *Pelissier and Sassi v. France*, Application no 25444/99.

42 ECtHR, *Deweert v. Belgium*, 27.2.1980, Series, no 35.

The principle also applies even if the crime is not considered punishable by effect of a mitigating fact, or a legal reason that leads to acquittal, or if there is a filing of the case.⁴³

In Somaliland, the principle is safeguarded by Article 26.3 of the Constitution, which provides that “*an accused person is innocent until proven guilty by a court*”. It is also safeguarded by Art. 13, para 2, of the CPC which states that a person accused of having infringed the penal law should be “*presumed innocent until the conviction becomes final*”.

Presumption of innocence is related to the burden of proof. It means that the accused (since presumed innocent) does not have to prove his innocence. On the contrary, it is the burden of the prosecutor, since he represents the State, to prove beyond any reasonable doubt that the crime has been committed and that the accused is the perpetrator of it.

The prosecutor must prove the case so that there is no doubt in the mind of the court, arising from the evidence presented to it, that would reasonably lead them to conclude that the defendant was not guilty of the allegations charged. The CPC provides two references (Art.110 and Art.163) to the burden of proof that the prosecution must satisfy to achieve conviction.

As indicated in a study conducted in 1993⁴⁴, sixty-seven countries of the world had included the presumption of innocence in their national constitutions.

The presumption works in practical ways to guarantee the protection of the defendant’s rights before a trial. In a criminal trial, the presumption of innocence is given force through the obligation of the prosecution to produce evidence of guilt, the defendant’s right to stand mute in the face of such accusations, and the prosecution’s burden to prove guilt beyond a reasonable doubt.

Presumption of innocence means that a person is presumed innocent *until proven guilty upon legal evidence and legally established evidence*⁴⁵, implying that the proof of guilt is established upon evidence taken by *legal* means and relying on *legal* rules of national law. As mentioned above, it means that *presumption (in the sense of assumption) of guilt is unacceptable*⁴⁶, until the precise criminal act is proven beyond any reasonable doubt. Unfortunately this principle is very often violated in practice, in favour of an easy establishment of guilt or of the rapidity of the process. Partly, presumption of innocence overlaps with the principle of impartiality.

However, neither the Constitution nor the CPC of Somaliland give the precise framework for the application of this principle. Even if the general wording of the Constitution is acceptable (since all Constitutions are

43 The case law of ECtHR considers the presumption of innocence as element of the general concept of fair trial as safeguarded in Article 6 para 1 of the European Convention of Human rights. ECtHR of 6.12.1988, Barberà, Messegué and Jabardo v. Spain, Collection Series, no 146.

44 See, M. Cherif Bassiouni, “Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions”, DUKE Journal of Comparative & International Law, (3) 1993, p.235.

45 See the decision of the ECtHR in Gäfgen v. Germany, 1.6.2010 (Application no. 22978/05).

46 See the decisions of the ECtHR in Minelli v. Switzerland, 25.3.1983, Series A, No 62; ECtHR, Salabiaku v. France, 7.10.1988, Series, No 141-A, para 27-28.

formulated in such way), Article 13, para 2, of the CPC appears to be problematic. This is obvious, because by providing that *“the accused is innocent until the conviction has become final”*, the CPC does not expressly prohibit that the conviction should not be based on illegal evidence and illegally established evidence. Even in Part II of the CPC regarding the production and effect of evidence, or in Art.203 regarding the admissibility of evidence, there is no prohibition or specification regarding the non-legality of evidence.

Notwithstanding the lack of a precise framework for the application of the principle, the prompt provision of competent legal assistance is one of the best means to honor the presumption of innocence.

Presumption of innocence is violated if, without the accused having previously had the opportunity to exercise his/her right to defence, a judicial decision concerning him/her reflects an opinion that he/she is guilty.

The greatest obstacle to the realization of an operative presumption of innocence lies in the extensive use of preventive detention or other forms of pre-trial incarceration. *Normally, according to the principle, preventive detention should be avoided.*

Massive pre-trial incarceration makes it almost impossible for the preparation of the defense, since access to the defendant is often limited in prison or jail. The defendant is unable to effectively contribute to the development of a defense strategy without access to witnesses and evidence that he may be the most capable to find.⁴⁷

- Scope of the principle:

The principle covers every person residing in the country (third nationals too) who are accused of committing any type of offence, and *extends especially to those not yet formally charged with a crime but without the funds to hire a counsel.* This means that the principle has effect from the moment of police arrest throughout the entire procedure, and until the issuance of an irrevocable decision on the case. The confession of the defendant, if taken by the use of force, violence or other means, constitutes inhuman or degrading treatment.⁴⁸ It is not permitted and it violates the principle. As a consequence the process is rendered null.

- False Evidence:

According to Article 291 of the Penal Code: *“Whoever, giving evidence as witness before the judicial authorities, affirms what is false or denies what is true, or conceals, wholly or in part, what he knows concerning the facts regarding which he is being questioned, shall be punished with imprisonment from six months to three years”.*

47 The Inter-American Court of Human Rights has found that prolonged pre-trial detention violates the presumption of innocence. See, *Suárez Rosero v. Ecuador*, reported (in English) in: *Inter-American Court of Human Rights* (: IACourtHR), Costa Rica, Judgment of November 2, 1997: Suárez Rosero Case, *Human Rights Law Journal*, (19) 1998, p.229, 238.

48 On the issue of questioning the defendant see below under the section of investigation for more details.

The elements involved in such an allegation comprise the following constituent parts, which must be proved for a successful prosecution to be properly undertaken:

- The offence may be committed by any person giving evidence as a witness before a formal court. The accused must be shown to have participated in that process.
- During the course of giving evidence, the accused must be shown to have stated as a fact something that the accused knows is not true; or
- During the course of giving evidence, the accused must deny as untrue information that the accused knows is in fact true, or
- During the course of giving evidence the accused conceals information and facts, about which the accused knows the truth and about which the accused has been questioned.

The principle purpose of court proceedings is to allow, as far as possible, the court of enquiry to find the truth of the situation that it is charged to examine. Enquiry by the court is through questioning and gathering evidence. Any purposeful and calculated acts to undermine, and render the justice process unreliable needs to be dealt with in this way.

Case law - one

ECtHR, Gäfgen v. Germany, 1.6.2010 (Application no. 22978/05)⁴⁹

[Excerpt]

[...]

11. On 27 September 2002 the applicant killed a boy, J., aged eleven, by suffocating him. J. was the youngest son of a banking family in Frankfurt-am-Main in Germany. He got to know the applicant, a law student, as an acquaintance of his sister. The applicant lured the child into his flat by pretending that the child's sister had left a jacket there.

12. After the murder of the child, the applicant deposited a ransom note at J.'s parents' place of residence stating that J. had been kidnapped and demanding one million euros. The note further stated that if the kidnappers received the ransom and managed to leave the country, then the child's parents would see their son again. The applicant then drove to a pond located on a private property, approximately one hour's drive from Frankfurt, and hid J.'s corpse under a jetty.

13. On 30 September 2002 around 1 a.m. the applicant picked up the ransom at a tram station. From then on he was under police surveillance. He lodged part of the ransom money into his bank accounts and hid the remainder of the money in his flat. That afternoon, he was arrested at Frankfurt-am-Main airport with the police pinning him face down on the ground.

14. After having been examined by a doctor at the airport's hospital on account of shock and skin lesions, the applicant was taken to the Frankfurt-am-Main Police Headquarters. He was informed by detective officer M. that he was suspected of having kidnapped J. and was instructed about his rights as a defendant, notably the right to remain silent and to consult a lawyer. He was then questioned by M. with a view to finding J. Meanwhile, the police, having searched the applicant's flat, found half of the ransom money and a note concerning the planning

⁴⁹ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99015#{“itemid”:\[“001-99015”\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99015#{“itemid”:[“001-99015”]}.).

of the crime. The applicant intimated that the child was being held by another kidnapper. At 11.30 p.m. he was allowed to consult a lawyer, for thirty minutes at his request. He subsequently indicated that F.R. and M.R. had kidnapped the boy and had hidden him in a hut by a lake.

15. Early in the morning of 1 October 2002, the Deputy Chief of the Frankfurt police, ordered an officer to threaten the applicant with considerable physical pain, and, if necessary, to subject him to such pain in order to make him reveal the boy's whereabouts. The detective officer thereupon threatened the applicant with subjection to considerable pain at the hands of a person specially trained for such purposes if he did not disclose the child's whereabouts. According to the applicant, the officer further threatened to lock him into a cell with two huge black men who would sexually abuse him. The officer also hit him several times on the chest with his hand and shook him so that, on one occasion, his head hit the wall.

16. For fear of being exposed to the measures he was threatened with, the applicant disclosed the whereabouts of J.'s body some ten minutes thereafter.

17. The applicant was then driven with M. and numerous other police officers to Birstein. Then, the applicant on the communicated order of the police officer in command and whilst being filmed, pointed out the precise location of the body. The police found J.'s corpse as indicated by the applicant.[...] An autopsy carried out on J.'s corpse on 2 October 2002 confirmed that J. had died of suffocation. [...]

19. Having returned to the police station, the applicant was then permitted to consult his lawyer.

20. In a note for the police file dated 1 October 2002, the deputy chief of the Frankfurt police stated that he believed that that morning J.'s life had been in great danger, if he was still alive at all, given his lack of food and the temperature outside. In order to save the child's life, he had therefore ordered the applicant to be threatened by the police officer E. with considerable pain which would not leave any injuries. He confirmed that the treatment itself was to be carried out under medical supervision. The Deputy further admitted that he had ordered another police officer to obtain a "truth serum" to be administered to the applicant. According to the note, the threat to the applicant was exclusively aimed at saving the child's life rather than furthering the criminal proceedings concerning the kidnapping. As the applicant had disclosed the whereabouts of J.'s body, having been threatened with pain, no measures had in fact been carried out.

21. A medical certificate issued by a police doctor on 4 October 2002 confirmed that the applicant had a hematoma (7 cm x 5 cm) below his left collarbone, skin lesions and blood scabs on his left arm and his knees and swellings on his feet. A further medical certificate dated 7 October 2002 noted that following an examination of the applicant on 2 October 2002, two hematomas on the applicant's left chest of a diameter of some 5 cm and 4 cm were confirmed, together with superficial skin lesions or blood scabs on his left arm, his knees and his right leg and closed blisters on his feet. According to the certificate, these discreet traces of injuries indicated that the injuries had been caused a few days before the examination. The precise cause of the injuries could not be diagnosed.

22. During subsequent questioning by the police on 4 October 2002, by a public prosecutor on 4, 14 and 17 October 2002, and by a district court judge on 30 January 2003 the applicant confirmed the confession he had made on 1 October 2002.

23. In January 2003 the Frankfurt-am-Main Public Prosecutor's Office opened criminal investigation proceedings against the deputy chief of the Frankfurt police, D., and detective officer E. on the basis of the applicant's allegations.

The applicant alleged that the treatment to which he had been subjected during police interrogation concerning the whereabouts of a boy, J., on 1 October 2002 constituted torture prohibited by Article 3 of the Convention. He claimed that he remained a victim of this violation. He further alleged that his right to a fair trial as guaranteed by Article 6 of the European Convention, comprising a right to defend himself effectively and a right not to incriminate himself, had been violated in that evidence which had been obtained in violation of Article 3 had been admitted at his criminal trial.

[..]

25. The applicant also lodged an alternative preliminary application seeking a declaration that owing to the continuous effect of the threat of violence against him on 1 October 2002, all statements which he had made to the investigation authorities should not be relied upon in the criminal proceedings. Moreover, the applicant sought a declaration that on account of the violation of Article 136a of the German Code of Criminal Procedure, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities because of the confession extracted was prohibited.

[..]

The procedural irregularity caused by the use of a prohibited method of investigation could only have been remedied if the applicant had been informed before his subsequent questioning that his earlier statements made as a consequence of the threat of subjection to pain could not be used as evidence against him. However, the applicant had only been instructed about his right not to testify, without having been informed about the inadmissibility of the evidence that had been improperly obtained. He had therefore not been given the necessary "qualified instruction" before making further statements.

[..]

31. However, the national court limited the inadmissible evidence to the aforesaid statements. It went on to dismiss the applicant's application for a declaration that on account of the prohibited investigation methods, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities as a consequence of the statements extracted from the applicant ought to be excluded from trial.

[..]

The European Court of Human Rights has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see *Chahal v. the United Kingdom*, 15 November 1996, § 79, Reports of Judgments and Decisions 1996-V, and *Labita*, cited above, § 119). The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *V. v. The United Kingdom* [GC], no. 24888/94, § 69, ECHR 1999-IX; *Ramirez Sanchez v. France* [GC], no. 59450/00, § 116, ECHR 2006-IX; and *Saadi v. Italy* [GC], no. 37201/06, § 127, ECHR 2008..).

In assessing the treatment to which the applicant was subjected on 1 October 2002, the Court notes that it is uncontested between the parties that during the interrogation that morning, the applicant was threatened by detective officer E., on the instructions of the deputy chief of the Frankfurt-am-Main police, D., with intolerable pain if he refused to disclose J.'s whereabouts. The process, which would not leave any traces, was to be carried out by a police officer specially trained for that purpose, who was already on his way to the police

station by helicopter. It was to be conducted under medical supervision. This was, indeed, established by the Frankfurt-am-Main Regional Court both in the criminal proceedings against the applicant and in the criminal proceedings against the police officers. Furthermore, it is clear both from D.'s note for the police file and from the domestic court's finding in the criminal proceedings against D. that D. intended, if necessary, to carry out that threat with the help of a "truth serum" and that the applicant had been warned that the execution of the threat was imminent.

As to its physical and mental effects, the Court notes that the applicant, who had previously refused to disclose J.'s whereabouts, confessed under threat as to where he had hidden the body. Thereafter, he continued to elaborate in detail on J.'s death throughout the investigation proceedings. The Court therefore considers that the real and immediate threats of deliberate and imminent ill-treatment to which the applicant was subjected during his interrogation must be regarded as having caused him considerable fear, anguish and mental suffering.

The Court has accepted the motivation for the police officers' conduct and that they acted in an attempt to save a child's life. However, it is necessary to underline that, having regard to the provision of Article 3 and to its long-established case-law, the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.

[..]

The applicant further submitted that his right to a fair trial had been violated, in particular, by the admission and use of evidence that had been obtained only as a result of the confession extracted from him in breach of Article 3⁵⁰.

[..]

However, himself had claimed previously that he had made a full and free confession even though he had recognised the risk that it would not have any (mitigating) effect on the trial court's judgment.

[..]

167. As to the use at the trial of real evidence obtained as a direct result of ill-treatment in breach of Article

50 In the same line with Art.3 of the European Convention on Human Rights, Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by the United Nations General Assembly on 10 December 1984 (resolution 39/46) and which entered into force on 26 June 1987, provides: "1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

3, the Court had considered that incriminating real evidence obtained as a result of acts of violence, at least if those acts had to be characterised as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law" (see Jalloh, cited in § 105). In its Jalloh judgment, the Court left open the question whether the use of real evidence obtained by an act classified as inhuman and degrading treatment, but falling short of torture, always rendered a trial unfair, that is, irrespective of, in particular, the weight attached to the evidence, its probative value and the opportunities of the defendant to challenge its admission and use at trial. It found a breach of Article 6 in the particular circumstances of that case.

168. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court reiterates that these are generally recognised international standards which lie at the heart of the notion of fair procedures under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfillment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, *inter alia*, *Saunders v. The United Kingdom*, 17 December 1996, § 68, Reports 1996-VI; *Heaney and McGuinness v. Ireland*, no. 34720/97, § 40, ECHR 2000-XII).

[...]

175. On the one hand, the exclusion of – often reliable and compelling – real evidence at a criminal trial will hamper the effective prosecution of crime. There is no doubt that the victims of crime and their families as well as the public have an interest in the prosecution and punishment of criminals, and in the present case that interest was of high importance. Moreover, the instant case is particular also in that the impugned real evidence was derived from an illegal method of interrogation which was not in itself aimed at furthering a criminal investigation, but was applied for preventive purposes, namely in order to save a child's life, and thus in order to safeguard another core right guaranteed by the Convention, namely Article 2. On the other hand, a defendant in criminal proceedings has the right to a fair trial, which may be called into question if domestic courts use evidence obtained as a result of a violation of the prohibition of inhuman treatment under Article 3, one of the core and absolute rights guaranteed by the Convention. Indeed, there is also a vital public interest in preserving the integrity of the judicial process and thus the values of civilised societies founded upon the rule of law.

[...]

The Court stated that the admission of evidence obtained by conduct absolutely prohibited by Article 3 might be an incentive for law-enforcement officers to use such methods notwithstanding such absolute prohibition. The repression of, and the effective protection of individuals from, the use of investigation methods that breach Article 3 may therefore also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole is rendered unfair. However, the Court considers that both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that

is, had an impact on his or her conviction or sentence.

[...]

179. The Court notes that, in the present case, the Regional Court expressly based its findings of fact concerning the execution of the crime committed by the applicant –and thus the findings decisive for the applicant’s conviction for murder and kidnapping with extortion– exclusively on the new, full confession made by the applicant at the trial. Moreover, that court also considered the new confession the essential, if not the only, basis for its findings of fact concerning the planning of the crime, which likewise played a role in the applicant’s conviction and sentence.

The additional evidence admitted at the trial was not used by the domestic court against the applicant to prove his guilt, but only to test the veracity of his confession. This evidence included the results of the autopsy as to the cause of J.’s death and the tyre tracks left by the applicant’s car near the pond where the child’s corpse had been found. The domestic court further referred to corroborative evidence which had been secured independently of the first confession extracted from the applicant under threat, given that the applicant had been secretly observed by the police since the collection of the ransom and that his flat had been searched immediately after his arrest. This evidence, which was “untainted” by the breach of Article 3, comprised the testimony of J.’s sister, the wording of the blackmail letter, the note found in the applicant’s flat concerning the planning of the crime, as well as ransom money which had been found in the applicant’s flat or had been paid into his accounts.

180. In the light of the foregoing, the Court considers that it was the applicant’s second confession at the trial which –alone or corroborated by further untainted real evidence– formed the basis of his conviction for murder and kidnapping with extortion and his sentence. The impugned real evidence was not necessary, and was not used to prove him guilty or to determine his sentence. It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant’s conviction and sentence in respect of the impugned real evidence.

[...]

183. Moreover, the applicant, who was represented by defence counsel, stressed in his statements on the second day and at the end of the trial that he was confessing freely out of remorse and in order to take responsibility for his offence despite the events of 1 October 2002. He did so notwithstanding the fact that he had previously failed in his attempt to have the impugned real evidence excluded. There is no reason, therefore, for the Court to assume that the applicant did not tell the truth and would not have confessed if the Regional Court had decided at the outset of the trial to exclude the impugned real evidence and that his confession should thus be regarded as a consequence of measures which extinguished the essence of his defence rights.

184. In any event, it is clear from the Regional Court’s reasoning that the applicant’s second confession on the last day of the trial was crucial for securing his conviction for murder, an offence of which he might otherwise not have been found guilty. The applicant’s confession referred to many additional elements which were unrelated to what could have been proven by the impugned real evidence. Whereas that evidence showed that J. had been suffocated and that the applicant had been present at the pond in Birstein, his confession notably proved his intention to kill J., as well as his motives for doing so. In view of these elements, the Court is not persuaded that, further to the failure to exclude the impugned evidence at the outset of the trial, the applicant could not have remained silent and no longer had any defence option but to confess. Therefore, the Court is not satisfied that the breach of Article 3 in the investigation proceedings had a bearing on the applicant’s

confession at the trial either.

185. As regards the rights of the defence, the Court further observes that the applicant was given, and availed himself of, the opportunity to challenge the admission of the impugned real evidence at his trial and that the Regional Court had discretion to exclude that evidence. Therefore, the applicant's defence rights were not disregarded in this respect either.

186. The Court notes that the applicant claimed that he had been deprived of the protection afforded by the privilege against self-incrimination at his trial. As shown above (see paragraph 168), the right not to incriminate oneself presupposes that the prosecution prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the latter's will. The Court refers to its above findings that the domestic courts based the applicant's conviction on his second confession at the trial, without having recourse to the impugned real evidence as necessary proof of his guilt. The Court therefore concludes that the privilege against self-incrimination was complied with in the proceedings against the applicant.

187. The Court concludes that in the particular circumstances of the applicant's case, the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence. As the applicant's defence rights and his right not to incriminate himself have likewise been respected, his trial as a whole must be considered to have been fair.

188. Accordingly, there has been no violation of Article 6 §§ 1 and 3 of the Convention.

[..]

The presumption of innocence binds all persons participating in trial under the same principle: judges, prosecutors, state officials, lawyers, social workers or clerks. The principle also binds reporters of the media.

Corollary to the presumption of innocence is the right not to incriminate oneself. This is a consequence of the presumption of innocence. It means that since the "burden" of proof falls within the obligations of the prosecuting authority the defendant has the right to remain silent. So, he has the right to refuse the charges against him and not confess any fact that would incriminate him. The silence of the defendant should not be taken as evidence of his guilt (even if this is what happens in practice for the majority of cases).

Practice Problems-Two

Karim is accused of stealing a car. It is the first time that he has been accused of any crime. He was only seen near the stolen car. However, after experiencing a beating from the Police he confessed that he was the one who stole it. The court issued an order for pre-trial detention and Karim is now being detained in the prison of Hargeisa. Karim has not been examined by a prosecutor. His case has been under investigation for the last 6 months.

- *Do you believe that Karim should be detained?*
- *If yes, what elements support this position?*
- *Do you see any principle (s) violated in this case?*

Practice Problems-Three

Mohammad is a 15 year old boy. He is the youngest of a family of twelve members which is very poor. He used to work hard to assist his family. He did not have time to go to school. He is illiterate. Now he is detained in the prison of Hargeisa for murder. It is the first time that he has been convicted of a crime. The Appeal Court has given him a 5 year custodial sentence for the murder of a relative.

He claims he is innocent, and it was an accident. He had an argument with his cousin. His cousin insulted him. Mohammad pushed his cousin, who fell and hit his head, and as a consequence of that he died. The Court didn't believe Mohammad because he didn't have any witness.

- *Do you believe that the Court should let Mohammad speak even if he had a lawyer representing him?*
- *Do you think that this sentence is fair for the accidental cause of Mohammad's cousin death? Does Mohammad's way of living play a role in his sentencing?*
- *Should any one inform him of his rights during his confinement?*

Practice Problems-Four

Abokor is accused of injuring a man. During the investigation, the Prosecutor examines Abokor and asks him to give his explanation of the incident. Instead of representing himself, Abokor sends a letter to the prosecutor saying that he does not wish to appear and give any explanation to the prosecutor, because he is presumed innocent and it is the prosecutor's obligation to prove that he is guilty.

- *Even if the prosecutor does not have any real evidence on the case, will the attitude of Abokor affect the prosecutor's decision on the indictment?*
- *Will the attitude of Abokor affect the prosecutor's decision for pre-trial detention?*

3.2.4. The right to a fair trial⁵¹

The notion of a “*fair*” hearing is contained in Article 14(1) of the International Covenant on Civil and Political Rights and in regional instruments such as Article 6(1) of the European Convention on Human Rights (while article 8(1) of the American Convention on Human Rights speaks of “*due guarantees*”). Sometimes the concept of “*fair trial*” is confused with the concept of “*due process of law*”.

⁵¹ See, OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9, 2003, Chapter 7 - The Right to a Fair Trial: Part II. For a comparative analysis of the jurisprudence on the right to a fair trial, see Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, 2002, pp. 478-594.

The “*minimum requirements for a fair trial*”⁵², according to the Bangalore Principles of Judicial Conduct, consist of the judge’s observance of the following rights to the parties:

- “(a) Adequate notice of the nature and purpose of the proceedings;
- (b) Be afforded an adequate opportunity to prepare a case;
- (c) Present arguments and evidence, and meet opposing arguments and evidence, either in writing, orally or by both means;
- (d) Consult and be represented by counsel or other qualified persons of his or her choice during all stages of the proceedings;
- (e) Consult an interpreter at all stages of the proceedings, if he or she cannot understand or speak the language used in the court;
- (f) Have his or her rights or obligations affected only by a decision based solely on evidence known to the parties to public proceedings;
- (g) Have a decision rendered without undue delay. The involved parties should be provided with adequate notice of, and the reasons for, the decision; and
- (h) Appeal, or seek leave to appeal, decisions to a higher judicial tribunal, except in the case of the final appellate court”.

It should be noted that a prerequisite for a fair trial is the implementation of the *principle of equality and non-discrimination*⁵³ as enshrined in Art.14 of the International Covenant on Civil and Political Rights. The principle recognizes that “*all persons*” are “*equal*” before the courts and they are entitled to a “*fair and public hearing*” in the determination of any “*criminal charge*” or of “*rights and obligations in a suit at law*” by a “*competent, independent and impartial*” tribunal “*established by law*”.

The term of ‘*discrimination*’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, *and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*”⁵⁴.

However, as noted by the Human Rights Committee of the International Covenant on Civil and Political Rights, “*the enjoyment of rights and freedoms on an equal footing ... does not mean identical treatment in every instance*”. In support of this statement, it points out that certain provisions of the Covenant itself

52 By its resolution 1994/35 of August 26 1994, the Sub-Commission on Human Rights of the Economic and Social Council recommended to the Commission on Human Rights to consider at its fifty-second session the establishment of an open-ended working group to draft a third optional protocol to the International Covenant on Civil and Political Rights aiming at guaranteeing under all circumstances the right to a fair trial and a remedy. (E/CN.4/Sub.2/1994/24, Annex II); http://www.bayefsky.com/reform/e_cn4_1995_81.php.

53 See, OHCHR, *Human Rights in the Administration of Justice*, op. cit., Chapter 13.

54 Ibid., p.651.

contain distinctions between people, for example article 6(5) which prohibits the death sentence from being imposed on persons below 18 years of age and from being carried out on pregnant women.

The Principle of equality before the courts has three components:

- *equality of access to the courts;*
- *equality of treatment before the courts, and*
- *equality of arms.*⁵⁵

Perhaps the most easily recognized conception of the right of equality lies in the notion that people should not be discriminated against because of their poverty. Both the International Covenant on Civil and Political Rights (Article 2.1) and the International Covenant on Economic, Social and Cultural Rights (Article 2.2), prohibit discrimination based on “*property ... or other status*”. This explicit prohibition against discrimination based on property ownership or status, which certainly includes one’s financial means, provides also the basis for the right to legal assistance (in both civil and criminal cases).

a) **The Principle of Equal Access to the Courts and to Justice**⁵⁶: There is no explicit provision in human rights treaties discussing “*access*” to courts as a principle of international human rights law. The concept is implicit in the statement that “*all persons shall be equal before the courts and tribunals,*” found in all major human rights treaties. Thus, establishing separate standards for access to courts by men and women (and boys and girls) violates this principle, as does the giving of different weight to the evidence provided by different genders, or according to the status of the witness.⁵⁷

b) **The Principle of Equal Treatment by the Courts**: There are two ideas at play in the principle of equal treatment by the courts: i) the basic idea that the opposing parties will be given an equal opportunity to prepare and present their cases before the court (known as the principle of equality of arms, as referred to below), and ii) that persons charged with similar offenses will be prosecuted in a similar fashion. So long as the cases are objectively similar, a court will treat them equally, *regardless of who the defendant is or whether the case is “politically” motivated or not.*

c) **The Principle of Equality of Arms**: This principle means that in civil or criminal proceedings, “*each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent*”.⁵⁸ In criminal cases, however, “*where the very character of the proceedings involves a fundamental inequality of the parties*”, the principle is even more important.⁵⁹

55 See, Richard J. Wilson, “Principles, Sources and Remedies for Violation of the Right to Assigned Legal Assistance in International Human Rights Law”, February 5, 2002; Electronic copy available at: <http://ssrn.com/abstract=1028900>.

56 Carol Harlow, “Access to Justice as a Human Right: The European Convention and the European Union”, in: *The EU and Human Rights*, 1999, p.187.

57 Amnesty International, *Fair Trials Manual*, 1998, Section 11.2.1.

58 European Court of Human Rights, *Dombo Beheer v. The Netherlands*, 27.10.1993, Series A, No 274. It can be found at: <http://www.echr.coe.int>.

59 P. Van Dijk & G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3d Ed. 1998, p.430.

The principle applies in civil as well as in criminal cases. In criminal cases it appears whenever there are criminal “charges” against a person. The “charges”, according to the case-law of the European Court for Human Rights are defined as “*the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence*”.⁶⁰

Case law - two

In the case *Sadak and Others v. Turkey*⁶¹ brought before the European Court of Human Rights, the applicants complained that the charges against them had been altered at the last hearing of their trial. They had initially been charged with separatism and undermining the integrity of the State. On the day of the deliberation, however, the National Security Court asked them on the spot to prepare their defence to a new charge, namely belonging to an illegal armed organisation, but then dismissed their application for further time to prepare their defence against the new charge. The applicants maintained that they had not been able to properly defend themselves and to adduce evidence against this new charge. The ECHR retained a violation of the right to a fair trial, in particular the right to have adequate time for the preparation of their defence (as safeguarded in Article 6-3.b of the European Convention for Human rights).

- *Is Art. 111 of Somaliland CPC related to the above case respected by the courts?*

There are several situations in the course of trial proceedings that may amount to a violation of the right to defence. The right to defence and furthermore to a fair trial was, for example, violated in a case where the trial court failed “*to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine the witnesses and present*” the defence.⁶²

Practice Problems-Five

Abdulrahman is 20 years old. He is detained for murder. The Appeal Court sentences him to 10 years’ imprisonment. He is accused of killing a relative during a fight. He would like to appeal to the Supreme Court but he does not have a lawyer. The previous lawyer left Abdulrahman in the middle of the hearing when he understood that Abdulrahman did not have enough money to pay him.

- *In the above case what should the judge do?*

⁶⁰ ECtHR, *Deweert v. Belgium*, 27.2.1980, Series A, no 35, p.22; ECtHR, *Foti v. Italy*, 10.12.1982, Series A, no 56, p.18; *Minelli v. Switzerland*, 25.3.1983, Series A, no 62, p.15.

⁶¹ ECtHR, *Sadak and Others v. Turkey*, 10.7.2001, Application no 29900/96 and 29903/96. For the meaning of “adequate time” see also, ECtHR, *Campbell and Fell*, 28.6.1984, Series A, No 80, p.45.

⁶² ECtHR, *Sadak and Others v. Turkey*, 10.7.2001, Application no 29900/96 and 29903/96. For the meaning of “adequate time” see also, ECtHR, *Campbell and Fell*, 28.6.1984, Series A, No 80, p.45.

Practice Problems-Six

Abdullah is sentenced by the Primary Court to 4 years for selling drugs. On his demand to see a lawyer the police told him that he is entitled to have a lawyer after the official issuance of the indictment. They told him that the fact that he asks for a lawyer speaks for itself about his guilt.

- *Do you agree with the arguments of the Police? Yes or no? Explain why in both cases.*

As mentioned above, the foundation of the right to Legal Aid in the criminal justice system is premised in the universally accepted principle of a “*fair trial*”.⁶³ According to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Legal Aid should include legal advice, assistance and representation for persons suspected, arrested, accused or charged with a criminal offence, detained and imprisoned, and for victims and witnesses in the criminal justice process, under no cost for those without sufficient means or when the interests of justice so require. Legal Aid should also include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.

The basic fair trial rights which should be guaranteed by every defence lawyer⁶⁴ can be classified in pre-trial rights, in rights during the hearing and in post-trial rights:

Pre-trial rights

- Prohibition on Arbitrary Arrest and Detention
- The Right to Know the Reasons for Arrest
- The Right to Legal Counsel
- The Right to a Prompt Appearance Before a Judge to Challenge the Lawfulness of Arrest and Detention
- Prohibition of Torture and the Right to Humane Conditions during Pre-trial Detention
- Prohibition on Incommunicado Detention

Rights during the hearing

- Equal Access to, and Equality before, the Courts
- The Right to a Fair Hearing
- The Right to a Public Hearing
- The Right to a Competent, Independent and Impartial Tribunal Established by Law
- The Right to a Presumption of Innocence
- The Right to Prompt Notice of the Nature and Cause of Criminal Charges
- The Right to Adequate Time and Facilities for the Preparation of a Defense
- The Right to a Trial without Undue Delay

⁶³ See, UNODC (2011), *Handbook on Improving Access to Legal Aid in Africa*.

⁶⁴ See, Lawyers Committee for Human Rights (2000), *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, www.lchr.org.

- The Right to Defend Oneself in Person or through Legal Counsel
- The Right to Examine Witnesses
- The Right to an Interpreter
- Prohibition on Self- Incrimination
- Prohibition on Retroactive Application of Criminal Laws
- Prohibition on Double Jeopardy

Post-trial rights

- The Right to Appeal
- The Right to Compensation for Miscarriage of Justice

The main rights which, alongside the Right to Legal Aid, form the core procedural rights that underpin access to justice and a fair trial are:

- The presumption of innocence and the right to silence;
- the right to self-representation and legal assistance from the earliest stages of the investigation and the right to have adequate time and facilities to prepare a defence;
- The right to information about rights and charges, and access to evidence;
- The right to be released from custody pending trial;
- The right to participation in one's own trial, and trial without undue delay;
- The right to call witnesses and examine witnesses;
- The right to free interpretation and translation, and
- The right to appeal.

According to the UN Basic Principles on the Role of Lawyers⁶⁵:

“5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

⁶⁵ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.”

3.3. Principles concerning Legal Aid

Legal Aid is not only as provided by Article 28(3) of the Somaliland Constitution in the case of poor people accused of serious crimes who cannot afford the fees of lawyers, but also, according to Principle 3.20 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, “*regardless of the person’s means, if the interests of justice so require, for example in the case of urgency, complexity or the severity of the potential penalty*”. In addition, “*children should have access to Legal Aid under the same or more lenient conditions as adults. In cases of children the best interests of the child should be the primary consideration for the child’s defence*” (Principle 3.22).

According to Guideline 8 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Legal Aid should be provided for suspects, accused, detained and imprisoned as well as for victims and witnesses, if needed. The circumstances in which it may be appropriate to provide Legal Aid to witnesses includes, but is not limited to:

- a) Where the witnesses are at risk of incriminating themselves;
- b) Where there is a risk to the safety and wellbeing of the witnesses resulting from their status as such; and
- c) Where the witnesses are particularly vulnerable, including having special needs.

3.3.1. Information

According to Guideline 2.41(d) of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, States should take measures to inform individuals at all stages of the criminal justice process about the possibility of Legal Aid:

“Information on the rights of a person suspected or charged of a crime in a criminal justice process and on the availability of Legal Aid services should be provided in police stations, detention centres, courts and prisons; for example, through the provision of a letter of rights or in any other official form submitted to the accused. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children; and such information should be in a language that those persons understand. Information provided to children must be provided in a manner appropriate to their age and maturity”.

According to Guideline 3.42 States should also introduce measures:

“(a) To inform promptly every person suspected, arrested, detained, accused, or charged with a criminal offence, of his or her right to remain silent; his or her right to consult with counsel or, if eligible, with a Legal Aid provider at any stage of the proceedings, especially before being interviewed by the authorities; and his or her right to be assisted by an independent counsel or Legal Aid provider while being interviewed and during other procedural actions;

(b) To prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police in the absence of a lawyer, unless the person gives his or her informed and voluntary consent to waive the lawyer’s presence and to establish mechanisms for verifying the voluntary nature of the person’s consent. An interview should not start until the Legal Aid provider arrives”.

3.3.2. Equity

Together with the right to information on Legal Aid, the principle of equity in access to Legal Aid should prevail. Thus, according to Principle 10.32 and 10.33 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems:

“Special measures should be taken to ensure meaningful access to Legal Aid for women, children and groups with special needs including but not limited to the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum-seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. Such measures should address the special needs of these groups, including gender-sensitive and age-appropriate measures.

States should also ensure that Legal Aid is provided to persons living in rural, remote and economically and socially disadvantaged areas and persons who are members of economically and socially disadvantaged groups.”

3.3.3. Independence

Regarding the performance of legal functions, principle 12 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provides that States should ensure that Legal Aid providers are able to carry out their work effectively, freely and independently. In particular:

“States should ensure that Legal Aid providers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; be able to travel, to consult and to meet with his/her clients freely and in full confidentiality both within their own country and abroad, and to freely access prosecution and other relevant files, and should not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”

3.4. Principles concerning attorneys Ethics

As mentioned above, in the mind of the general public, defense attorneys are often incorrectly identified with their clients' crimes, beliefs and actions. What is more, defense attorneys can, in the mind of their clients, be incorrectly identified with the Police, the Prosecutor and/or the Courts. Suspicion of defense attorneys is perhaps an inevitable consequence of the complex and difficult role they play in the administration of justice. Because their duties so readily expose them to misunderstanding, anger and criticism, it is critical that all defense attorneys conduct themselves in accordance with the highest ethical standards and that the Bar Associations vigorously regulate the professional actions of its members. While it is unrealistic for defense attorneys to expect to be widely loved and praised for performing their work, if they are rigorously ethical, they should expect to be treated with the dignity and respect appropriate to their profession.

The fundamentals of defense attorney ethics should be included in each country's Code of Conduct for lawyers. A thorough knowledge of each of these rules and an understanding of their purpose is indispensable.

Representing a victim of crime may be different to representing the typical accused. Victims of crimes may, on occasion (for example in rape cases), be so traumatized by their victimization that they may lack legal capacity or competence. In such cases, the advocate should not take a passive position on the appointment of a legal representative or guardian for the client. Instead, the advocate should seek to have the most responsible and dedicated person available recognized by the court.

Advocates of victims must understand that a victim may either be in fear of their victimizer or victimizers, or be so dependent upon them that they are unable to recognize or protect their own interests. Where the perpetrators include members of the victim's own family, it is the individual interests of the victim that the advocate must support, over and above those of the family as a whole.

The principles a lawyer is obliged to respect in the performance of his/her duties may be divided into three categories related to the respect of:

- his/her profession in general and the performance of legal functions;
- his/her behaviour towards the client, and
- his/her behaviour towards the authorities.

Described below are some of such principles included in the UN Basic Principles on the Role of Lawyers, and in the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

3.4.1. Integrity and competence of the legal profession

A leading principle is that a lawyer should always *maintain integrity, and competence of the legal profession*. According to the UN Basic Principles on the Role of Lawyers⁶⁶, the duties of lawyers towards their clients shall include:

⁶⁶ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7 1990.

“13.(a) Advising clients as to their legal rights and obligations and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

(b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

(c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.”

3.4.2. Confidentiality

Confidentiality is one of the first of ethical obligations of each lawyer towards his/her client. Unless the client otherwise directs, it is improper for a lawyer to give any information from his/her files to a third party during or after his/her employment. That a lawyer should preserve the confidences of his client implies that personal data and data from the case concerning the person who is or who has been involved in judicial or non-judicial proceedings (and other interventions) should be protected at all stages. This includes not revealing any information or personal data to the media and the press.

The obligation to protect confidences does not preclude a lawyer from revealing information when his/her client consents, after full and informed disclosure. The obligation of the lawyer to preserve the confidences of his/her client continues during and after his/her employment.

The principle of confidentiality also requires that a lawyer should not use information acquired in the course of the representation of the client to the disadvantage of the client.

It should be emphasised that, in upholding the principle of confidentiality, the lawyer should be respected and assisted by the authorities. According to the UN Basic Principles on the Role of Lawyers, *“Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.”* (Point 22).

It is essential to protect attorney-client confidences by making sure that a client interview (as described below) is private. With clients who are being held in custody, it is often difficult to get the jail or prison officials to provide the opportunity for conversations that cannot be overheard. However, while jail or prison authorities may resist, advocates must insist upon having private conversations with their clients.⁶⁷

⁶⁷ UN Basic Principles on the Role of Lawyers No.8, states that: *“All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by, to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight but not within hearing, of law enforcement officials”* (emphasis added); The ICCPR article 14.3 requires that access to attorneys be *“in conditions giving full respect for the confidentiality of their communications”*. See also The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 17 and 18.

It is advisable to provide as much information as possible to the client about the nature of the charges he or she faces, and the potential lines of defense, before hearing his or her version of events. By having the discussion in this manner you can often avoid the client spending a great deal of time explaining irrelevant facts and direct them towards telling you about the facts that will actually help you to defend their case. For example, if your client is accused of gambling and all he wants to talk about is how he only loses money when he gambles (which is not a defense) it is best if he is informed of that fact early in the conversation.

Family members often wish to be present when their relatives are interviewed, however, including the family members will destroy the confidentiality of the interview. It is also sometimes the case that clients, especially minors, will feel unable to reveal certain truths if their family members are present. Of course, in some circumstances it is valuable to interview the family, preferably after interviewing the client. Generally, the ideal process is to speak first with both the family and the client about non-confidential matters and then follow up with detailed separate interviews of the client and the family.

Confidentiality is perhaps the most important principle. If client confidentiality is violated, the advocate should expect to be sanctioned by the Bar Association with either a long-term suspension or permanent loss of license.

3.4.3. Non-discrimination

On the basis of Principle 6.26 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, a lawyer should not refuse the defence of a client for reasons of preference, or based in race, colour, language, national, ethnic, social origin or clan, citizenship or domicile, birth, education, social or other status or property, gender, age, religion or belief, political or other opinion, for physical or mental infirmity or for any other reason.

Practice Problems - Seven

1. You are late to court for a trial because you stayed late at a wedding party the night before and did not want to get out of bed. The Judge (who you know is corrupt) asks you why you are late and says he will impose a fine on you if you do not have a good reason. You heard on the radio that some roads were closed that morning because of a bombing.
 - *What should you tell the Judge?*
 - *Do you see any behaviour contrary to a principle related to the conduct of Lawyers?*
2. Because you were late to court the Judge is angry with you and he tells you that you cannot leave until you have accepted the cases of the ten accused that are unrepresented in court that day because their attorney has been arrested for financing terrorism. You believe that some of these ten will be freed if you help them but you are already so busy that you don't have enough time to handle your current cases properly.
 - *Should you accept the new cases?*
 - *What should you consider in your decision?*

3. You are in the courthouse when you overhear your best friend from law school, who is also your brother-in-law, asking his client for a bribe to give the Judge. You take him aside and ask him not to accept the bribe money, but he refuses and tells you that this is the only thing that will help his client who he is sure is innocent, and your friend needs half of the bribe money to pay his landlord or he and your sister and their baby will be homeless.
 - *Does any article of the Code of Conduct explain your duty in this situation?*
 - *What action would you take?*

3.5. Client Relations

Many of the principles contained in most countries' Codes of Conduct relate to relations between the attorney and the client, since proper treatment of the client is the most fundamental ethical duty of a defense attorney. Often the defense attorney is the client's sole friend and ally in a hostile world. The first duty of a defense attorney is to respect the best interests of his/her client. However, many factors can make it difficult for a defense attorney to successfully honor this important duty.

3.5.1. Building trust

While gaining the trust of a client is often difficult, the advocate should attempt to do so whenever possible. A distrustful client is unlikely to provide the necessary information to properly defend their case, and is unlikely to follow the advocate's advice. Listening respectfully to the clients concerns and keeping the client informed are vital to earning a client's trust. Helping a client with a small matter relating to their conditions of confinement (such as obtaining blankets in winter, more or better food, access to recreation, or education, etc.), or assisting them in contacting their family, can sometimes win the confidence of a suspicious client. Often any sincere attempt to advocate for the client's interests - even if unsuccessful - will win the trust and respect of the client.

Obtaining, on behalf of the client, conditional release from confinement, based on posting a surety bond, bail, the naming of a guarantor, or a promise to appear, is definitely a good way to gain the client's trust.⁶⁸

Should the attempt to have the client released fail, the advocate will still have demonstrated (assuming the client is kept informed of the process) that he or she is willing to work in the client's interest, and the client will likely be more cooperative in working with the advocate on the rest of their defense.

3.5.2. Maintaining trust

Clients are often concerned that the advocate will work against their interest or reveal their secrets. Therefore it is important to explain the seriousness of your duty of confidentiality as soon as possible upon meeting the client. Telling the client that a breach of confidentiality can result in the loss of employment and livelihood

⁶⁸ International standards require consideration of conditional release prior to trial. ICCPR, Article 9.3.

for the advocate should improve the client's willingness to confide in the advocate, and boost his or her faith in the relationship.

Normally, in all codes of conducts, advocates have the duty to discontinue representation and take necessary corrective measures whenever he or she notices the client committing a crime or fraud. To avoid this circumstance arising, it is necessary to inform the client of this duty at the beginning of the relationship. If you should later suspect that the client's actions are about to become illegal, it is best to once again notify him or her of your duty, and to encourage the client to not engage in the potentially illegal actions.

Threats are one of the more common ways that potential illegalities will come to the attention of the advocate. Clients may sometimes be upset with their accusers and with the Prosecutor. If a client tells you *"I am going to kill that man"*, it is important to discuss with the client whether this is simply an expression of anger or an actual plan for a murder before deciding to terminate your representation. For example, you might reply that *"if you are telling me you have a plan to murder the prosecutor, I have a duty to withdraw as your attorney and take corrective measures, if you are just saying that you are angry with him then I sympathize with you and we can discuss how best to defend your case"*.

While it is appropriate for the advocate to encourage the client to maintain a hopeful attitude, it can be a serious mistake to encourage false hopes, since the advocate is likely to be blamed if the results of the case are not to the client's liking. Never promise specific results, only specific efforts that you will make. Your statement: *"I'm going to file an appeal in case which could result in you being released from custody"* could be understood by the client as *"this appeal will release you from prison"*, unless a serious discussion explaining the appeals process is undertaken.

Clients may ask you to predict the outcome of various proceedings before they are complete. The best answer to a client who asks *"will I win my case?"* is generally *"I don't know"*, to which the advocate might add *"cooperate with me and we will improve your chances of winning"* or *"I will do everything I can for your case"*. Sometimes it may be appropriate to tell a client that the chances for his case *"do not look good"*. However, if the advocate imagines that he or she can predict the outcome of every case this is an illusion and this illusion is guaranteed to be shattered at some point. The advocate has a duty to work for the client's interests in every case, no matter how hopeless that case may appear, and if the advocate faithfully carries out this duty, the advocate may, on occasion, be surprised by a successful result where none seemed possible.

Often, the greatest strains upon the relationship between the client and the advocate result from misunderstandings. The best hope for avoiding misunderstandings is for the advocate to raise the client's level of understanding about his or her situation and the advocate's role in the case. A well-informed client will create far fewer difficulties for the advocate, and the prospect that your hard work and loyalty will earn the client's trust and confidence is greatly increased.

Practice Problems-Eight

1. Your client (who you believe is guilty) is a beggar, is known to associate with criminals, has a bad odor, does not trust you, and speaks to you rudely. The Prosecutor, who is a neighbor of your father and is well respected by everyone, secretly asks you not to object to the admission into evidence of an expert's report that says the bullet found in the victim came from your client's gun. Neither your client nor you were present at the time of the expert's examination, and the expert is not in court to be questioned by you. The Prosecutor tells you that he will never agree to any of the witnesses or documents you present in any of your future cases if you object to this report now.

- *What principles of Conduct should you consider?*
- *What actions would you take?*

2. You are representing a man who is in the smuggling business, and who is accused of breaking the arm of his servant. At your first meeting your client tells you that he cannot be convicted. He then explains to you that he will instruct his brother to go to his servant tomorrow and inform him that he will be killed if he speaks against his master. Your client then smiles and tells you that there are no other witnesses to the beating he gave his servant.

- *What action do you take?*
- *What principles of conduct should you consider?*

3. Your client is convicted of organizing a band of smugglers and is sentenced to 6 years' imprisonment. You have filed an appeal for him which has not yet been heard. Your client has no sons or brothers. He tells you that his wife and daughters cannot manage the farm without him and asks you to find a buyer for the farm. You know that your uncle lives in the same village and he wants to buy your client's family farm.

- *What do you tell your client?*
- *What articles of the Code of Conduct do you consider?*

A few days later your uncle asks you if your client has any chance of winning his appeal because he wants to try to get a lower price for the farm and wants your client to agree to marry one of his daughters to your uncle's youngest son.

- *What do you tell your uncle?*
- *What articles of the Code of Conduct do you consider?*

4. You are representing a client accused of endangering the life of a child under Article 450 of the Penal Code. While you are representing the client, he tells you of several larcenies using forged keys he committed a year before that no one suspects him of having done.

- *Do you have any duty to reveal information about these larcenies?*
- *Do you have a responsibility to remain silent about these larcenies?*

5. You are representing Hassan and he has confessed to you that he committed the crime, but says he wants to be found not guilty. Hassan also tells you that he wants to testify at his trial that his neighbor Hakim committed the crime.
- *What actions would you take in Hassan's case?*

3.5.3. Client Interview

To optimally perform his/her duties, and to protect the interests of his/her client, a lawyer should always conduct an initial interview with his/her client. The goals of the interview include, but are not limited to:

- establishing trust with the client;
- informing the client about the attorney-client relationship;
- informing the client about the accusation and possible defenses to the accusation;
- educating the client about the legal process;
- learning about the client's needs, issues and concerns, and
- learning the client's version of events, and the whereabouts of any exculpatory witnesses or evidence.

A lawyer is bound to end the representation if there is a conflict of interests, or his/her confidence might be at risk, or his/her independence might be compromised.

Further, a lawyer has the duty to discontinue the representation, and to take necessary measures, whenever he or she notices the client is committing a new crime or fraud. What is more, a lawyer and any legal provider should not be involved in fraudulent, deceptive or illegal conduct in proceedings before the courts of law, even if this is for the benefit of his/her client.

Practice Exercise - One

The class is divided into groups of 3-6 persons. Each group is to work together to produce written answers in the form of a list. The lists can then be discussed before the whole class to produce a combined list that thoroughly answers the questions below:

Your client Saddam is accused of instigating delinquency under Article 320 of the Penal Code because several recently arrested juvenile pickpockets claim to have been working for him. You are meeting him for the first time in the jail. List all the questions you would ask him during your meeting.

- *List all of the topics you would inform your client about at your meeting.*
- *Would it be best to discuss the topics on your list in a particular order, and if so what order?*
- *How much time would you allow for the discussion of each topic? What would be the ideal overall length of your first interview?*

- *Is it possible for you to have private conversations with your clients who are held in jail or prison? What obstacles, if any, exist to prevent you from having private and confidential communication with your client who is held in custody? How can advocates work to remove current obstacles to confidential communication?*

3.5.4. Conflicts of Interest

Whenever an advocate has an interest which appears to conflict with the interests of his or her client, it can undermine the honesty and integrity of the profession as a whole. An advocate cannot give his or her full loyalty to the client's cause if it is in conflict with his or her own interests and the client cannot have confidence in the advocate if a conflict exists.

Conflicts of interest are quite common and typically arise through no fault of the advocate, however, since the remedy is for the advocate to withdraw from representation, it is in the interest of all concerned that potential conflicts be identified as soon as possible. Therefore, one of the first things an advocate must do upon receiving a new case is to review it, in order to determine *if a conflict of interest is present or likely to arise*.

The most common type of conflict arises when an advocate, or one of his or her partners, has a relationship with the alleged victim or one of the witnesses in the case. For example, the witness may be a friend, relative, client, or former client of the advocate. Since the advocate may need to attack the credibility of any witness testifying against his or her client, a conflict of interest occurs whenever there is, or appears to be, some reason for loyalty to a witness on the part of the advocate. Conflicts can also arise whenever there is a close relationship between the advocate and a judge or prosecutor assigned to the case.

It is a bad practice for a single defense attorney to represent more than one individual in the same case. While the prosecutor may accuse two or more individuals of acting together in a crime, each may have a different defense at trial. The right to a defense attorney is an individual right. In nearly every case with more than one accused, each accused may have reason to emphasize the guilt of others, and to minimize his or her responsibility. An advocate cannot simultaneously maintain a duty of loyalty to different clients with conflicting interests, and individuals who are accused in the same indictment almost always have conflicting interests.

For instance, in cases of trafficking in persons involving more than one person, it is inevitable that there will be conflicts of interest between individuals with different roles within the trafficking scheme. Distinctions must be made between those who are the planners of trafficking in persons; those who implement the schemes of others, and those who are exploited, and no single lawyer can simultaneously represent clients who have such antagonistic relationships.

Practice Problems-Nine:

1. Your client is accused of planting a bomb at the mosque that killed the provincial police chief while he was praying. You and the police chief are from the same village and his youngest wife is the niece of your older brother's wife. You moved from the village when you were two years old and your brother lives in Ethiopia and you have not seen him in ten years. A witness says he saw your client hide something under a rug at the mosque and then run outside. This witness is your son's teacher at school and the policeman who arrested the accused outside the mosque is your uncle.
 - *Are there any conflicts of interest that would require you to end your advocacy?*
 - *List the possible conflicts and indicate which would require you to withdraw from the case if any, and your reasons for each conclusion.*
2. Your client is the son of the biggest importer and seller of automobile tyres in your city, and he and his father are accused of smuggling drugs into Somaliland. Your father is the second largest importer and seller of automobile tires and would like to expand his business.
 - *Do you have a conflicts of interest that requires you to withdraw from the case?*

3.6. Complaints against a lawyer

In the event that there is a complaint against a lawyer concerning his/her duties, a criminal procedure may be envisaged according to the Somali Penal Code of 1962. Article 299 of the Penal Code expressly provides that an advocate who is not faithful to his professional duties, and who causes injury to the interests of the party defended, assisted or represented by him before the judicial authorities, is punishable with imprisonment of one to three years, and with a fine of no less than 50,000 SLSH. According to Art.299 para 2 the punishment may be increased in the following cases:

- If the offender has committed the act in collusion with opposite party;
- If the act was committed to the prejudice of an accused person. (According to Art.299, para 3, if the prejudice was committed against a person accused of a crime punishable with the death penalty or imprisonment for life, the punishment for the defence lawyer is increased from three to ten years and fine of no less of 10,000 SLSH).

Additionally, Art.300 of the Penal Code provides that an advocate who, before the judicial authorities, places his professional services or his advices at the disposal of the opposite party, is punishable with imprisonment from six months to three years and a fine of no less 1,000 SLSH.

According to para 2 of Art.300 of the Penal Code, a punishment of up to one year and a fine from 500 to 5,000 SLSH may apply if the advocate or the adviser, having assisted or represented a party undertakes, without the consent of the latter and in the same proceedings, the defence of or the function of adviser to the opposite party.

Further, Art.301 of the Penal Code punishes the corruption of the attorney, stating that *“the attorney who pretends to have influence on a judge or with the Office of the Attorney General or with a witness, expert or interpreter receives or causes money or any other benefit to be given or promised to himself or to a third party by his client on the pretext that he has to procure the favor of a judge or of the Office of the Attorney General or of the expert or interpreter, or that he has to remunerate them, is punishable with imprisonment from two to eight years and a fine of no less of 10,000 SLSH.”*

It should be noted that conviction under Articles 299, 300 (para 1) and 301 entails interdiction from public offices (Art.302 CP).

In addition to the criminal responsibility, complaints against defence lawyers for the performance of their duties entail a disciplinary procedure according to Principle 13.37 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems⁶⁹: *“Disciplinary complaints against Legal Aid providers should be promptly investigated and adjudicated in accordance with professional codes of ethics before an impartial body and subject to judicial review”*.

According to the UN Basic Principles on the Role of Lawyers, charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice (point 27).

All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession, and in light of these principles (point 29).

Questions:

1. *What can a client do if he has a complaint against his lawyer?*
2. *What is the competent body to deal with a disciplinary offense of a lawyer?*
3. *Could the misconduct of a lawyer be settled outside the judiciary system?*
4. *Does a lawyer need a lawyer to represent him/her during the disciplinary procedure?*

⁶⁹ Accordingly the UN Basic Principles on the Role of lawyers provides that: *“Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review”* (Point 28).

Chapter 4: Legal Aid Schemes

Learning objectives

Participants will:

- become aware of the variety of Legal Aid Schemes;
- understand the present Legal Aid system in Somaliland and
- try to identify the best Legal Aid model for Somaliland.

Domestic laws and practices may vary significantly, while generally maintaining conformity with international human rights standards due to the ‘margin of appreciation’ doctrine. This presumes that it is in the competence of national governments to decide how to arrange Legal Aid provision in respective jurisdictions. Rules governing ‘mandatory’ and ‘discretionary’ cases can be derived either from international obligations binding a state, or its domestic law. Ideally, the latter should be in conformity with the former, however this is not always the case.

Services may include legal advice, the preparation of relevant documents, or full representation, including participation of the lawyer in trial proceedings. The type of services provided may vary, and may depend on the stage of the criminal procedure, the gravity of the charge(s), and the individual characteristics of the recipient. Thus, in many systems (for example in Canada, the UK and the Netherlands), legal advice may be received relatively easily, including online and telephone counseling services, whereas retention of a lawyer for representation in court requires an application and testing procedure.

4.1. The Variety of Legal Aid Schemes

Worldwide, there is a great variety of Legal Aid schemes. They include:

- *Pro bono* Legal Aid work by private lawyers;
- State-funded court-appointed lawyers and public defenders;
- State-funded interns assigned to rural law firms;
- State-funded law clinics;
- State-funded justice centres;
- State-funded public interest litigation;
- State-funded cooperation agreements;
- Public interest law firms;
- University Legal Aid clinics;
- Street law-type clinics; and
- Paralegal advice offices.

4.1.1. Pro bono lawyers

In many developing countries there may be a tradition of lawyers providing some *pro bono* work, but it is rarely mandatory (compared to the US for example, where all lawyers must complete a certain number of hours per year of *pro bono* work). Recently, however, there has been a trend towards making *pro bono* work compulsory for practicing lawyers. The Cape Law Society in South Africa⁷⁰ has made it compulsory for its members to do *pro bono* work. Kenya has made *pro bono* work compulsory for members of the legal profession who require evidence of such work to renew their practice certificates, while in Nigeria a reform plan has proposed making *pro bono* work a prerequisite for appointment as Senior Counsel.

Pro bono schemes are relatively inexpensive to operate and, if supported by the legal profession, can engender a spirit of public service. *Pro bono* clients, however, may not receive the same level of service as paying clients. Furthermore, many lawyers are so reluctant to take on *pro bono* cases that, even if they are mandatory, they may “buy out” of the time they would be required to devote to them (for example, in the US a lawyer can pay a fee to the Bar Association in lieu of doing *pro bono* work). *Pro bono* Legal Aid work can be used as a supplement to state-funded Legal Aid services, but it should not be regarded as a substitute.

4.1.2. Law Clinics

In developing countries, university law clinics can play a valuable role in supplementing the work of national Legal Aid bodies, and in advancing the promotion and protection of human rights. The involvement of law students in Legal Aid provision, with appropriate guidance and monitoring, not only expands Legal Aid services, but also places in the hearts and minds of the next generation of legal professionals a sense of social responsibility and an understanding of the potential of the law as an instrument for social justice and reform. One of the major purposes of legal education is to train future lawyers, not only to be competent practitioners, but also to be sensitive to the need for improvements in existing justice systems as part of their professional responsibility. For example, University Legal Aid Clinics were the first organizations in several African countries to focus on providing access to justice for poor Africans.

However, unless University law clinics are mainstreamed into their university budgets, or the national Legal Aid budget, their financial position remains precarious, as they have to rely on local or foreign donor money. Established national Legal Aid bodies can financially support University law clinics by entering into cooperation agreements with them. For instance, in South Africa, many law clinics are funded by Legal Aid South Africa. Over time, these law clinics have been separated from the Universities and incorporated into the Justice Centre, although some University legal clinics still exist independently.

⁷⁰ South Africa has experimented using both public and private sectors to provide legal services for the poor in criminal and civil cases through a variety of Legal Aid mechanisms. See David McQuoid-Mason, *The Legal Aid Board and the Delivery of Legal Aid Services in South Africa*: www.legalaidreform.org.

4.1.3. Legal literacy/awareness programs

Legal literacy programs play a very important role in complementing legal services for the poor, and should be seen as important components of any national Legal Aid scheme. The South African Street Law Project⁷¹ is a preventative legal education programme that provides people with an understanding of their legal and human rights, and how they can enforce such rights. Street law students at the universities are taught how to use interactive learning methods when teaching school children, prisoners and ordinary people about the law. The programme has been conducted in hundreds of high schools throughout South Africa⁷², and involves a combination of training law students and teachers from the schools to use a street law student text for the pupils, and a teacher's manual for teachers.

Like the law clinics however, unless University street law programmes are mainstreamed into their University budgets, or the national Legal Aid budget, their financial position remains precarious.

4.1.4. Non-governmental Legal Aid service providers

In many countries where the state has inadequate resources to provide legal assistance, local NGOs have sought to fill this gap. Often their client eligibility criteria is focused on the provision of Legal Aid to the most vulnerable, and their scope of work may include legal representation, legal information and advice, community awareness and sometimes some non-legal services, such as psychosocial counseling. They may be limited in their geographic reach, or the type of cases/issues they address (for example, a Legal Aid NGO may work solely on housing, land and property issues, or only take on criminal cases). Most NGOs must rely on local or international donor funding, raising concerns about their long-term sustainability.

An important function played by many NGOs is the provision of legal assistance to detainees at the pre-trial stage in police stations, or accused persons on remand, or convicted persons at the appeal phase. Some NGOs, such as the Paralegal Advisory Service Institute (PASI) in Malawi conduct legal awareness sessions in prisons to educate prisoners about criminal law and procedure, so that prisoners are empowered to apply law and procedure to their own case at their next court appearance – for example in deciding whether to make their own bail application, enter a plea of guilt, present mitigating factors at sentencing, or conduct their own defence. Organisations in both Malawi and Kenya have worked with local magistrates to conduct prison visits where the magistrate can screen the pre-trial caseload and determine who is there unlawfully or unnecessarily and fix dates for trial. The exercise has been effective in reducing congestion and tension by restoring prisoners' confidence in the justice system when they can see that they are not forgotten.

NGOs can provide basic legal advice and assistance that helps to guide people in their immediate choices and enable them to navigate the justice system. By educating people about the law, NGOs can empower people to apply the law to their own set of circumstances, and to use the law as a lever for bringing about change. In terms of criminal justice, providing immediate access to legal advice and assistance at the police station

71 <http://www.streetlaw.org.za/>.

72 David McQuoid-Mason, *ibid.*

on arrest and during interview, at court on first appearance and in the prisons, assists the state in adhering to its broader human rights and constitutional obligations to ensure that any accused person has access to a lawyer as soon as possible after being detained⁷³, and that they have adequate time and facilities to prepare their defence.⁷⁴

In the short term, due to NGOs' established reputation and experience in providing Legal Aid, any new national Legal Aid scheme should explore ways in which to formally or informally cooperate with existing Legal Aid NGOs. A referral mechanism could be established where the national Legal Aid body refers cases that it does not have the capacity to adopt, however safeguards need to be in place to ensure that Legal Aid NGOs are not overwhelmed with referrals, and that they retain a right of refusal if a client does not meet their criteria or may pose a conflict of interest, etc. Where funding is available, a national Legal Aid body can financially support NGOs by entering into cooperation agreements with them to conduct legal assistance work, particularly in certain locations (e.g. rural areas) or for certain populations (e.g. IDPs) that the national scheme cannot reach, or in providing services the national scheme does not have the capacity to undertake (e.g.: civil cases and mediation).

4.1.5. Community paralegals

Community paralegals are laypersons (generally without any formal legal training or with incomplete legal training), who come from the communities they seek to serve, and who have received basic training in substantive law and skills such as mediation, interviewing and advocacy. They empower people to have a greater knowledge of the law, their rights and their responsibilities. They provide guidance on how to realise those rights and find solutions to individual and community problems. Community paralegals operate primarily in rural areas where communities have limited access to formal justice systems, including access to lawyers, and where dispute resolution tends to take place within customary systems. Community paralegals do not undertake legal representation, but they may undertake a variety of activities at a community level aimed at concretely solving individual and community problems, such as providing legal information and options in a particular case, undertaking legal awareness and community education, mediation, advocacy, supporting community mobilisation and collective action, and assisting individuals and communities to navigate local authorities, including the police and local government departments. Community paralegals are able to straddle the formal and customary justice systems. They understand the community and can engage with local elders and religious leaders to ensure that decision-making at a local level respects the basic rights of all people.

Community paralegals are most effective when connected to lawyers so that they can provide community members with the option of litigation (often through local Legal Aid service providers/NGOs). They can play an important role within national Legal Aid schemes through:

- Educating communities about the law and human rights;

⁷³ The Somaliland Constitution, article 27(1).

⁷⁴ International Covenant on Civil and Political Rights (ICCPR), article 14(3)(b).

- Referring clients to Legal Aid offices and lawyers, and
- Educating traditional leaders about their rights and responsibilities before the law.

For instance, in South Africa, paralegals are included within the State Justice Centres through cooperation agreements. In Malawi, they are recognized as Legal Aid service providers in the new Legal Aid Act.

The above Legal Aid schemes can be classified as follows:

- Ex-officio (judicare)/court-appointed lawyer model⁷⁵;
- Public defender model⁷⁶, and
- Mixed model.⁷⁷

Regardless of the model adopted, it is highly unlikely that any state will have the resources to provide adequate Legal Aid to all those who require it. Even the oldest, most developed systems of Legal Aid are struggling with adequate financing of Legal Aid in the face of high demand. Therefore, it is useful to consider other actors and methods that can be used to supplement the provision of Legal Aid, particularly in the short term.

4.2. The present Legal Aid system in Somaliland

Currently, the model proposed for Somaliland is a mixed model comprising State-sponsored Legal Aid presently implemented by the Somaliland Ministry of Justice (MoJ) Legal Aid Unit and a public defenders scheme (Art.24 draft LA Act). Legal Aid providers are either employed by the State, or by private persons, or they provide legal services on their own account. Public defenders must meet the requirements to be registered as a lawyer or to be appointed as a public prosecutor provided for in applicable law or as prescribed. Paralegals may also provide Legal Aid as prescribed by law.

⁷⁵ The court-appointed lawyers model grew in popularity in the 30 years following the World War II in Europe, Australia and the USA, and it continues to be the most common method of providing legal aid in many countries. Nowadays, it is used in many developing countries in Africa, Asia and Eastern Europe. Until recently, it was the primary method of delivering state-sponsored Legal Aid in South Africa.

⁷⁶ A public defenders scheme refers to the delivery of legal aid services to those eligible for legal aid by salaried lawyers employed by the (usually government) legal services authority. Public defender schemes first appeared in the early 1900s, for example, in the US and Australia. In the late 1940s, many states underwent a reform process of their legal aid schemes, establishing court-appointed lawyer schemes or mixed model schemes that, for the first time, offered the poor and low-income citizens a comprehensive range of legal aid services. In the past two decades, emerging democracies and developing countries in Eastern European, Latin American and elsewhere, including Lithuania, Bulgaria, Mexico, Nicaragua, Colombia, Chile, Mongolia and South Africa have all piloted and subsequently introduced public defender schemes in response to identified weaknesses in traditional court-appointed schemes, such as the high financial costs and concerns at the poor quality of representation. Fundamental to the success of the scheme is that it is independent from judicial or political interference. The selection, funding and payment of defence lawyers must be independent. Public defenders must be able to advocate vigorously on behalf of the interests of their client, who will often, particularly in criminal cases, be facing the state as the other party to a case. However, up to now, no state has exclusively adopted a public defender model.

⁷⁷ The general approach taken is to implement a “mixed system” that gives priority to the use of public defenders who are full-time state employees but also includes private lawyers who may be contracted by the public defenders office to represent indigent defendants when the public defenders do not have the capacity, skill level or there is a conflict of interest. In many states even this mixed model is then supplemented by various other modes of legal aid service provision.

Up until recently, this model consisted of private lawyers contracted on a case-by-case basis by the MoJ Legal Aid Unit to provide Legal Aid in cases of serious crimes where the accused was indigent. In accordance with the law, the presiding judge of the relevant court appointed the lawyer, who was paid by the MoJ on receipt of a letter from the presiding judge confirming that the lawyer had completed the task of legal representation. The lawyer was paid on the basis of the number of court hearings per case that the lawyer attended. The rate was fixed at 30,000 Somaliland shillings (approximately 5 USD) per hearing.

Up until recently, the model was lacking a quality control mechanism, and the lack of a transparent and systematic process of appointment and request for payment. This left the model vulnerable to allegations of corruption and nepotism.

The draft Legal Aid Act proposes the establishment of a Public Defender's Office as an independent national institution providing Legal Aid, complementing the Legal Aid services already provided, and which does not replace any other scheme or system providing or facilitating access to Legal Aid. Among the main responsibilities of the Public Defender's Office is the responsibility to maintain public defender offices in all locations where a court is based and, if necessary, in prisons, and the provision to contract with private lawyers to provide *ad hoc* Legal Aid services on behalf of the public defender scheme.

To-date, independent Legal Aid NGOs (Legal Aid service providers), supported by various international donors, offer Legal Aid:

- The Somaliland Lawyers Association (SOLLA) (operating in all the regions excluding Sool);
- The Somaliland Women Lawyers' Association (SWLA) (operating in Hargeisa and Gabiley);
- The University of Hargeisa, Legal Clinic (operating in Hargeisa);
- The Amoud University Legal Clinic (operating in Boroma).

The above organizations provide legal assistance and representation in criminal and civil cases to vulnerable members of the community, with a specific focus on the needs of women, children, internally displaced persons, remand prisoners and persons in detention at police stations. Legal Aid services were provided through lawyers and paralegals⁷⁸ and include legal representation, legal information and advice giving, mediation and legal awareness raising services. In addition, Hargeisa and Amoud Legal Aid Clinics provide clinical legal education to third and fourth year law students to supplement their theoretical learning with practical legal experience. The responsibility for monitoring the quality and scope of the service providers' work is undertaken by their donors. To date, the majority of the work of three of the providers is focused in Hargeisa, the capital of Somaliland, and its surrounds, with SWLA and SOLLA also having a limited presence in other regions. Amoud Legal Clinic serves the wider Boroma community.

⁷⁸ Legal advocate staff numbers are: 11 from SOLLA, 5 from SWLA, 9 from Hargeisa Legal Aid Clinic and 3 from Amoud Legal Aid Clinic. Paralegal staff numbers are: 22 from SOLLA, 6 from SWLA, 13 from Hargeisa Legal Aid Clinic and 4 from Amoud Legal Aid Clinic.

In 2012, two independent studies were conducted in Somaliland on the issue of access to justice and Legal Aid.⁷⁹ Both studies interviewed and surveyed a sample of the public as well as various justice sector stakeholders regarding their justice needs, perceptions and experiences within the Somaliland justice system.

The ‘Justice and Policing Study’ concluded that there was a significant lack of trust within the community towards the justice system, and that one of the major reasons for this lack of faith in the Police, courts and lawyers was due to the prevalence of corruption across all sectors of the formal state justice system. It was found that there is a general public perception that corruption is endemic throughout the formal system, and that only those with money will receive the protection of the law.

As a component of the ‘Justice and Policing Study’, a public perception survey was conducted in December 2011 of 120 women, youth, elders and IDPs from the Hargeisa region, Somaliland. The results of the survey revealed that about one third of the 120 survey respondents had experienced a legal or justice problem between January and December 2011. From this group, and an additional group of 45 Legal Aid beneficiaries who had received services from the above mentioned Legal Aid service providers⁸⁰, priority legal needs were identified as being family problems (including domestic violence and inheritance disputes) and land disputes, and lesser criminal matters such as assault (fighting). These findings are useful in guiding discussions around the need for, and the possible scope of, the provision of state-sponsored legal assistance in civil cases.

Finally, it was found that even though people, and particularly youth, will generally take active steps to address their legal problems, almost none will independently seek legal information to inform that process. Instead there is a tendency to passively rely on the assistance of elders, police or court entities, despite the acknowledged limitations of each option. The study recommended that this passive acceptance of the *status quo* should be converted into active consciousness of the current flawed systems through increased legal rights awareness-raising and additional support to individuals to challenge the policies and practices that fail to uphold and protect those rights.

The survey respondents were also asked about their perception, attitude and knowledge of the justice system in Somaliland. Specifically, respondents were asked about their perception of the accessibility and effectiveness of lawyers in their community. Almost three quarters of respondents (71%) stated there are no lawyers in their community. Of the 29% who said there are lawyers in their community, almost two-thirds (61%) believed they were not affordable. Almost half of the Legal Aid beneficiaries interviewed stated that their primary motivation for approaching a Legal Aid service provider for assistance was that they could not otherwise afford legal assistance. The issue of affordability of legal assistance also appeared in the Ministry

79 The first was the ‘Strengthening the Quality and Scope of Justice Provision and Policing in Somaliland’ baseline study (the “Justice and Policing Study”) conducted by the Faculty of Law at the University of Hargeisa, Somaliland. The study was supported financially and technically by the UNDP Governance and Rule of Law Programme (GROLS) and was publicly released in July 2012. The second was the aforementioned Legal Aid Baseline Study conducted by the Minister of Justice (MoJ) Legal Aid Unit, publicly released in August 2012 (the “MoJ Study”).

80 Each of the three legal aid providers acting in Hargeisa – the Somaliland Lawyers Association (SOLLA), The Somaliland Women Lawyers’ Association (SWLA) and the University of Hargeisa Legal Aid Clinic – submitted lists of clients registered with them between January and March 2012. Using a simple random sampling technique, 45 clients (15 from each provider) were selected for interviews about their experience with legal aid services.

of Justice (MoJ) study, wherein the majority of prisoners interviewed who did not have legal representation said that it was because they could not afford representation. Such data highlight the real and continuing need for the provision of free legal assistance, particularly for vulnerable groups such as detainees.

In Somaliland, communities outside of the regional capitals have little or no access to the formal justice system.⁸¹

The lack of Legal Aid lawyers at the majority of the mobile court hearings highlights a real issue of vulnerable people participating in the formal legal process without legal assistance. This is of particular concern in cases concerning serious crimes, for which there is a constitutional obligation upon the Somaliland government to ensure that a lawyer is provided.

The MoJ study obtained additional statistics from various government agencies regarding the number of serious crimes prosecuted in 2010 and 2011. According to the Office of the Attorney General, there were 1,053 prosecutions for serious crimes in 2010 across the six regions of Somaliland, and 983 prosecutions in 2011. According to the study, therefore, Legal Aid providers, plus the three court-appointed lawyers who were interviewed, were able to represent approximately 39% of defendants charged with serious crimes in 2010 and 43% of those charged in 2011.

The same study also included interviews with 78 prison inmates detained in Hargeisa, Burco, Berbera, Boroma, Gabiley and Erigavo prisons. Twenty-two of these prisoners were on remand and were accused of committing serious crimes, and 56 had been convicted of committing serious crimes.

Of those on remand, 41% stated that they did not have a lawyer, and all but one interviewee gave the reason as being affordability. Of the 59% who had a lawyer, all were receiving free legal representation from a variety of sources: a Legal Aid service provider (six interviewees); a private lawyer working *pro bono* (five interviewees) and a court-appointed lawyer (one interviewee).

Of the 56 convicted interviewees, 25 did not have any legal assistance during their trial, and in none of these cases did the judge ask if the accused wanted a lawyer, nor was a lawyer assigned to them. Of those who had a lawyer, over half (17) were represented by a Legal Aid lawyer from one of the Legal Aid service providers. Nine interviewees were represented by a *pro bono* private lawyer and five had a court-appointed lawyer.

The above-described evidence demonstrates the limitations of the previous court-appointed lawyer model in Somaliland.

⁸¹ In 2008, the Government of Somaliland and UNDP launched a mobile courts programme which aimed to improve access to justice for persons living in areas where there is no access to the formal court system, through enhanced community legal awareness and adjudication of cases, and to enhance linkages between elders and formal justice institutions' representatives. Between April and July 2012, UNDP staff undertook monitoring visits to 18 mobile court sessions in five locations in Hargeisa region. The staff observed seven civil cases, all of which were property or land dispute cases, and 11 criminal cases of alcohol smuggling, rape and murder.

4.3. Country Examples on Legal Aid

In some countries, state-funded Legal Aid is also available in administrative and other types of proceedings. This conforms to the internationally recognised standards set out by the International Covenant on Civil and Political Rights (ICCPR), and by the European Convention on Human Rights, according to which the term ‘*criminal charges*’ used in Article 14 of the ICCPR and in Art.6 of the ECHR must be broadly interpreted.

4.3.1. South Africa

Since its establishment in 1971, the South Africa Legal Aid Board has been the primary method of delivery of state-funded Legal Aid in South Africa.⁸² It initially adopted the court-appointed lawyers system, which dealt with both criminal and civil cases. Private lawyers who rendered Legal Aid services in accordance with the Legal Aid Board’s rules were paid at fixed rates.

In 1990, a pilot public defender programme was introduced to address an increasing demand for legal aid in criminal matters. In 1994, Legal Aid Board law clinics, which catered to criminal and civil cases, were introduced for the same reason. Between 1970 and 1998, the Board assigned 997,707 Legal Aid cases to private lawyers. 56%, or 559,238 of these cases, were assigned between 1994 and the advent of the new South African Constitution (which entered into force in 1996). With such a dramatic increase in the number of cases, the Board eventually abandoned the court-appointed lawyers’ model as the prime method of delivering Legal Aid services.

During 1995, it was estimated that the average cost of a court-appointed lawyer criminal case was R822 (approximately 98 USD), and the average cost of a public defender criminal case was R555 (approximately 66 USD). The Legal Aid Board had been examining ways of reducing the cost of court-appointed lawyers’ cases by considering fixed-fee-per-case and fixed price contracts, rather than payment at a fixed hourly rate. Ultimately, the Board took the decision to drastically reduce the emphasis on court-appointed lawyers, and to move towards a predominantly public defender model.

The South Africa model is useful, as it demonstrates what is achievable with a modest per capita annual expenditure of approximately 2 USD on Legal Aid.

The overall lesson from the South African experience is that the court-appointed lawyers’ model can work well when there is a comparatively small number of cases, and an independent body in place that has the resources to efficiently administer the model. However, the model is not desirable, nor feasible, when there is a large number of cases to handle and/or where the State faces budgetary constraints, as it is impossible to accurately forecast necessary future expenditure, particularly if an hourly-rate system is adopted.

⁸² David McQuoid-Mason, *The Legal Aid Board and the Delivery of Legal Aid Services in South Africa*: www.legalaidreform.org.

4.3.2. Australia

Australia has a federal system of Government comprising federal, state and territorial jurisdictions. The Australian (Commonwealth) and State and Territory governments are each responsible for the provision of Legal Aid for matters arising under their laws.

Legal aid for both Commonwealth and State matters is primarily delivered through State and Territory Legal Aid Commissions (LACs), which are independent statutory agencies established under State and Territory legislation.⁸³ The Australian Government funds the provision of Legal Aid for Commonwealth family, civil and criminal law matters under agreements with State and Territory governments and LACs. The majority of Commonwealth matters fall within the family law jurisdiction.

Legal Aid commissions use a mixed model to deliver legal representation services. A grant of assistance for legal representation may be assigned to either a salaried in-house lawyer or referred to a private legal practitioner. The mixed model is particularly advantageous for providing services to clients in regional areas, and in cases where a conflict of interest means the same lawyer cannot represent both parties.

The Australian Government and most State and Territory Governments also fund community legal centres, which are independent, non-profit organisations which provide referral, advice and assistance to people with legal problems. Additionally, it funds financial assistance for legal services under certain statutory schemes and legal services for Indigenous Australians.

By way of history, the Australian Government took its first major step towards a national system of Legal Aid when it established the Legal Services Bureau in 1942. However, there was a move in the late 1970s to service delivery by the States and Territories (not the federal arm of government). In 1977, the Australian Government enacted the *Commonwealth Legal Aid Commission Act 1977* (LAC Act), which established cooperative arrangements between the Australian Government and the State and Territory governments under which Legal Aid would be provided by independent Legal Aid commissions to be established under State and Territory legislation. The process of establishing the LACs took a number of years. It commenced in 1976 with the establishment of the Legal Aid Commission of Western Australia; in 1978 with the Legal Aid Commission of Victoria (LACV), and ended in 1990 with the establishment of the Legal Aid Commission of Tasmania. The cooperative arrangements that were established by the LAC Act provided for Commonwealth and State and Territory Legal Aid funding agreements, which began in 1987.

In July 1997, the Australian Government changed its arrangements to directly fund Legal Aid services for Commonwealth law matters. Under this arrangement the States and Territories fund assistance in respect of their own laws.

⁸³ National Legal Aid in Australia: <http://www.nationallegalaid.org/>.

4.3.3. United States

A number of delivery models for Legal Aid have emerged in the US.⁸⁴ In a ‘staff attorney’ model, lawyers are employed on a salary to solely provide legal assistance to qualifying low-income clients, similar to staff doctors in a public hospital. In a ‘judicare’ model, private lawyers and law firms are paid to handle cases from eligible clients alongside cases from fee-paying clients, much like doctors are paid to handle Medicare patients in the U.S. The ‘community legal clinic’ model comprises non-profit clinics serving a particular community through a broad range of legal services (e.g. representation, education, law reform) and provided by both lawyers and non-lawyers, similar to community health clinics.

Defendants under criminal prosecution who cannot afford to hire an attorney are not only guaranteed Legal Aid related to the charges, but they are guaranteed legal representation in the form of public defenders as well.

In a series of cases, the US Supreme Court ruled that American indigents do have a right to counsel, but only in criminal cases.⁸⁵ A few states (like California) have also guaranteed the right to counsel for indigent defendants in ‘quasi-criminal’ cases like paternity actions.

All lawyers must complete a certain number of hours per year of *pro bono* work. However, there is underfunding of Legal Aid. This problem of chronic underfunding of Legal Aid traps the lower middle class in no-man’s-land: too rich to qualify for Legal Aid, too poor to pay an attorney in private practice. To remedy the ongoing shortage of Legal Aid services, some commentators have suggested that mandatory *pro bono* obligations ought to be required of all lawyers, just as physicians working in emergency rooms are required to treat all patients regardless of their ability to pay.⁸⁶ However, such proposals have been successfully fought off by bar associations. A notable exception is the *Orange County Bar Association in Orlando, Florida*, which requires all bar members to participate in its Legal Aid Society, by either serving in a *pro bono* capacity or donating a fee in lieu of service. Even where mandatory *pro bono* Legal Aid exists, however, funding for Legal Aid remains severely insufficient to provide assistance to a majority of those in need.

4.3.4. European Union⁸⁷

Article 47 of the Charter of Fundamental Rights of the European Union provides that Legal Aid is made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. Of the 28 Member States of the European Union, some examples are provided below of Legal Aid systems in France, Greece, Italy, and Germany.

⁸⁴ For the legal aid schemes in the USA see: <http://legalaid.uslegal.com/>.

⁸⁵ See decision of US Supreme Court on *Gideon v. Wainwright*, 372 USA 335, of 18.3.1963: <https://supreme.justia.com/cases/federal/us/372/335/case.html>. In this case, the Supreme Court unanimously ruled that state courts are required under the 14th Amendment to provide counsel in criminal cases for defendants who are unable to afford to pay their own attorneys.

⁸⁶ Helynn Stephens, “Price of pro bono representations: examining lawyers’ duties and responsibilities”, *Defense Counsel Journal*, 71, no. 1 (January 2004), p. 71-79.

⁸⁷ For legal aid in all European Union countries see: http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ger_en.htm.

4.3.4.1. France⁸⁸

In France, the current Legal Aid model (which replaced the older one dating from legislation of 1972), is governed by the Legal Aid Act (No 91-647 of 10 July 1991) and Decree No 91-1266 of 18 December 1991. It covers:

- *Legal aid proper*: financial aid for court proceedings and out-of-court settlement proceedings;
- *Aid towards advocates' fees* in criminal proceedings that are available as an alternative to prosecution (settlement and mediation), for legal assistance for those held by the police for questioning, and for disciplinary proceedings in prisons, and
- *Access to the law* (information, guidance, free legal consultation). Legal Aid entitles the recipient to free assistance from an advocate or other legal practitioner (bailiff, notary, auctioneer, etc.) and to exemption from court costs.

The costs of a court action depend on: the nature and complexity of the case and the procedure, and the court hearing the action.

A distinction can be made between three categories of costs:

- *Lawyer's fees*, for which there is no fixed scale – the lawyer and the client are free to agree on the rate which the client generally has to pay unless he is eligible for Legal Aid;
- *Court costs*, enumerated exhaustively in section 695 of the new Code of Civil Procedure and consisting mainly of:
 - a) Refreshers for advocates (refreshers are distinct from basic fees);
 - b) Court bailiffs' procedural charges;
 - c) Judicial examination and investigation charges;
 - d) Witnesses' allowances (fixed scale);
 - e) Advocates' hearing fees;
 - f) Disbursements: these are costs corresponding to trial-related outlays by practitioners, repayable on a fixed scale.

Court costs are borne by the losing party, under section 696 of the new Code of Civil Procedure. But the court may, by reasoned decision, order the other party to pay them in whole or in part, in which case it specifies how they are to be shared.

- *Other costs* incurred by the parties: as a rule they bear these costs themselves, unless the court decides otherwise, in both criminal and civil proceedings. The court gives its decision on an equitable basis, having regard also to the losing party's ability to pay. The court has the power to order that a no costs order may be made.

⁸⁸ http://ec.europa.eu/civiljustice/legal_aid/legal_aid_fra_en.htm.

In criminal proceedings the State bears the costs of justice. People convicted of an offence must pay a fixed charge for the proceedings, based on the seriousness of the offence.

Legal Aid is given by the Legal Aid bureau at the Regional Court, subject to available resources, nationality, residence and admissibility.

The applicant is entitled to Legal Aid if s/he is a French national, or a citizen of the European Union, or a foreign national habitually lawfully residing in France. Foreigners not residing in France are also entitled to Legal Aid for a case in a French court if they are nationals of a State that has an international or bilateral agreement with France giving entitlement to Legal Aid.

Legal Aid is given if the action is not manifestly inadmissible or devoid of substance. This condition does not apply to defendants, to persons civilly liable, to witnesses, to persons under examination, charged or accused, or to persons convicted.

Legal Aid is given to claimants and defendants in contentious and non-contentious matters in all courts. It can be given for all or part of the proceeding, and to assist in reaching a settlement before the action comes to trial. Legal Aid can also be given for the purposes of seeking enforcement of a judgment or other enforceable document.

In criminal cases, the procedure allows Legal Aid to be given in cases of urgency (police custody, initial questioning, immediate summary trial and similar situations). It is given in the course of the proceeding and covers all acts of procedure.

All litigants are free to choose their own advocate. If they choose their advocate, they must give his name on the Legal Aid application form. If they do not know an advocate, one will be designated for the applicant by the president of the Bar association for the Regional Court. Legal Aid may be given with retroactive effect where a party has commenced an action and won it, but Legal Aid was refused on the grounds that the action had no reasonable prospect of success.

4.3.4.2. Greece⁸⁹

Legal Aid in Greece exempts the applicant from all legal costs, including judicial stamp duty, duty on the writ of execution, surcharges on these stamp duties, solicitor's and bailiff's fees, costs relating to witnesses and experts, and the fees of the barrister or other representative. The granting of Legal Aid holds good for successive procedural stages and courts right up to the enforcement of judgments.

Legal Aid is available before all courts: civil, criminal and administrative. It is available for both contentious and non-contentious proceedings. There is a specific procedure for emergencies which is always available for applications for Legal Aid. There is no special application form for Legal Aid. Legal Aid is granted by: (a) the district court, (b) the (single-judge) regional court or (c) the president of the full regional court in which

⁸⁹ http://ec.europa.eu/civiljustice/legal_aid/legal_aid_gre_en.htm.

the proceedings are to be instituted or are pending. In matters unrelated to a trial, Legal Aid is granted by the district court of the place of residence of the applicant.

The following persons are eligible for Legal Aid:

- a) anyone (any national) who can show that payment of his legal costs is liable to deprive him and his family of the means necessary for their maintenance;
- b) corporate bodies which serve the public interest, or are non-profit-making, and groups of persons which have the right to take part in court proceedings if it is shown that payment of the costs of the proceedings would make it impossible or difficult for them to accomplish their aims;
- c) partnerships or associations if the partnership or association cannot pay the costs of proceedings, and its members cannot do so without depriving themselves and their families of the means necessary for their maintenance;
- d) foreign nationals provided there are reciprocal arrangements, and stateless persons on the same conditions to Greek nationals. Some bar associations have projects to cover Legal Aid for asylum seekers and refugees.

If evidence of the economic situation of the applicant does not allow him/her to pay the cost of the case, the applicant must submit:

- a) a certificate from the mayor or president of his municipality stating his financial and family circumstances and occupation, and certifying that he is unable to pay without risk to himself and his family. In the case of a non-profit-making corporate body, it must be shown that the accomplishment of its aims would be made impossible or difficult; and in the case of a partnership or association, that the partnership or association cannot pay the costs of proceedings and its members cannot do so without depriving themselves and their families of the means necessary for their maintenance;
- b) a certificate from the litigant's local tax office certifying that in the previous three years the applicant has submitted an income-tax return and a return for any other tax due, and that the returns have been checked by the tax office;
- c) in the case of a foreign national, a certificate from the Ministry of Justice certifying that there are reciprocal arrangements with the country of origin.

4.3.4.3. Italy⁹⁰

Legal Aid in Italy (also known as "*Patrocinio a spese dello Stato*") is provided for by Articles 74-141 of the Presidential Decree n.115/2002 (Law Gazette No 139/2002). Italy aims to implement Article 24 of the Italian Constitution, and ensure access to the right of defense (in civil, administrative and criminal cases) to persons not able to independently obtain the services of a lawyer due to an inability to pay for them from their income.

The Constitution of the Italian Republic, Clause 24 states: "*Everyone is allowed to take legal action for the protection of her/his rights and legitimate interests. Defence is an inviolable right at any grade of the*

⁹⁰ http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ita_en.htm.

proceedings. The means of action and defence before all Courts are guaranteed to the indigent by public institutions. The law determines the conditions and legal means to remedy miscarriages of justice”.

Legal Aid in Italy is a service which allows everyone to be assisted by a lawyer or by an expert witness free of legal costs in all criminal, civil, administrative, accounting or fiscal proceedings and ‘voluntary jurisdiction’, and whenever the presence of a lawyer or expert witness is required by law. Legal Aid is granted for all grades or stages of the trial, including all further connected incidental and contingent proceedings. It is granted before Tribunals, Courts of Appeal, the Supreme Court, surveillance courts and judges, Regional Administrative Tribunals, Judicial Review Committees, Provincial and Regional Fiscal Commissions and the State Auditors’ Court.

Legal Aid covers the following:

- Counsel’s fees and expenses;
- Travel costs and expenses incurred by judges, officials and judicial officers for performing their duties outside the court;
- Travel costs and expenses incurred by witnesses, court officials and expert witnesses who incurred expenses when performing their duties;
- The cost of publishing any notice regarding the judge’s ruling, and
- The cost of official notifications.

Anyone with a taxable income not exceeding 9,269.22 Euros per annum, as shown on his or her latest tax return, is entitled to Legal Aid. The income threshold is adjusted every two years by order of the Ministry of Justice to take account of variations in the National Institute for Statistics’ (ISTAT) consumer price index.

There is no specific procedure for emergencies. It should, however, be pointed out that decisions must be taken quickly (within 10 days) and that there is a general principle that can be derived from the provisions governing Legal Aid that stipulates that the body responsible for granting Legal Aid must take an immediate decision in cases of emergency.

Applicants granted Legal Aid may nominate a lawyer from the lists of Legal Aid lawyers drawn up by bar associations of the appeal circuit court of the judge who knows the merits of the case, or the judge before whom the case is pending.

Applicants granted Legal Aid may also nominate expert witnesses where allowed by law.

If the case is at the appeal stage, the lawyer will be chosen from the lists drawn up by bar associations of the court of appeal circuit where the judge who made the contested ruling has his or her chambers.

The list of Legal Aid lawyers comprises professionals who have applied to be put on it and have the qualifications necessary to represent clients.

4.3.4.4. Germany⁹¹

In Germany, a distinction is made between assistance under the Legal Advice Scheme Act, and assistance with court costs. The Legal Advice Scheme Act provides for people on low income to receive assistance with the cost of advice and representation outside the courtroom. Persons in need receive assistance with the conduct of court proceedings under the rules on assistance with court costs.

In civil cases, including employment, administrative, constitutional and social cases, assistance (advice and, where necessary, representation) under the Legal Advice Scheme Act (advice and, where necessary, representation) is given. In criminal cases, and cases involving administrative offences, only advice but no representation is given.

The applicant may choose the lawyer from whom he/she wishes to obtain assistance under the Legal Advice Scheme. In Bremen and Hamburg, citizens' advice bureaus provide the legal advice. Lawyers are required to give legal advice. They may only refuse to take on a case where there are serious grounds for doing so. The choice of lawyer is also a matter for the applicant where assistance with court costs is given. Applicants must choose a lawyer authorised to represent them. Only where applicants are unable to find a lawyer prepared to represent them will the presiding judge assign a counsel.

The lawyer providing legal advice is entitled to claim a small amount as a fee from the applicant (10 euros), which may be waived depending on the party's circumstances. Other agreements regarding remuneration have no value in law. The lawyer receives the rest of the remuneration from public funds. Where assistance with court costs is given, all the applicant's procedural costs are covered, apart from costs not related to the presentation of the case. There are no further costs for the party in need.

Where an application for Legal Aid is justified, the applicant incurs no other costs. All costs arising from the proceedings are covered by the approval of the aid. Where applicants have the financial means to cover part of the costs with part of their income, they are required to pay back the sum in question into public funds in installments.

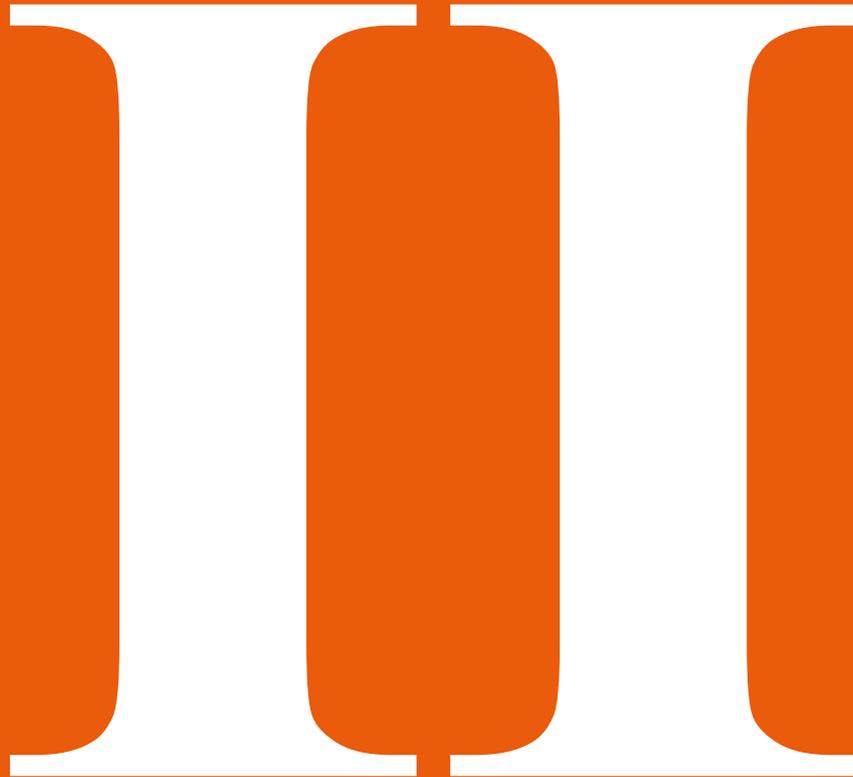
Approval of assistance with court costs does not automatically cover appeals. The cover ends when the final decision concludes the case. However, a fresh application may be made for assistance with court costs to cover appeal proceedings. The appeal court examines whether the party is still in need, whether the appeal is not willful or malicious and whether it has a chance of success. If these conditions are satisfied, the party is entitled to assistance with court costs to cover the appeal.

Practice Exercise - Two

The class is requested to study the above models and comment on the pros and cons of each system. Then they will have to choose the most favorable among the above models, and justify their choice.

⁹¹ http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ger_en.htm.

Part II: Representing and Defending the Accused in Each Stage of the Criminal Justice Process



Part II:

Representing and Defending the Accused in Each Stage of the Criminal Justice Process

Learning objectives

Participants will:

- understand the function of Legal Aid in the justice procedure at all stages.
- understand the general principles of Legal Aid at the police stage and become aware of the goals of defense involvement during investigation;
- become aware of the important role of Legal Aid at the Police stage and during investigation, especially for persons that are detained;
- become aware of the principles applying during this stage; and become aware of the possibility of defense investigation.

A Legal Aid program should include legal assistance at all stages of the criminal process including arrest, investigation, pre-trial detention, bail hearings, trials, appeals, and other proceedings brought to ensure that human rights are protected.

Suspects, accused persons, and detainees should have access to legal assistance immediately upon arrest and/or detention wherever such arrest and/or detention occurs. According to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, *“A functioning Legal Aid system, as part of a functioning criminal justice system, may reduce the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts, and reducing reoffending and revictimization. It may also protect and safeguard the rights of victims and witnesses in the criminal justice process. Legal Aid can be utilised to contribute to the prevention of crime, by increasing awareness of the law [for example by disseminating information by the State to the public].”*

In the same context, the Lilongwe declaration adds that Legal Aid, as part of a functioning criminal justice system, may also reduce the costs of criminal justice administration and incarceration.

A person subject to criminal proceedings should never be prevented from securing Legal Aid and should always be granted the right to see and consult with a lawyer, accredited paralegal, or legal assistant. According to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Governments should ensure that Legal Aid programs provide special attention to persons who are detained without charge, or beyond the expiration of their sentences, or who have been held in detention or in prison without access to the courts. Special attention should be given to women and other vulnerable groups, such as children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally and seriously ill, refugees, internally displaced persons, and foreign nationals.

According to the Lilongwe Declaration, referral mechanisms should be established between the court and village hearings. Such mechanisms might include:

- Diversion from the court to the village for the accused to make an apology or engage in a victim-offender mediation;
- Referral from the court to the village to make restitution, and/or consider compensation appeals from the village to the court.

As mentioned above, Legal Aid should also be provided during the settlement procedures at the village hearings. However, this issue cannot be covered under this Manual.

Chapter 1:

Legal Aid at the Police stage and during investigation

Learning objectives

Participants will:

- become aware of the important role of Legal Aid at the Police stage and during investigation, especially for persons that are detained;
- become aware of the principles applying during this stage; and
- become aware of the possibility of defense investigation.

1.1. General principles

The right to legal assistance during detention, interrogation and preliminary investigations⁹² is a basic right included in many resolutions of the United Nations, as well as the African Commission on Human and Peoples' Rights. Pursuant to the Basic Principles on the Role of Lawyers, all persons are entitled to the assistance of a lawyer at all stages of criminal proceedings (principle 1), and access should be promptly provided after arrest (principles 1 and 17) and, in any case, no later than 48 hours from the time of arrest (principle 7).

According to the African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Access to Justice of 2001*, "any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present." (Clause M.2.f).

In many countries, many suspects are detained for lengthy periods of time in overcrowded police cells. Prolonged incarceration of suspects without providing access to Legal Aid or to the courts violates the basic principles of international law and human rights. Therefore, legal advice and assistance for the police stations should be more enforced.

It is the responsibility of the State to take measures to make sure that the police will not restrict access to Legal Aid.

According to Guideline 4.43(a) of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, in order to ensure that detained persons have prompt access to Legal Aid in conformity with the law, States should take measures at the pre-trial stage, "to ensure that police and judicial authorities do not arbitrarily restrict the right or access to Legal Aid of persons arrested, detained, suspected of or charged with a crime, in particular in police stations".

⁹² The European Court of Human Rights has consistently acknowledged that the right to a fair trial normally requires that an accused person be allowed legal counsel during the initial stages of police investigation, *Murray v. United Kingdom* (1996) 22, EHRR, 29, para. 66.

States should also “request bar or legal associations and other partnership institutions to establish a roster of lawyers and paralegals to support a comprehensive legal system for persons arrested, detained, suspected or charged with a crime, in particular at police stations” (Guideline 4.43[f]).

According to the Lilongwe Declaration, legal and/or paralegal services should be provided in police stations in consultation with the Police Service, the Law Society, University law clinics and NGOs. These services should include:

- Providing general advice and assistance at the police station to the accused as well as to victims of crime;
- Visiting police cells or lock-ups (cachots);
- Monitoring custody time limits in the police station after which a person must be produced before the court;
- Attending at police interview;
- Screening juveniles for possible diversion programmes;
- Contacting / tracing parents / guardians / sureties, and
- Assisting with bail from the police station.

Additionally, the police are required to co-operate with service providers and advertise these services and how to access them in each police station.

According to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, (Principle 3.20) “anyone who is arrested, detained, suspected or charged with a crime punishable by a term of imprisonment or the death penalty is entitled to Legal Aid at all stages of the criminal justice process”.

It is the responsibility of the police, prosecutors and judges to ensure that those who appear before them, who cannot afford a lawyer and/or who are vulnerable, are provided access to Legal Aid (Principle 3.23).

Example:

In Malawi⁹³, paralegals seeking admission to police stations to assist an accused at the interview or interrogation stage faced initial resistance. Most children who were in conflict with the law ran the risk of being treated as adults while in the hands of the police because it was difficult to determine their age in the absence of a birth certificate. However, in a short time, the Paralegal Advisory Service Institute of Malawi met with police officers to agree to a code of conduct governing paralegal entry to and work in police stations. This provided partial recognition of the paralegals, and placed them under the authority of the police (when on police premises) and began the process of building up a degree of trust. An interview form was agreed upon, and paralegals were invited to use this form in the case of each young person brought to the police station.

Since 2004, paralegals in Malawi have diverted 77 per cent of children in conflict with the law away from the criminal justice system.

93 See, UNODC (2011), *Handbook on improving access to legal aid in Africa*, p.50.

In Malawi paralegals approached police trainers from a UK Department for International Development-funded police reform programme, to explore options for training paralegals in investigative skills. Police trainers agreed to provide paralegals with a three-day training course in investigative interviewing skills that they provide to investigating police officers. The course aimed to provide officers with the skills to interview effectively rather than oppressively. This then opened the way for paralegals to gain access to suspects during the interview or interrogation stage. The police trainers advocated for the inclusion of paralegals in police interrogations.

The above example shows that once the door has been opened, even in a small way, opportunities arise to develop new initiatives with the police service.

Article 27, para 1, of the Constitution of Somaliland gives the accused the right to appoint an advocate from the time of arrest, and states that: *“Any person who is deprived of his liberty has a right to meet as soon as possible his legal representative”*. Similarly, the Criminal Procedural Code (Article 15, para 5) establishes the right of the defense attorney to be present during all stages of the proceedings.

Many advocates mistakenly believe that participation in the investigation is an unimportant part of their duty and that safeguards contained in the CPC will protect the client’s rights in their absence. In fact, how the early phases of an investigation are conducted is often more critical to the outcome of the case than anything that occurs later in the court. For example, it is not unusual for a client to tell his or her defense attorney that the confession obtained by the police was the result of beating, and not a statement of the truth. Proving that a beating took place, that the beating was the cause of the confession, and that the confession was false, is often exceedingly difficult since it can be expected that the police will admit nothing. If, on the other hand, the advocate attends the interrogation, the beating and the false confession may be prevented and a good deal of suffering by the client and difficulty for the advocate is thereby avoided.

There are several potential practical difficulties that must be faced by advocates determined to provide their clients with representation at all stages of the investigation. The primary obstacle to advocates participating early in the investigation is that they are often not appointed until much later in the case.

It is not helpful for advocates to take a passive view towards the manner in which they are appointed. If advocates simply wait quietly by their telephones hoping for the police, the prosecutor, or the court to call them it can be expected that many suspects will continue to be unrepresented at critical times.

Class Discussion - One

- *How are you appointed to cases?*
- *Is the investigation typically complete before you are appointed to the case?*
- *How could you be appointed earlier in the process?*
- *Could public education about the right to an attorney impact appointment times?*
- *Could notices about how to contact defense attorneys be posted at police stations? Jails? Juvenile detention facilities?*

- *What improvements might be made?*

Once assigned to the case, there are often additional obstacles that are faced by the advocate wishing to provide meaningful representation during the investigation. In principle, according to the CPC, notifications are foreseen to be made to the accused (e.g. Art.215 the notice of appeal); to the attorney general, and to the Court by the police (e.g. Art.24.1 for the commission of an offence), but not directly to the defence lawyer. The only case where a defence lawyer is notified according to the CPC is in the case of Legal Aid appointed by the court as provided by Art.75 (d) of the CPC. In that case, the competent Judge, as soon as he receives the charge and the request to fix a date for the hearing, should “*appoint a defence Counsel for the accused in the cases coming within the provisions of sub-paragraph b) of paragraph 2 of Article 14 of the Law on the Organization of the Judiciary, when the accused has not appointed his own defence Counsel, and direct that the appointment be communicated to the accused and the said defence Counsel*”.

In any other case, once the advocate becomes aware of an activity, he or she may sometimes be prevented from attending or participating by the police or the attorney general.

In cases of fear of the loss of evidential facts, Article 58.1.(a) of the CPC allows a waiver of the duty of warrant for the Police in search and seizure. In serious crimes it is more likely than in most other cases that this provision is invoked. However, the advocate should demand from the judge to show the existence of specific facts, as proof of the “*fear*” that justifies the waiver.

Class Discussion - Two

- *Are you notified in advance of investigation activities?*
- *How are you notified?*
- *What actions could advocates take to ensure that they are properly informed of investigative activities?*
- *Are you always permitted to observe, ask questions and make objections during investigation activities?*
- *Do you face any obstacles to your participation in investigation activities?*

Normally the advocate has access to the findings of the investigation, the objects under seizure and the documents contained in the file. As a practical matter, simply viewing these documents and objects is unlikely to be sufficient for the advocate’s purposes. The advocate needs to have some method of recording what is in the file in order to be able to study it in precise detail. However, the first challenge is to get the prosecutor to agree to allow the advocate any access to the file.⁹⁴ Some prosecutors believe that they are only required to provide a copy of the indictment to the advocate, although the CPC is clear that access to the file must be provided.

⁹⁴ Article 134, para 2, of the CPC allows the accused to take a complete copy of the court case file “upon payment of the costs and fees fixed by decree of the Minister of Grace and Justice, provided that the trial or the higher Court may order that a complete copy of the Court case file be given to the accused without payment if the Court considers that such may be necessary for an appeal”.

Ideally, the prosecutor would supply the advocate with photocopies of every item in the file and allow unlimited inspection of items of physical evidence. The next best option would be for the prosecutor to provide access to the file and the use of a copy machine. However, given the frequent lack of electrical power in many prosecutors' offices, and the general absence of copy machines and supplies to keep them operating, this is not yet the practice. Most advocates resort to taking handwritten notes of what is in the file. Handwritten notes are not an adequate substitute for copies of the original documents, as notes are very time-consuming to produce and carry great potential for missing important details and making errors. If the advocate must make notes, the amount of time that the advocate is given with the file and the type of space that is provided for the purpose of inspecting the file can limit both the quality and quantity of notes that the advocate can reasonably produce. A better solution might be to use a basic digital camera to photograph each page of the file to be viewed later on a computer screen and printed as necessary.

Class Discussion - Three

- *What obstacles have you faced in obtaining access to a file and other evidence?*
- *What approaches have you used to overcoming these obstacles?*
- *What solutions can you and other advocates achieve?*

1.2. Defense Investigation

Defense attorneys can easily fall into the mistaken belief that the only purpose of their job is to find flaws in the evidence collected by the police and the reasoning presented of the prosecutor. In fact, the advocate has the ability and the responsibility to gather and present exculpatory evidence and witnesses that are neglected or overlooked by the police and the prosecutor.

There are two paths that the advocate may take to ensure that evidence and witnesses favorable to the defense are fully and fairly considered by the court:

- to persuade the court to investigate potentially exculpatory evidence and witnesses using its official powers; and
- (for the advocate) to investigate these facts and witnesses independently and then bring them before the court.

Legal systems throughout the world differ widely in the details of how much and in what manner they permit the defense to participate in and/or challenge the official investigation against their client, and how much and in what manner they recognize the right of the defense to bring its own evidence and witnesses.

Historically, the world's major legal traditions (Islamic Law, Common Law and Civil Law) developed somewhat independently of each other, over time they have each learned and borrowed from each other, and the trend is toward the narrowing of differences and an increasing convergence of methodology.

The fundamental structure of Somaliland’s legal system places it squarely in the civil law tradition rather than the common law tradition.⁹⁵ However, current procedure laws expand the powers of the defense attorney well beyond those historically available in civil law countries, and reflect the modern trend within civil law to adopt measures to protect the accused that were once associated with common law.⁹⁶

Under article 116 of the CPC, the defense has the right to present evidence, and this includes witnesses and experts of its own.

It may not be feasible for the police in Somaliland to conduct all possible investigations and uncover all possible exculpatory evidence. The police that first arrive at the scene of a crime should be properly trained to collect evidence and to preserve the crime scene. The police may make errors or overlook important evidence, or they may stop investigating a case once they have referred it to the Attorneys General Office.

Therefore, advocates must either successfully prompt the official investigation to undertake work favorable to the defense, or consider conducting their own search for exculpatory evidence or witnesses (i.e. a defense investigation).⁹⁷

The goals of defense involvement in the investigation are:

- To uncover errors in the police investigation;
- To uncover facts omitted from the police investigation that support a defense;
- To discover bias and prejudice, or errors on the part of prosecution witnesses, and
- To make a record of and preserve facts and evidence favorable to the defense for presentation to the court.

How these goals are achieved is of far less consequence to guaranteeing a just outcome for the client than the fact that they are achieved.

It is evident that if the advocate becomes a witness to events in the case about which he or she must then testify, a conflict of interest may apply which would require the advocate to withdraw from the case. Some

95 Civil Law has its origins in Roman Law and the Napoleonic Code and is the traditional origin of the modern systems in France, Germany, Italy, and many other countries. Common Law has its origins in English courts of common pleas (although there are scholars that assert that many of Common Law’s methods are borrowed from Islamic Law) and was further developed in English-speaking countries and English colonies around the world. Common Law is the traditional root of the modern systems in the UK, USA, India, Pakistan, Malaysia and many other countries.

96 One method of distinguishing Civil Law and Common Law approaches is to label Civil Law “inquisitorial” and Common Law “adversarial”. The idea behind this distinction is that in the “inquisitorial” system the verdict is the result of an inquiry into the truth controlled by the Judge, where in the “adversarial” system the verdict is the product of a battle over the truth between opposing parties in which the Judge acts merely as referee. Of course this distinction is a great oversimplification of two complex systems (or more accurately dozens of systems). In Common Law countries, the Judge has far more power to control access to witnesses and evidence than a mere referee, and in Civil Law countries the adversarial relationship between the prosecutor and the defense is by no means absent.

97 The approach of trying to push the judge, prosecutor and police to undertake a competent and complete investigation is one traditionally associated with Civil Law systems. The approach of conducting an independent investigation is one traditionally associated with Common Law.

investigatory activities may be better handled by someone working for the advocate, rather than the advocate him/herself, and preferably a professional investigator.

Specific tasks that may be undertaken by investigators include:

- producing crime scene diagrams and photos;
- obtaining official documents and records;
- conduct victim and witness background investigations;
- witness interviews;
- identifying new witnesses;
- writing reports; and
- testifying at trial.

A number of obstacles exist that impede most advocates from conducting a defense investigation. The main obstacle is that advocates fail to understand what a tremendous benefit this type of work can be to their case. Advocates are also sometimes unsure about how to carry out a defense investigation, and believe that they simply do not have the time needed to do it. Another factor may be resistance from police, prosecutors and judges who are not familiar with the concept. Because Somaliland is - up to the present - lacking private investigators, simply hiring one is probably not an option. Instead, defense investigators should be trained for this.

Class Discussion - Four

- *Have you asked the Judges, Police, and Prosecutors in your cases to authorize or undertake investigative tasks that would benefit the defense?*
- *Have Judges, Police, or Prosecutors in your cases been willing to authorize or undertake investigative activities calculated to produce evidence favoring your client?*
- *What obstacles exist in obtaining the cooperation of the Judges, Police, and Prosecutors to undertake investigative activities favorable to the defense?*
- *Have you ever conducted any defense investigation in any of your cases?*
- *How would using a defense investigator be useful?*
- *What obstacles to using a defense investigator have you faced or would you foresee?*

Practice Exercise - Three

First the class should be divided into groups of between four and eight participants. Each group will have to designate half of its members to act as advocates and half to act as police. The trainers will be designated as judges and prosecutors.

For each scenario below, the advocates should discuss amongst themselves what evidence or witnesses they wish to present and how.

If they wish to seek something via the police file they must request in writing the permission of the trainers acting as judges and prosecutors, who will then decide if they should request the task be undertaken by the participants acting as police. The police will then record what actions they will actually undertake and why. Upon completion of all activities a class discussion will follow.

1. Your client, Abdul, is accused under Art.460 of Penal Code for the seizure of Jafar, 19 years old. Abdul says Jafar stayed with him voluntarily because he had quarreled with his father. He says that Jafar is lying now because he is angry that Abdul denied his request to buy his goats.
2. Your client, Mahmoud, is accused of trading narcotics under Art.342 of Penal Code. He has never been accused of a crime before. He says that his confession is false and that he agreed to it only because he was beaten by the police. Your client says the real reason he was arrested is that he prevented a policeman marrying his sister.
3. Your client, Rashid, is a public officer accused of corruption under Art.246 of Penal Code. He claims that this is a false accusation due to the fact that he is against the government.

Chapter 2:

Legal Aid at the Court

Learning objectives

Participants will become aware of the role of Legal Aid during the Court procedure and in particular:

- How to build the theory of the case;
- The need for legal interpretation
 - become aware of different interpretation methods
 - how to persuade the court to adopt a particular interpretation of a provision or statute
 - become aware of the provisions on the use of interpreters
 - understand when to get an interpreter
 - the interpreter's necessary qualifications and
 - how to work successfully with an interpreter
- How to examine witnesses
- Become aware of the particularities and weaknesses of the eye witnessing;
- Understand the order of examination and types of questions asked to a witness;
- Understand how to prepare a witness for his/her testimony;
- Understand how to anticipate lines of cross-examination;
- Understand how to use a hostile witness
- Become aware of ways of expertise
- Understand the role of the expert;
- Become aware of the closing statement and learn the methods of how to successfully persuade a court to acquit the client;
- Understand how to address issues related to sentencing following the verdict and statement by the client;
- Understand which circumstances lead to the reduction of punishment;
- Learn which actions may have an impact in determining the sentence other than direct mitigating circumstances;
- Become aware of the appeal strategy and learn how to use new evidence according to the CPC, and
- Learn how to respond to crimes committed during trial in and out the court

According to the Lilongwe Declaration, Governments should introduce measures to:

- Promote the wider use of alternative dispute resolutions and diversion of criminal cases, and encourage the judiciary to consider such options as a first step in all matters;
- Conduct regular case reviews to clear case backlogs, petty cases and refer/divert appropriate cases for mediation, and convene regular meetings of all criminal justice agencies to find local solutions to local problems, and
- Encourage non-lawyers, paralegals and victim support agencies to provide basic advice and assistance, and to conduct regular observations of trial proceedings.

As mentioned before a person is entitled Legal Aid at all stages of the criminal justice system. The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provide, in Guideline 5.44(d), that States should take measures to safeguard Legal Aid during court proceedings, in particular:

“To ensure that the counsel of the accused is present in all critical stages of proceedings. A critical stage is every stage of a criminal proceeding in which the advice of a lawyer is necessary to ensure the accused’s right to a fair trial or every stage at which the absence of counsel might impair the preparation or presentation of a defence.”

The same guidelines provide also that: *“A court may, having regard to the particular circumstances of a person and after considering the reasons for refusing Legal Aid, direct that a person be provided with Legal Aid, with or without his or her contribution, when the interests of justice so require”* (Guideline 1.40[e]).

The court stage is the stage where the defence has to present its theory of the case, examine witnesses and experts, and give its closing remarks. It is considered most important and crucial for the outcome of the trial, since in many cases the outcome depends not only on the preparation of the case during the investigation (collection of evidence), but also on the eloquence of the attorney and its debating technique.

2.1. The theory of the case

The theory of the case is the legal theory by which the client is not guilty of the crime of which he or she is accused. In every case, the advocate must endeavor to arrive at such a theory.⁹⁸ It should be possible to state the theory of the case in a short sentence. For example: *“my client is not guilty of assault because he had a legitimate right of self-defense under article 34 of the Penal Code”*. A theory of the case can also be something simple like a mistaken identity (i.e. *“the police arrested my client in error because he looked like, or was dressed like, the person who committed the crime”*), or it might be as complex as arguing that the fingerprint analysis stating that your client’s fingerprint is on the murder weapon is wrong because the analyst used a flawed fingerprint evaluation technique.

⁹⁸ In a very small number of cases it may not be possible to find a basis upon which to argue that the client is not guilty, in which case the theory of the case should express why the client is deserving of a lesser punishment or an alternative sentence.

The theory guides investigation and preparation of the case, and directs presentation of the case at trial.

For example: If your theory of the case is that your client could not be guilty because he was in Puntland when the crime occurred, then the investigation should focus upon finding evidence and witnesses that show that the client was in Puntland at the time the crime occurred, and at trial your presentation should be calculated to emphasize the evidence in support of the same conclusion.

Such theory is developed and finalized in the court stage. The advocate must be willing to re-evaluate and change the theory of the case both before and during trial if it is not consistent with the undisputed facts in evidence. It should be underlined that the final theory can only be determined once the advocate has thoroughly researched the law and investigated the facts.

2.1.1. Understanding your audience

Your theory of the case is only of value if it is one which is capable of convincing the judges who hear the case. The sort of theory that a person finds persuasive often has more to do with the assumptions and beliefs that they bring to the theory than the theory itself.

For example: There are many people in Tanzania who believe that the ground bones of a leopard can cure aches and pains, although there is no scientific evidence to support this belief. If you were to survey two groups of people about whether leopard bone is an effective medicine, one group composed of doctors from Somaliland, and the other of farmers from Tanzania, you could fairly predict that their answers would be guided by their backgrounds. Even a very persuasive advocate would be unlikely to change the minds of either group.

It is wise to select a case theory that conforms to the assumptions and beliefs of the judges who will be deciding your case. Therefore, it is useful to learn as much as possible about your intended audience's background. There are countless areas that might affect a judge's thinking, and it is not possible to find out everything that might be useful.

The type of facts that would be both useful and possible to discover include:

- the judge's education;
- regional, ethnic and religious identity of the judge;
- political affiliation;
- family and other close associations;
- personal ambitions;
- personal beliefs, and
- how the judge has acted in prior cases that were similar to your current case.

If your judge's potential reaction to various theories is not self-evident, you can try to test potential theories on others with similar background characteristics. Of course, the above may be a reason for the disqualification of a judge according to Art.10 of the Somali CPC.

2.1.2. Understanding yourself and your clients interests

The case theory is not an expression of the advocate's opinion about the client or the crime. Just the same as judges, advocates have personal assumptions, biases, and prejudices that affect their opinions. However, advocates have a *duty to present professionally* the most effective defense available to the client, regardless of their personal opinion of the client's guilt or innocence. To successfully respect their duties, advocates must examine their own assumptions and prejudices and be certain that it is professional duty and not personal opinion that motivates their decisions about the client's case.

However, *loyalty to professional duty is different from personal loyalty* and may require the advocate to make some concessions against the client's interest in order to improve the client's position on more important legal issues.

It is perfectly acceptable to have a theory of the case that does not portray your client in a positive light, as long as the theory is convincing and it leads to conclusions in your client's legal interest. For example, if you are representing a man who has previously been convicted of many robberies, and in this case he is accused of digging under a wall to enter a house and steal things, your theory could be that "*my client does not dig in the dirt, digging is too much work, give him a shovel and he'll wait outside your house to hit you with it and take your money, he does not commit crimes that require hard work, this crime is not his*".

2.1.3. Fine tuning the theory

A good theory is one that incorporates and accounts for all facts that cannot be successfully disputed. However, the best theory is the one that requires the fewest *factual disputes* to be resolved in your favor. A theory of the case maybe composed of multiple theories, however *simpler is better*. The most successful theory is the one that requires the least mental *effort and/or imagination* on the part of the intended audience.

Practice Problems - Ten:

Write down one more case theories for each problem below:

1. Your client, Mohammad, is charged with smuggling. Somaliland border guards find diamonds and other gem stones sewn into a blanket found amongst Mohammad's belongings upon searching him at the border as he tries to enter Somaliland from Ethiopia. Mohammad lives in Hargeisa and left to visit relatives in Addis Ababa one week before.
2. Your client, Hakim, is stopped in his car by police officers who search and find one kilo of heroin under the passenger seat that he was sitting in. Your client denies any knowledge of the drugs.
3. Your client, Abdulrahman, is the manager of a profitable restaurant that serves mostly foreigners. He is accused of transgression and injury against an official of public service for allegedly insulting and fighting with a police officer who says he was questioning him in the bazaar because he appeared to be intoxicated. When you meet Abdulrahman he has the marks of being badly beaten. The police did not record the names of any witnesses.

2.2. The need for interpretation

The meaning of some provisions or statutes is not always clear. Even when it appears that the text is clear, the application of the provision to the facts of the case can raise questions. Interpretation is often needed to clearly understand the meaning and scope of a provision. Whether judges acknowledge doing so or not, they are engaged in decisions regarding the interpretation of provisions whenever they apply the law to the facts of a case. Advocates must be able to argue effectively for interpretations that help their client's case, and against those that harm them.

2.2.1. Interpretation Method

The civil law tradition has developed specific methods of interpretation, and while few Somali judges are reported to consciously follow these methods, their actions are often based upon similar reasoning. Understanding these methods will give the advocate a useful insight into what sort of arguments regarding the meaning of statutes are likely to be effective.

The first premise of interpretation is that if the wording of a provision or statute is unambiguous, no interpretation is needed unless this would cause an absurd result. Where an absurd result would follow from the plain meaning of the provision or statute, interpretation is required.⁹⁹

When a text is ambiguous or mysterious, judges are to look for the intent of the legislature. Like everywhere, Somaliland's laws are rife with ambiguities. Ambiguities may arise in some of Somaliland's statutes when the versions of the same law differ enough to be understood to have different possible meanings on a single issue.

When searching for the legislative intent of a provision of the law, the court should first examine the text itself, the entire chapter, and if necessary, the entire law and any commentaries written about the law.

If this type of study does not solve the ambiguity, courts should look to the legislative history. Legislative history refers to the progress of a law through the *legislative* process, and to the documents that are created during that process. The Parliament should help since it keeps in its collection all the plenary session documents and other records bearing upon its activities.

When no text directly resolves the question of intent of the legislature, the court should rely upon general principles of law to craft a rule for the case. Finally, where legislative history is confused or the law is very old, the court may then look to the social purpose of the law and resolve gaps and ambiguities in the manner that best promotes the law's social purpose.¹⁰⁰

⁹⁹ See, J. Mazaud & Francois Chabas, *Leçons de Droit Civil*, T.1 (12th ed. 2000), p.182.

¹⁰⁰ See, E. Steiner, *French Legal Method* (2002), p.64.

2.2.2. Sources of Law

Not every legal question pertaining to criminal law can be answered solely with reference to the Penal Code and the CPC. Further legal research is often needed. While it is not a fully exhaustive list, it would be useful to consider the following sources to support an argument before a judge:

- The Constitution
- International texts
- The Koran and texts on Sharia'h Law
- Legal dictionaries
- Textbooks and materials from your classes at the University
- University law journal articles
- Material and articles from the Law clinics
- Judicial training materials prepared by national and international NGOs and international organizations supporting judicial training programs
- Material of the Ministry of Justice
- Publications of international organizations.

2.2.3. Presentation of the argument

Persuading a court to adopt a particular interpretation of a provision or statute is rarely easy. Courts are often not used to considering such issues; therefore, the best approach is to provide your argument to the court, in writing, in advance of the trial date as part of your defense statement. Presenting the argument in this manner will allow the court time to properly consider your arguments rather than feeling pressure to make a decision immediately.

Class Discussion - Five

- *Have you argued before a judge about the meaning of a provision or a statute?*
- *What type of arguments about the interpretation have you made?*
- *Do any obstacles exist for advocates attempting to argue for a particular interpretation of a provision or statute?*
- *What type of arguments do you think are most likely to be effective?*

2.3. The Use of Interpreters

2.3.1. The right to an interpreter

Under Article 207 of the CPC, the Court can appoint an interpreter, selecting him, if possible, from among persons jointly agreed by the parties “when the person wishing or required to make a statement or give evidence does not know the language used by the Court”; and “in any other case when it is deemed necessary

or desirable by the Court”, as well as in the case of Art.183 of witnesses who are deaf, dumb or deaf and dumb. The language of the article could be understood to mean that an interpreter is not needed for every phase of the trial and investigation, but only for explaining the charge and indictment, and during interrogations and confrontations. However, such a reading would be contrary to Article 8 of the Constitution of Somaliland which prohibits any kind of discrimination and privilege between the citizens of Somaliland.

To be treated equally, an accused must be given an opportunity to understand and participate in the proceedings against them which are equal to those afforded a native speaker.

The International Covenant on Civil and Political Rights (ICCPR), Article 14, also requires that *“All persons shall be equal before the courts and tribunals...”* and ICCPR Article 14.3(f) specifically provides that the accused shall have access to *“free assistance of an interpreter if he cannot understand or speak the language used in court”*. Additionally, Guideline 3.42.f. of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems demands that States *“provide the services of an independent interpreter, whenever necessary, and the translation of documents where appropriate”* for all persons suspected, arrested, detained, accused and charged with a criminal offence.

2.3.2. When to get an interpreter

Whenever an advocate suspects that his client does not have the language skills to understand the proceedings it is best to ensure that an interpreter is used. Most often when it is appropriate to use an interpreter in court it is also necessary to have an interpreter for attorney-client communications.

2.3.3. The qualifications of a Court Interpreter

The work of a court interpreter is highly skilled and very demanding, and it should pay correspondingly well. In many countries qualifying as a court interpreter requires passing a very difficult examination that tests simultaneous translation speed and accuracy, knowledge of arcane legal terminology, and interpreter ethics. Because the interpreter will often be party to confidential attorney-client communications, a court interpreter must be willing to honor the obligation to protect the client’s secrets.

For the sake of convenience and cost savings, it is often tempting to use a friend or relative of the accused, or a local elder as an interpreter; however, this is almost always a bad idea. Even if this sort of *ad hoc* interpreter is fluent in both the language of the court and the language of the accused it is *almost never the case that they are also acquainted with legal terminology, free from conflicts of interest, and able to protect the client’s confidences*. It is particularly important to avoid using an interpreter who is in any way connected to offenders in cases where your client is a victim.

An interpreter may be very sympathetic to your client and eager to help, but still cause problems for an advocate if he or she lacks an understanding of legal matters and their own duty. For example, mental illness can sometimes be a defense to a crime and it certainly is something the advocate needs to be aware of, but amateur interpreters may hide the symptoms of a client’s mental disorder, thinking that they are helping the client. Interpreters are usually reluctant to translate nonsense, and an interpreter who is not properly trained

may try to make the client sound coherent, which can cause rather severe mental health problems to be unnoticed by the advocate and the court.

2.3.4. Working successfully with an interpreter

Once an interpreter is present, judges, prosecutors, advocates and the accused often begin to act as though they have forgotten that translation needs to take place. The very best simultaneous translators will still sometimes need clarifications or time to catch up with a speaker. Unless all speakers speak slowly, pause occasionally, and avoid speaking at the same time as other speakers, the interpreter's job will quickly become impossible. Making sure that the interpreter is sufficiently comfortable to interrupt speakers, ask them to stop speaking, or to repeat themselves, can prevent many problems from occurring.

It is also necessary to monitor the interpreter's actions to ensure that they are translating everything verbatim. Often an interpreter will take the approach that he will just convey the general idea of what is going on and not worry about what he or she deems unimportant details. This is unacceptable and must be prevented, as the interpreter is really in no position to decide what is truly significant and what is not. If you notice that the length of the translation varies tremendously from what is being translated, or if words appear in the translations that were not in the original statement, or vice versa, there is clearly a problem.

Problems are greatly reduced if the advocate discusses their expectations with the interpreter in advance. It is also best to brief the interpreter on what to expect in terms of unusual vocabulary or esoteric technical terms well in advance because certain words and concepts may not have direct equivalents in the language of the client, and the interpreter will need time to craft an appropriate phrase or explanation to translate the word or concept correctly.

Whenever there are different languages being used there are potentially different culture values that must be considered as well. Whenever topics such as religion, body parts, bodily functions, obscene language or other potentially culturally sensitive material is likely to be discussed, the advocate should warn the interpreter of this possibility, and have a plan for how to handle these topics if they are relevant to the case. If an interpreter simply fails to interpret testimony, because he or she is shocked, or embarrassed or concerned about offending others, it could change the outcome of the case in ways the interpreter does not understand.

Class Discussion - Six

- *Have you faced any obstacles in obtaining interpreters for your clients?*
- *Is funding available for interpreters?*
- *What are the qualifications of interpreters you have encountered in court?*
- *What can advocates do to ensure that their clients have qualified interpreters provided to them at no cost?*

2.4. Examining Witnesses

According to the interpretation of Article 14(3)(e) of the ICCPR, the right to examine witnesses means that the prosecution must inform the defense of the witnesses it intends to call at trial within a reasonable time

prior to the trial so that the defendant may have sufficient time to prepare his/her defense.¹⁰¹ The defendant also has the right to be present during the testimony of a witness and may be restricted in doing so only in exceptional circumstances, such as when the witness reasonably fears reprisal by the defendant.

The ability to effectively question witnesses is one of the most important skills for an advocate. Those lacking in these skills will sometimes protest that using artful questioning is some type of deception or trickery. In fact, the main purpose of artful questioning is to reveal the truth that would otherwise be obscured by a witness's bias, prejudice, ignorance or mistakes. Artful questioning also aims to avoid wasting court time, and should focus the attention of the judges upon those facts which are most helpful to your case. Given that courts place great importance on eyewitness testimony, if you are able to challenge the testimony of an eye witness, the entire evidential edifice will collapse and the case may fall in your favour.

According to Art.189 of the CPC:

“1. A witness may, while under examination and with the permission of the Court, refresh his memory regarding matters about which he is being examined, by referring to:

- a) any writing made by himself;
 - i. at the time of occurrence of the event concerning which he is questioned;
 - ii. so soon after the occurrence of the event that the Court considers likely that the transaction was at that time fresh in his memory;
- b) any such writing made by another person and read by the witness within the time aforesaid, if, when the witness read it, he knew it to be correct;
- c) professional treatises, if the witness is an expert or a technical consultant.

2. Whenever a witness is permitted to refresh his memory by referring to any document or writing, he may, with the permission of the Court, refer to a copy of such document or writing if the non-production of the original is satisfactorily accounted for.

3. A witness may also testify to facts mentioned in any such document or writing as is mentioned in this Article, even though he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

4. Any document or writing referred to under the provisions of this Article shall be produced before the Court and shall be shown to the other party, if such party so desires.”

2.4.1. Eye witnessing

If someone directly observed an event, s/he should be able to accurately describe what happened. Many people have been convicted of various crimes by true eyewitness testimony.

How accurate is the testimony of an eyewitness? You may have been in situations in which your perception did not match what others say they saw. You probably assumed the others were mistaken in their perception.

¹⁰¹ See Lawyers Committee for Human Rights (2000), *What is a Fair Trial?*, p.18.

However, I want you to consider that you may have been mistaken. To this, some of you will get upset and declare, *“I couldn’t be wrong. I saw it with my own eyes.”*

However, at this point it is important to underline that memory is designed to filter the world. If our brains were perfect video cameras they would be paralyzed by an overload of information. We tend to develop the details of the event (called *“arm focus”*), to remember details of the gun pointing at us, but we cannot recall the face of the thieves or other persons in the store where an armed robbery took place.

Memory is not a factual recording of an event and memories can become distorted by other information which may occur after the event.¹⁰² The fact that memories can be altered by outside influences is overwhelmingly accepted by scientists.¹⁰³

The reconstitution of a true event depends on our consciousness and our ability to memorise. However, memory depends on a series of objective and subjective factors. Among the objective factors are:

- The proper functioning of the witness’s senses (sight, hearing, etc.);
- The amount of light (e.g. if it was night);
- The speed with which the subject was moving;
- His/her wakefulness and sobriety, and
- His/her state of mind (it is an objective factor because here we measure the mental capacity and/or illness).

Among the subjective factors are:

- His/her personal background (e.g. experiences, knowledge);
- His/her professional background (e.g. a car engineer can easily recognize a type of engine when a car passes by);
- His/her personal bias or prejudices (e.g. if he thinks that all women are the same);
- The attention s/he gives to events;
- His/her commitment in civil cases (for example, his/her attachment to community);
- The authority of the subject (e.g. if a person of high standing is accused the tendency is to justify his actions).

However, as good as the senses of a witness may be, there is a normal inability of all persons to calculate with accuracy some dimensions, such as:

- Speed (there is often an overestimation);
- Time;

102 Yuille, J. C., & Cutshall, J.L. (1986), “A case study of eyewitness memory of a crime”, *Journal of Applied Psychology*, 71, pp.291-301.

103 Schacter, Daniel L. (2001), *The Seven Sins of Memory: How the Mind Forgets and Remembers* (Houghton Mifflin Co.); Loftus, Elizabeth F. (1980), *Memory: Surprising New Insights Into How We Remember and Why We Forget* (Reading, Mass.: Addison-Wesley Pub.). Loftus is best known for her work on the misinformation effect and eyewitness memory.

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- Distance;
 - Shapes (e.g. of face);
 - Height (over-estimation of 12cm), and
 - Age (over/under-estimation of maximum 8 years).

Therefore, if there are differences, this may be normal in reality even if the witness is not willing to lie or the victim is not traumatized.

Some of you might be saying to yourself, “*Although eyewitnesses may be inaccurate when they are emotionally aroused, they are probably reliable in day-to-day situations*”. Psychologist Elizabeth Loftus has found that memory can be changed by events that occur after a fact.¹⁰⁴ In one of her studies, subjects viewed a film of one car colliding with another. After viewing the film, half of the subjects were asked, “*How fast was the first car going when it hit the other?*”. The remaining subjects were asked, “*How fast was the first car going when it smashed into the other?*” The estimates of car speed were significantly higher for the car that “*smashed into*” the other car.

By merely altering the questions, witnesses may report things that were not even present. In 1978, Loftus showed subjects a series of slides depicting a *Datsun* approaching an intersection, turning right, and knocking down a pedestrian in the crosswalk. Half of the subjects saw the intersection with a yield sign, while the rest observed a stop sign (otherwise, the slides were identical). In questions about the slides, half of each group of subjects were asked, “*Did another car pass the Datsun while it was stopped at the stop sign?*” The remainders of each group were asked, “*Did another car pass the Datsun while it was stopped at the yield sign?*” All subjects were later shown a series of paired slides. They were asked to identify which slide they had seen previously. Researchers were interested in how subjects would respond to slides showing the *Datsun* at either the yield or stop sign. Of those who had been questioned with the opposite of what they had witnessed, 80% chose the sign consistent with the question — not consistent with what they had previously seen. In other words, if you had seen the slide with the *stop* sign and were asked the question with the *yield* sign, you would most likely pick the *yield* sign as what you saw!

Whenever we codify an experience (and we all do) we filter it through our own consciousness. If we remembered the words literally or all details, we may miss the meaning. If I say “*I’m really tired today because the baby kept me standing all night*”, what can you remember of what I told you? Probably that the baby cried all night.

104 Loftus, E.F. (1980), *Memory*, *ibid.* See also, Loftus, E.F., Doyle, J.M. & Dysert, J. (2008), *Eyewitness testimony: Civil & Criminal*, 4th edition. Charlottesville, Va: Lexis Law Publishing; Loftus, E.F. & Palmer, J.C. (1974), “Reconstruction of auto-mobile destruction: An example of the interaction between language and memory”, *Journal of Verbal Learning and Verbal Behaviour*, 13, pp.585 -589; Gershaw David (1996), “I Saw It With My Own Eyes!”: <http://virgil.azwestern.edu/~dag/lol/EyesSawIt.html>; Zaragoza, M. S., Belli, R., & Payment, K. E., (2007), “Misinformation effects and the suggestibility of eyewitness memory”, in: M. Garry & H. Hayne (Eds.), *Do Justice and Let the Sky Fall: Elizabeth F. Loftus and Her Contributions to Science, Law, and Academic Freedom* (pp. 35-63), Mahwah, NJ: Lawrence Erlbaum Associates.

When we remember, we rebuild what we believe that we remember. When we recall an event, this recall becomes our most recent memory. As with a picture, when we look at it often, we may remember more details than the original memory.

When we do not know something we try to guess. If we cannot guess we have the following choices:

- Say: *“I do not know”*;
- Confabulate, or
- Fill in the gaps.

So, what happens if that memory is less flattering? The confabulation occurs when the brain strives to recreate an event, but as we may be unable to remember the details, we often graft on other details. Experts today believe that memory can return even at the embryonic state when activated.

In the event of trauma - including rape - the reaction is bimodal between:

- *“Hypermnesia”* (memory abnormally vivid): This is hyper-reactivity to stimuli and re-traumatic experience coexisting with psychic insensitivity, and
- *“Avoidance”*: This is the case of amnesia and *“anhedonia”* (the inability to enjoy pleasure).

Amnesia from trauma is a well-documented phenomenon.¹⁰⁵ It can last for hours, weeks, or years. As was mentioned above, the dissociation during trauma is known to cause memory holes. What does this mean?

When any person (including you) is threatened, the cerebral cortex is closed. The time it takes to return to the normal state is days, weeks, months and even years... The intervention depends on the state of the victim. When people want to avoid talking about something, they may use words that hide rather than reveal what they can tolerate in the moment.

Then, the traumatic reactions can elicit a physiological response (heart rate, breathing, dilated pupils, dry mouth, node in the stomach), an emotional reaction (related to mood, fear, helplessness or horror), and can distort the process of thought (memory fragmented or out of sequence, distortion of the concept of time, confabulation). As a consequence, a testimony may be alienated with no intention of the witness to do so.

2.4.2. Order of examination

According to Art.188 of the CPC:

1. *A witness shall first be examined-in-chief; then, if the other party so desires, the witness may be cross-examined; then if the party calling the witness so desires, the witness may be re-examined.*
2. *The examination-in-chief and the cross-examination shall relate to relevant facts but the cross-examination need not be confined to the facts which the witness testified to in his examination-in-chief.*

¹⁰⁵ See, Van der Kolk Bessel A. & Fislser Rita, (1995), “Dissociation and the fragmentary nature of traumatic memories: Overview and exploratory study”, *Journal of Traumatic Stress*, Vol.8, Issue 4, p.505.

3. *The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is introduced, with the permission of the Court, in re-examination, the other party may further cross-examine e upon that matter.*”

Art.187 of the CPC defines ‘examination-in-chief’ as the “*the examination of a witness by the party that calls him*”. “*Examination-in-chief*” is also called “*direct examination*”. The goals of direct examination are to get the maximum benefit for your case from the witness’ testimony, establish the credibility of the witness, foresee any expected attacks on the witness, and keep the testimony efficient and interesting.

2.4.2.1. Type of questions

According to Art.191 of the CPC:

“1. *Leading questions shall not be asked in an examination-in-chief or in a re-examination except with the permission of the Court.*

2. *The Court may permit leading questions in examination-in-chief and re-examination only as to matters which are introductory or undisputed or which have, in its opinion, been already sufficiently proved.*”

Art.187 (d) of the CPC defines the “*leading question*” as “*any question put to a witness in such a way as to suggest a reply that the party putting the question wishes or expects to receive*”.

The best type of question to ask in direct examination is one which directs the witness to the relevant subject matter, but calls for a narrative response. This is because the testimony will be most persuasive if the witness tells the story in their own words.

Generally, it is better to ask: “*Tell us what happened on the night of May 12, 20013?*” rather than: “*Did something happen the night of May 12, 2013?*”. The first type of question is more likely to produce a lengthy detailed answer, while the second type of question will usually get just a “*yes*” or “*no*” response.

It is also best to avoid questions which seem to suggest an answer, for example, it would be better to ask: “*Who were you with on the evening of May 12, 2013*”, rather than: “*Isn’t it true you were with Mohammad on the evening of May 12, 2013?*”. The first question will be likely to produce a detailed answer which is clearly coming from the witness’ memory, while the second question may seem like the advocate is reminding the witness of what to say.

To avoid the witness recounting endless irrelevant matters, ask questions that direct the witness towards the relevant material. For example, ask: “*Did you see any sign that Mohammad feared for his safety before he shot the man?*”

2.4.2.2. Expanding the details of the helpful facts

In order to obtain maximum benefit from the helpful evidence, prompt the witness to provide further detail. For example, “*You say he looked very frightened, what physical signs of fear did you see?*”. This question directs the witness to supply the type of detail that you are interested in.

It is useful to repeat the witnesses' own words in the follow-up questions to obtain further detail. The repetition both reinforces the witness testimony, and it avoids the witness disputing the wording of the question. For example, *"You say the color drained from his face and his hands were shaking, can you describe how his hands were shaking?"* If the question accurately recites the witness' own words the answer will focus on providing more detail, while using a question that alters the witness' words can lead to confusion.

2.4.3. Anticipating cross examination

According to Art.187(b) of the CPC, cross-examination is the process of questioning a witness called to testify by the opposing party. After you complete your direct examination of your witness, you can expect that the Prosecutor will perform cross-examination to try and undermine or weaken the impact of your witnesses' testimony. Therefore, it is wise to consider whether your direct examination questions will hurt or help your witness in withstanding cross-examination.

One technique to lessen the impact of cross examination is to bring out any bad facts, which will inevitably be raised by your opponent, to place them in a more positive light. For example, in a case in which you wish to establish a legitimate right of defense under article 34 of the Penal Code, you might try to lessen the negative impact of a prior shooting committed by your client by asking questions that suggest that the experience made him more careful:

- *"Mohammad, did you know that if you shot this man it would result in a police investigation?"*
- *"Did you know this because there had been an investigation the last time you shot someone?"*
- *"Knowing that there would be a police investigation would you have shot him if you did not fear for your life?"*

It is also important to avoid questions which result in broad general claims that put your witnesses' credibility at issue, and render harmful information relevant. For example, if your questioning produces an answer like *"I'm not a violent man"* or *"I never get angry"*, you have invited harmful evidence. The prosecutor may then produce evidence of every time your witness' has ever been violent or angry regardless of whether that event is in any other way connected to the case because it now bears upon the witnesses' credibility.

It should also be added that according to Article 194 of the CPC, a cross-examination on a written statement is possible: *"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, without such writing being shown to him or being proved."*

2.4.4. Preparing the witness

The manner in which the advocate phrases questions can improve the quality of testimony, but a defense witness who is not educated about the trial process can still damage the defense case and cause misunderstandings. Therefore, prior to the trial the advocate must have a meeting to explain their role to the witness. At the same time the advocate should also explain to the witness the witness oath and court procedures.

If the witness does not understand the purpose of their testimony within the case theory problems will arise.

For example:

Your theory of the case is that the person who committed the crime could not be your client because all the witnesses say the criminal leapt over a two meter high wall to escape, and your client is not in physical shape to jump that high. You call the client's best friend to testify that the client was much fatter before he went to jail. The friend tells you privately that your client was at least 25kgs heavier before his arrest, but at the trial the friend is reluctant to say this. When you ask him about the client's weight at the time of his arrest he describes him as "hefty" and "on the large side", but refuses to use the word "fat" or estimate his weight in kilos.

If you take the time before the witness testifies to explain his role within the case theory, this sort problem will not arise.

It is also necessary to give the witnesses some understanding of the type of hostile questioning they can expect from the Prosecutor. The witnesses should be urged not to engage in any argument with the Prosecutor on irrelevant matters and never to answer a question that they do not fully understand. Defense witnesses should be advised that they are entitled to ask for further explanation of any question they do not understand. A well prepared advocate should have a very good idea of the type of questioning the witness will face from the Prosecutor, and should discuss with the witness the specific areas of questioning he or she will face. Failure to prepare the witness risks his or her testimony being unnecessarily discredited.

For example:

Your witness, Abdul, has a criminal record in the past as a thief. Abdul testifies truthfully about the present case of murder, but when the Prosecutor asks him about his past he lies and says that they confuse him with another person. The Judge recognizes that Abdul is lying about his past and so disbelieves all his testimony. This type of problem may be avoided if the advocate discusses the Prosecutor's likely questions with the witness in advance.

2.4.5. Testimony by your client

According to Art.185 of the CPC, *"the provisions regarding the examination of witnesses shall apply, in so far as applicable, to the questioning, examination and taking of the oath or making an affirmation of or by the accused"*.

Generally, it is best to avoid having your client testify. It is a lazy advocate who allows his or her client to testify, and then blames the eventual conviction on the client's foolish statements while testifying. If most clients were clever and sophisticated enough to withstand questioning by the Prosecutor, then they wouldn't need advocates. Unfortunately, it often happens that the accused is the only one in possession of certain key facts, so their testimony is often essential to the case theory. In addition, the accused has a right to testify regardless of their attorney's advice, and it is not always possible to persuade them not to do so.

Because the accused usually feels so much pressure when testifying in their own case, it is much less likely that preparing them to testify will result in them properly following your advice. Most clients cannot be sufficiently prepared for testimony, and will behave consistent with their personality under stress. There

are many accused who have been sent to prison not because there was strong evidence of their guilt, but because their behavior while testifying convinced the court that they were dishonest and untrustworthy. The advocate must weigh up all of these considerations when advising the client about whether or not to testify during the trial.

Practice Problems - Eleven

1. Your theory of the case is that your client, Hussein, is innocent because at the time the crime occurred he was in Berbera visiting his uncle Ali. When Ali comes to your office to discuss his testimony all he wants to talk about is how the policeman who arrested Hussein is from a rival tribe and how he wants to denounce the policeman in court.
 - *What actions would you take regarding Ali's testimony?*
2. Your client Jama is accused of murdering a man while trying to kidnap him. Jama says the man tried to rob him, but no witness saw this happen. The police say that the dead man was previously convicted of robbery, and that there was a long dagger found tucked in his belt. Jama wants to testify, but he becomes so impatient and angry every time you discuss his testimony with him that you don't know what he will say.
 - *What would you advise Jama about testifying?*
3. Your client, Abdulhakim, signed a confession twenty four hours after he was arrested. Abdulhakim says he was beaten until he confessed, but there are no marks on him by the time he is brought to court. Abdulhakim's wife, Leila, has told you that she saw him right after he was released by the police and that he had bright purple and yellow bruises all over his body. She took a picture of him, but it is not very good and only shows part of his back.
 - *Write down the questions you would ask Leila to prompt her to give a complete description of Abdulhakim's injuries.*

2.4.6. Cross-examination

In cross-examination, the witness you are questioning may be hostile to you and your client, and therefore it is necessary to adopt a style of questioning that cannot easily be turned against you by the witness.

According to Art.195 para 1 of the CPC:

"When a witness is cross-examined, he may be asked any question which tends:

- a) *to test his veracity,*
- b) *to discover who he is and what is his position in life,*
- c) *to shake his credit,*

although the answer to such question might tend directly or indirectly to expose him to penal proceedings or to civil action for damages."

In general, the best questions for cross-examination are the opposite of good direct examination questions. Instead of asking for the witness to tell their story (which the Prosecutor will have already done with them),

an appropriate cross-examination question asks the witness simply to affirm or deny a statement by the advocate.

For example: (in the case of a shooting between two men)

- “Do you own a gun?”
- “Is the gun an AK 47?”
- “The day you were shot, did the police find an AK 47 in your car?”
- “Was the gun found on the passenger side of your car?”
- “Were you the passenger in the car that day?”
- “Was there blood on the gun?”
- “Was that your blood?”
- “Was that your gun?”
- “Were you holding your gun when you were shot?”
- “Did your gun have a magazine in it?”
- “Was the magazine loaded?”

Each question should include only one new fact that the witness has not previously affirmed. If you include two or more facts within a single question the witness can deny the whole question based upon any one of the facts.

For example: (in the case above):

Q “You pointed your loaded gun at Mohammad before he shot you?”

A “No, I did not.”

The witness could be saying no for at least four reasons. He could be denying:

- that the gun is his;
- that he pointed it;
- that it was Mohammad he pointed it at, or
- that it was loaded.

The question does more to create confusion than it does to clarify what happened.

It is wisest to never ask a question during a trial for which you do not already have the answer.¹⁰⁶ Furthermore, the advocate can never assume that because he or she knows the correct answer to a question, that the witness will give that answer when the question is asked. Therefore, the advocate is safest to never ask a question during cross-examination the answer to which he cannot prove by some other means. In practice, this means that whenever you ask a question of a hostile witness you are prepared to contradict that witness by means of other evidence should he or she give the incorrect answer.

¹⁰⁶ This is one of the reasons that a defense investigation is vital.

It is useful to notice also that, according to Art.195, para 3, CPC:

“If any such question relates to a matter not relevant to the proceedings and tends only to affect the credit of the witness, the Court shall decide whether or not the witness shall be compelled to answer it. In exercising its discretion, the Court shall have regard to the following considerations:

- a) *such questions are proper if they are of such nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;*
- b) *such questions are improper if:*
 - i. *the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the creditability of the witness on the matter to which he testifies;*
 - ii. *there is a great disproportion between the importance of the imputation made against the witness’s character and the importance of his evidence.*

The Court may, if it deems fit, warn the witness that he is not obliged to answer a question”.

The evidence which contradicts the statements of the opposing party’s *witness is impeaching evidence*.¹⁰⁷ There are innumerable sources of impeaching evidence. Any reliable source, from as disparate sources as learned treatises to the testimony of another witness, can be turned to this purpose. One of the most fruitful sources of impeaching evidence are the witnesses own prior statements. Having previously interviewed the witness during the defense investigation and recorded their answers in a manner that can be used as evidence, can serve as a distinct advantage. Using a witness statement taken by the police or prosecutor is often more challenging because they are often silent or vague in areas that help the defense, and are typically not described in the witnesses’ own words.

According to Art.197 of the CPC:

“The credit of a witness may be impeached by the party other than the party calling him or, with the consent of the Court, by the party who has called him:

- a) *by the evidence of persons who testify that they from their personal knowledge of the witness believe him to be unworthy of credit;*
- b) *by proof that the witness, in order to give his evidence:*
 - i. *has caused or induced another person to give, or offer to give, to him or to a third person any bribe or other corrupt inducement, or*
 - ii. *has accepted the offer of such bribe or other corrupt inducement;*
- c) *by proof of former statements, inconsistent with any part of his evidence which is liable to be contradicted;*
- d) *when a man is prosecuted for:*

¹⁰⁷ Something “impeaching” casts doubt on something else, especially by challenging its credibility or validity. The term is widely used in common law jurisdictions where the technique of cross examination itself originates.

- i. *a crime or attempted crime of sexual violence, or*
 ii. *a crime or attempted crime against modesty or sexual honour;*
on a woman over 16 years of age, evidence may be given to show that the woman was of generally immoral character.”

When you have impeaching evidence available and well organized for your use, cross-examining a witness can be free of anxiety for the advocate:

- If the witness gives the correct answer, you have established the fact you wanted for your case, and
- If the witness gives the incorrect answer, you have the opportunity to establish the fact you want with the impeaching evidence and simultaneously show the witness to be either mistaken or a liar.

Indeed, depending upon the theory of the case, it is sometimes more beneficial to the defense to have the Prosecutor’s witnesses lie and be impeached than to have them tell the truth. Each lie that is successfully impeached can serve to damage credibility on points for which you may not have impeaching evidence.

There are some limited circumstances under which it is sensible to ask a question without being able to impeach the witness for giving the wrong answer. In fact, for some questions there is no answer that harms your case. For example, if you have managed to get a witness to admit that he has been paid to give false evidence, it is quite safe to ask him how much he has been paid. If the sum of the payment is low you can argue that he values the truth very little, and if the sum is high you can argue that he has great incentive to lie. There may also be situations in which you have successfully established the basis for an accusation against the witness, and the final question is just used to make that accusation.

For example:

Q “*You did not report to work on May 12, 2013?*”

Advocate is ready to impeach with the employers records.

Q “*You say you don’t remember where you were before arriving at the scene of the shooting?*”

Impeaching evidence contained in witness’ statement to defense investigator.

Q “*You say you don’t remember who you were with earlier that day?*”

Impeaching evidence contained in the witnesses’ statement to defense investigator.

Q “*The police found a gun in your car?*”

Impeaching evidence contained in report of police.

Q “*Your whole body smelled of alcohol?*”

Impeaching evidence contained in the statement of the doctor who treated witness.

Q “*You were drunk*”

No, impeaching evidence needed, the advocate has made the point regardless of the answer given by the witness.

It needs to be noted that according to Art. 195, para 5, of the CPC:

“A Court:

- a) *may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed,*
- b) *shall forbid any questions or inquiries which appear to it to be intended solely to insult or to annoy or which, though proper in themselves, appear to the Court needlessly offensive in form.”*

2.4.7. Completing Impeachment

There are a number of different ways to complete the impeachment of a hostile witness. The type of impeaching evidence you have available is usually the main factor to consider in deciding how to complete impeachment, although where you have available a number of impeachment methods, stylistic and tactical concerns should be considered as well.

2.4.7.1. Using Prior Inconsistent Statements/Documents

Perhaps the simplest and most dramatic method of impeachment is using the witness’s own statement, because then the witness can be directly impeached without any delay.

For example:

The witness, Ali, has just testified that he decided to carry a gun that day because he believed that your client was a dangerous man.

Q *“You previously spoke to the police about this incident?”*

W *“Yes”*

Q *“They wrote down your statements?”*

W *“Yes”*

Q *“They showed you what they had written?”*

W *“Yes”*

Q *“This is your signature at the bottom of the form?”*
(while showing the witness the document)

W *“Yes”*

Q *“By signing there you were swearing to the truth and accuracy of your statements?”*

W *“Yes”*

Q *“In your statement you told the police that you carry a gun everyday wherever you go?”*

W *“Yes”*

The process is fundamentally the same whenever documentary evidence is used for direct impeachment.

2.4.7.2. Using an Impeaching Witness

Witnesses cannot always be impeached directly. Often, the impeachment must be completed by a subsequent witness or other evidence after the witness you wish to impeach has finished their testimony.

For example:

The witness has testified exactly as in the example above, except that no signed statement was taken by the police. You must therefore use a subsequent witness to complete the impeachment.

Q “How do you know Ali?”

W “We have worked together for the last ten years”

Q “How often do you see him?”

W “Every day, except Friday, several times a day”

Q “Have you ever seen him with a gun?”

W “Yes, he has one every day when he comes to work. He either carries it with him or leaves it in his car”.

Practice Exercise - Four

Divide the class into groups of three to six participants. Using the fact pattern below, each group will produce a written list of cross-examination questions as described. Once the groups have completed their work one member of each group will conduct a mock cross-examination, with the trainer acting as the witness and answering the questions in a manner consistent with the fact pattern (but not necessarily with the same facts contained in the witness statement). The trainer and class will then discuss what questions were most effective and why.

Abdi is 14 years old and does construction work when he can get it, but most days he waits by the mosque and is not hired for any jobs because he is small for his age. Abdi is accused of resistance to a public officer under article 264 of the Penal Code.

The police gave statements to the prosecutor saying that Abdi kicked and punched a traffic policeman named Hussein outside the mosque when the policeman asked him to stay out of the road. According to the police it took four of them to stop Abdi’s attack on Hussein and place him in handcuffs. They explain that Abdi’s arm was broken when he jumped out of the truck on the way to the police station. Hussein says that his back was injured in the attack and that he could not work as a traffic policeman for 10 days because of the injury.

Abdi says that he was standing by the mosque on the sidewalk with 20 others waiting for work when they were told by the police Sergeant Hussein that they had to leave or pay 5,000 SLSH each. Abdi says that he gives half his wages to his uncle Abdulkadir to whom he was entrusted when he was 6. He says Abdulkadir gave money to Hussein but that Hussein would still not let him stay. He shouted at Karim (the commanding officer) that Hussein was a thief and then Hussein and three other policemen (Ali, Ahmed, and Hakim) started beating him. Abdi says he did not fight back but fell to the ground, at which time all four men began kicking him. After several minutes they put handcuffs on him and as they pulled him to his feet he realized his arm was broken.

You have written copies of the statements given by Abdi and the four policemen. You also have several witnesses available to testify, including Mohamad (a mullah), Abdulkadir (a construction worker), and Abokor (a neighbor of Hussein).

Mohamad's statement: On March 15 at 9 a.m. I was walking to the old mosque when I saw a group of five or six policeman arguing with a group of 15 or more workers. I then saw the policeman surround a boy in the crowd, knock him to the ground and begin kicking him. I shouted at them to stop as they were really hurting him, and eventually they did stop. They put him in handcuffs, dragged him to a green police truck, pushed him inside the cab and drove off.

Abdulkadir's statement: I was standing by the old mosque hoping to find work at about 9 a.m. on March 15. Lots of other men were there looking for work. It is the same most days. Lately the police have been bothering us for money but if we don't get work we can't pay them and they chase us off. This day the Sergeant told us everyone must pay 5,000 SLSH. I started to leave because I had no money, then I heard some shouting and I saw a boy on the ground being beaten by the police. He was curled up on the ground like a baby not fighting back. It was embarrassing, it seemed like he was crying as well. If he were my son I would give him another beating for being such a weakling.

Abokor's statement: My neighbor Hussein is a policeman and he is a very good and religious man. I have known him since we were boys. Last year my house burned down and Hussein said he would help me for two weeks at the end of March with the reconstruction. I laid the brick for the walls myself but Hussein carried all the bricks for me. I lost one leg from a landmine so I cannot carry very much, but Hussein is strong like a bull and would carry many bricks at one time which allowed me to work much faster. In fact, Hussein would bring the bricks so fast that I could not keep up, so he would go off and play football with his sons or chop some wood until I needed another load of bricks. Because of his help I finished all the brickwork for the reconstruction of my house in just ten days.

Karim's statement: I was commanding a small squad of traffic police by the big traffic circle (rotary) next to the mosque on March 15 at about 9 a.m. I was in my car when a young beggar went crazy and attacked one of my men, named Hussein, and the others had to pull him off. Afterwards, Hussein reported to me that he was in great pain from his back and could not feel his fingertips. I told him to go home and rest and to see a doctor if he was not better by the next morning. Hussein never complains of being sick and always comes to work no matter what, so when he was unable to work for the next ten days I knew he must be badly hurt.

Ali's statement: I was working on traffic duty by the mosque on March 15 at around 9 a.m. when Hussein was attacked by a young Al-shababi who was shouting anti-government slogans. First he was standing on the sidewalk and then when Hussein looked away the boy ran at him and jumped onto his back and started trying to strangle him. I shouted to Ahmed and Hakim and we all ran over to help. Together we pulled the boy off but he was kicking and punching the whole time. Hussein fell to the ground during the struggle and twisted his back. Once we had the Al-shababi in handcuffs he still did not calm down and on the way to the police station he jumped from the bed of the truck and broke his arm. I think Al-Shabab must give them drugs to make them act this way.

Ahmed’s statement: I was on traffic duty by the mosque around 9 a.m. the morning of March 15. Hussein, Hakim, Ali, and I were attempting to expel a group of loiterers from the roadway because they were blocking traffic. A boy began yelling and started to punch and kick Hussein. Hussein tackled the boy and took him to the ground. Hussein hurt his back doing this. It then took all four of us to handcuff him because he was trying to kick and punch. We had to drag him to the truck.

Hakim’s statement: I was on traffic duty by the mosque around 9 a.m. on the morning of March 15. Hussein, Ahmed, Ali, and I tried to get a bunch of loiterers out of the road because they were blocking traffic. A boy began yelling and started to punch and kick Hussein. Hussein tackled the boy and threw him on the ground. Hussein hurt his back doing this. Then the three of us handcuffed him. He was trying to kick and bite as we tried to drag him to the truck.

Hussein’s statement: I was on traffic duty near the mosque around 9 a.m. on March 15. I shouted at a teenager who was standing by himself in the middle of the cars to get out of the road. He did not move, and I thought that maybe he is deaf, so I went close to him and ordered him to move again. The next I knew the boy was kicking and punching like a madman. I stepped forward to grab him but he kicked my foot and I fell onto my back. He kept attacking me but I was too injured to get back up by myself. I was grateful that Hakim, Ali, and Ahmed were nearby and were able to pull him off me. Once he was handcuffed Ahmed and Hakim led him to Karim’s car for transport to the police station and Ali helped me to my feet. I was in great pain and had numbness in one of my legs. I could not get out of bed without great suffering for over a week.

- *Hussein, Karim, and Ali are called by the prosecutor to testify. Prepare a cross-examination for each. Also indicate which witnesses you would call to testify as defense witnesses and explain why.*
- *Your theory of the case is that your client is telling the truth and that the police were soliciting bribes and that they attacked your client.*

If, during your cross-examination, the witness deviates from their statement in any way that does not support the theory of the case the advocate should impeach them. If the witness testifies consistently with their statement, the advocate should draw out testimony that magnifies and highlights any contradictions between prosecution witnesses and testimony that reinforces defense witnesses statements.

2.5. Experts

Experts are like any other witnesses, except that they have specialized education, training, or experience which allows them to offer opinions on matters within their specialization.

According to Art.157 of the CPC, opinions of experts are considered relevant facts: a) upon a point of foreign law; or b) upon a point of science or art.

According to Art.161 para 1 of the CPC, experts can be appointed either at the request of the Attorney General or of the accused or of the Court whenever “*the Court considers it necessary or proper for the opinion of an expert to be provided about a particular matter*”, choosing the expert, “*if possible, from among persons designated by agreement between the parties*”. However, it is possible to call an expert to give evidence as a witness at the request of one of the parties or by the Court on its own motion (Art.161, para

5). The appointment of an expert to give evidence does not prevent any of the parties from exercising the right to obtain, at their own expense, evidence from other technical experts.

If an expert witness is called by you, you would conduct the direct examination as with any other witness, with the addition of some questions designed to allow the expert to offer the following information:

- The details of the expert's education, training, or experience that form the basis of his or her expertise.
- The actions taken by the expert in this case that form the basis of the expert's opinion.
- The expert's opinion, that relates to this case.

Similarly, cross-examining the expert is in principle the same as cross-examining any other witness. An expert can be challenged for bias, prejudice, fraud, mistake, lack of opportunity to observe, lack of recollection or any of the other issues that apply to an ordinary witness.

In addition, it is possible to challenge the expert on matters specifically related to his or her expert opinion. The following areas can sometimes be successfully attacked by the advocate:

- Whether the area of the expert's education, training, or experience is one that has a generally accepted scientific basis.

Example: The expert has a Ph.D. in Philosophy and claims to be able to tell if someone is lying by observing a glowing light surrounding their body, which he can see by looking inside his hat.

- Whether the expert's, education, training, or experience is sufficient to make him an expert in the area where he claims his expertise.

Example: The expert claims to have conducted an autopsy on the victim and determined that the time of death was at 2:30a.m. on Tuesday. However, the expert's medical school diploma is from a school in Pakistan that is not recognized by any government or academic institution and for many years his only work has been with sheep.

- Whether the expert employed methods recognized within the field of his or her expertise.

Example: The expert has a degree in medicine from a well-respected university in Europe. He claims that by examining the victim's facial expression after death he can say that the victim died of poisoning.

- Whether the expert correctly employed his methods.

Example: The expert used a special kit designed and manufactured in the United Kingdom to determine that the substance seized from the accused was heroin, however, the instructions on the kit say: "Do not expose to temperatures exceeding 25 C°" and the testing was done during the middle of the day in July in a laboratory in Hargeisa that is not air conditioned.

In order to attack an expert upon the grounds of their expertise, it is generally wise to have your own (technical) expert available for consultation and, if necessary, testimony. It is also possible to challenge an expert within their field through the use of a technical manual, scholarly treatise, or scientific journal article. The practicality of such a challenge is only dependent upon having access to experts, technical manuals,

scholarly treatises, or scientific journal articles. However, the utility of mounting a challenge to an expert opinion may at times be quite marginal.

Practice Problems - Twelve

- *What objections if any would you have to the examples of expert opinion testimony below?*
- 1. The driver who took the body to the morgue offers the opinion that an explosion was the cause of death.
- 2. An astrologer with a degree in Astrology from a respected school of Astrology in Beijing testifies that the victim cannot have committed suicide because his astrological chart shows him to have been an exceptionally happy man.
- 3. The policeman that found the body testifies that he believes that the motive for the murder was the victim's conversion to another religion, because when searching the victim's house he found odd looking statues and foreign books in the house, and the neighbors gave the police hostile looks as they carried out the body.
- 4. The police detective to whom your client confessed the murder testifies that while he did threaten your client when he asked for a defense attorney to be present during the questioning, his threat would have not scared an innocent person.
- 5. The medical examiner testifies that the death could not have been a suicide because the expression on the victim's face was one of anguish and pain and a suicide is always peaceful.

2.6. Closing statement/summation

Article 119, para 1 (b), of the CPC provides for defense attorney to present arguments in rebuttal of the accusation at the conclusion of the trial. Some advocates like to believe that the eloquence of their argument at the end of the case is all that is required to overcome the prosecution case and free their client. However, the truth is that the foundation for the advocate's final argument must be laid during the investigation and the trial.

In order to successfully persuade a court to acquit, the advocate must articulate how the facts support the defense theory of the case. The required facts need to have been elicited during either cross-examination of the prosecution witnesses or presentation of defense witnesses and defence evidence. The advocate must also explain precisely how the defense theory of the case renders the client not guilty of the crime he is accused of committing.

The most persuasive legal arguments are those that successfully combine the facts of the case with the applicable law. For example, it is clearer to state the legal and factual basis for your argument.

Example:

“Under Article 26, para 2, of the Constitution crime is a personal act; the fact that his brother confessed to this crime does not make Mohamad (my client) in anyway responsible. The ticket found in Mohamad’s pocket at the time of his arrest proves beyond any doubt that he was leaving in a boat from Berbera at the time the crime occurred in Hargeisa.”

Arguing only the conclusion is far less persuasive.

Example:

“There is not enough proof to show that Mohammad assisted his brother in this crime, he should be found not guilty.”

Each part of the defense builds upon the foundations laid down in the earlier phases. The summation or closing argument ties all the various parts together to show how each supports the conclusion that the client is not guilty.

The presumption of innocence dies quickly and quietly unless the advocate breathes life into it by cataloguing and putting in context both the defects in the prosecutor’s case and the evidence of innocence. An advocate who does nothing more than make a general claim of innocence is unlikely to be successful. In the summation, the advocate must ensure that the facts and the law that support the conclusion that the client is not guilty are impossible for the court to overlook.

In cases where a separate hearing on sentencing cannot be obtained, the summation or closing argument must also contain persuasive arguments for adoption of the defense’s preferred disposition. There will no doubt also be rare occasions when the client’s guilt cannot plausibly be contested, and in which sentencing is the only area in which the advocate can make some positive contribution to the case’s outcome. While the factual emphasis is different in such cases, the same techniques are utilized, as in the case where the arguments address solely the questions of guilt and innocence.

Practice Exercise – Five

Using the fact pattern from Practice Exercise Three, with the additions below, each participant will write a closing argument for either the prosecution or the defense based upon assignments made by the trainer. Several participants will then be selected to deliver their closing arguments, which will then be commented upon by the trainer and other participants.

Testimonies elicited at Abdi’s trial:

Karim: Karim’s testimony at trial was entirely consistent with his written statement. However, he added several facts in response to questions by the defense advocate. When asked why he described Abdi as a beggar he said that: “Ali told me the boy was a well-known beggar”. When asked whether Hussein had reported to him numbness in his leg after the attack he said: “No, it was only in his fingers”.

Ali: Ali testified that he did not remember telling Karim that the boy was a beggar. He testified that Abdi was not on the sidewalk when he attacked Hussein, that it was Hussein that was standing on the sidewalk. He denied that Abdi had jumped on Hussein's back and said his statement was wrong and that what he had meant was that Hussein "jumped back" off the sidewalk when Abdi attacked him. He testified that Hussein fell to the ground before he and the others came to his assistance, and not in the struggle that followed. Ali was impeached on the basis of his prior statement on this point. Ali then explained that, actually he could not remember when Hussein fell. He said that he believed Abdi was a member of the Al-Shabab because he heard him shouting Al-Shababi slogans when he attacked Hussein.

Hussein: Hussein testified in conformity with his statement on most points but added some details. When asked if he was certain that Abdi was transported in Karim's car he testified that he thinks he hit his head during his fall and that he was somewhat confused about what happened afterward. When asked if he told Karim he had numbness in his fingers he said that he could not remember speaking with Karim because he hit his head. When asked if he has a neighbor named Abokor he said yes he does. When asked if he ever helped Abokor work on his house he said he had done so in early March, before this incident, but had to stop because of his injuries.

Mohamad: Mohamad's testimony was completely consistent with his written statement. When asked by the prosecutor if he heard Abdi say any Shababi slogans he replied "Is 'help they are killing me' a Shababi slogan?" When asked by the prosecutor if he had ever been a member of the Al-Shabab group he answered that when he was a religious student this organization did not exist. When asked if he sympathized with the Shababis now he said "Islam is a compassionate religion, I sympathize with all men's suffering".

Abdulkadir: Abdulkadir testified that he saw nothing unusual happen on March 15. When confronted with his written statement he said that he cannot read or write so he has no idea what the statement says. When shown his signature on the statement he acknowledged that it was his mark. When asked if he has received any threats regarding his statement he said he cannot remember being threatened. When asked if he had discussed his statement with anyone since he signed it he said yes he talked to Ali and told him the same thing that he doesn't know anything.

Abokor: Abokor's testimony was identical to his written statement except that he testified that Hussein had finished helping him with the house on March 15. When confronted with his written statement Abokor said that the land mine that took his leg had also scrambled his brains and that he made a mistake about the dates in his written statement. When asked how the mistake came to his attention he said that prior to the trial Hussein reminded him about the correct dates and that he believes that Hussein, as a policeman, is more likely to be correct about dates. When asked if he noticed that Hussein had any injury after March 15 he said that he noticed that Hussein was limping badly for a few weeks. When asked if Hussein seemed confused or forgetful during the time he was limping, Abokor said: "not at all confused, Hussein is always very sharp".

2.7. Sentencing

In most cases the CPC allows the court substantial discretion to determine the length of imprisonment and other conditions of the sentence within the limits set by the law. With respect to mitigating/extenuating

circumstances, Art.119 of the Penal Code provides that if a crime is punished (e.g. by imprisonment), that the sentence imposed can be reduced by not more than one third.

2.7.1. The value of a separate hearing

Given how great the impact of the court's decision at sentencing can be, it is important to have a plan for sentencing ready in advance. Ideally, the defense should make a request before the trial that matters related to sentencing be addressed in a separate hearing following the verdict. While it may be the practice of the courts in Somaliland to announce the sentence at the same time as the verdict in the case, it should always be the goal of the defense to have the question of guilt considered separately from the details of punishment. The defense cannot easily address issues related to sentencing prior to conviction, since doing so might undermine their claim of innocence and increase the likelihood of a guilty verdict.

International law recognizes the right of the accused to address the court on questions related to punishment at a time after conviction and before punishment.

If an accused is not contesting his or her guilt at trial, it is generally quite easy to illicit testimony about any issues related to punishment from the accused during the trial phase. However, when guilt is contested, obtaining the same testimony during the trial can be either impossible or impractical.

The defendant has a right to contest an accusation against him or her on the grounds that there is insufficient evidence to prove the case, while exercising the right to remain silent both before and during trial. If in such a case the accused is found guilty, he or she will not have had the opportunity during the trial to address the court regarding any mitigating or extenuating circumstances, and to express remorse or contrition.

2.7.2. Separate evidence

Article 117 of the CPC provides for the possibility of rebuttal of evidence. If the accused produces evidence that the Attorney General could not have reasonably foreseen, the Court may allow the Attorney General to produce evidence in rebuttal. In such case, the accused may, after such evidence in rebuttal has been produced by the Attorney General, produce further evidence in his own defence.

There are a number of issues related to punishment upon which the defense needs to present evidence and/or witnesses that typically have no relevance to guilt or innocence, such that presenting them at trial would be a waste of time if the accused is found not guilty. These issues include:

- the true amount of injury or damage justifying restitution;
- the defendant's financial status and ability to pay fines or restitution;
- the impact of imprisonment or other punishment upon the defendant's family and dependents;
- the validity of any criminal record for the accused;
- mitigating or extenuating circumstances not amounting to a defense, such as mental illness, poverty, duress, physical disability, poor health, low intelligence, or lack of education, and
- the defendant's risk of re-offending.

Advocates sometimes think that they can successfully present mitigating or extenuating facts regarding punishment simply by talking about them or having the client mention them. Unfortunately, it is the experience of most judges that some people will tell any lie they can think of to avoid punishment or try to make it less severe. Therefore, in order to get any real lessening of punishment because of a mitigating fact, it is necessary to present a credible witness or some other evidence. If you argue that your client should be given no imprisonment because he is dying of lung cancer, you should be able to present testimony from his doctor and/or the appropriate medical records to prove this.

2.7.3. Statements by the client

According to Art.119, para 3, of the CPC, the accused shall always be allowed to have the last word. However, every effort should be made to avoid the accused making any statements without discussing with their advocate what they intend to say beforehand. Clients rarely have a good idea about what sentiments or information is helpful, and what will make their situation worse. It is generally appropriate to encourage the client to speak about his or her feelings of remorse if they can do so.¹⁰⁸ Even the most cynical judges will at times show mercy and compassion when presented with a genuinely humbled and contrite defendant. However, if your client is unable to speak without blaming others and making excuses, it may be better if he or she remains silent. Statements that mix remorse and blame like for example: *“I’m very sorry I broke his legs but he was always trying to run away”* are not helpful.

2.7.4. Mitigating/Extenuating circumstances

Which mitigating or extenuating factors a particular court will recognize as most influential will always be somewhat idiosyncratic. However, some facts can be said to be likely to be viewed as mitigating in certain cases.

According to Art.40 of the Penal Code, ordinary extenuating circumstances include:

- a) *having acted for motives having a particular moral or social value;*
- b) *having acted in a state of anger caused by an unlawful act of another;*
- c) *having acted under the influence of meetings or assemblies forbidden by law or by the authorities where the offender is not a habitual or professional offender;*
- d) *having in the case of crimes against property caused negligible damage to the property of the party damaged;*
- e) *where in addition to the act or omission of the offender, an act committed with criminal intent by the party injured has contributed in causing the event;*

¹⁰⁸ The exception to this is in the case where an appeal is foreseen and the client is going to continue to maintain his or her innocence. In that case anything that could be understood as an admission of guilt must be scrupulously avoided by the client and the advocate.

- f) *where before trial the offender has fully paid compensation for the damage or, where possible, has effected restitution; or having before the trial and apart of the case referred to in the last paragraph of Art.18, spontaneously and effectively taken measures to eliminate or reduce the injurious or dangerous consequences of the offence;*
- g) *any other circumstance that the Judge considers to be such as to justify the lessening of the punishment.*

Additionally, according to Art.75 of the Penal Code, there are also extenuating circumstances which may be considered by the judge:

- if the aid laid by the persons that participated in the offence has played a minor role in the preparation and execution of the offence (Art.75 para 1), and
- if the person that has committed the offence or has participated therein has been forced to, especially if he has been forced to by a supervisor or person of authority, or has caused a minor or person with mental deficiency or infirmity to commit the offence (Art.75 para 3).

There are also mitigating or extenuating circumstances as per the type of crime, such as described in Art.238 of Penal Code for acts of minor importance, or in Art.303 of the Penal Code.

2.7.4.1. Actions Committed under Duress

In cases where a defence, acting under duress, is not successful, the arguments advanced by the defence that demonstrate that the party acted under duress may still be relevant as a mitigating factor. This may include circumstances where, for example:

- A trafficked person becomes a trafficker and claims that it was the only way they could escape their own exploitative situation.
- The offender claims they had to assist in the crime, otherwise that harm would have come to them or their family.

2.7.4.2. Limited Role in the Offence

The extent of the offender's involvement in the actual commission of the crime may have an impact in determining an appropriate sentence, though this will not generally impact their culpability.

Examples of minor roles in, for example, trafficking cases, include:

- Transporting a victim for a short distance;
- Working as a cook or cleaning-person in a trafficking operation;
- Renting facilities knowing that they will be used by a trafficking operation;
- Loaning vehicles knowing that they will be used to move trafficked persons, and
- Preparing fraudulent documents knowing they will be used to facilitate the movement trafficked persons.

Practice Problem - Thirteen

1. Your client, Saeed, is accused of exploiting the working force of others under article 464 of the Penal Code. He denied the crime to the police and he now tells you he wants to remain silent at the trial. The Prosecutor tells you that he will present documents at the trial that prove your client has been convicted twice in the past of committing fraud. Your client says he was never convicted of any crime in the past.
 - *What actions would you take before and during the trial regarding these past convictions?*
2. Your client, Omar, signed a written confession in which he admits to holding a hostage under Article 460 of the Penal Code. He tells you that the confession is true and that he not only seized the victim, but that he beat the victim so badly that the victim is permanently deaf in one ear. Medical reports confirm the deafness. Five elders from Omar's village come to you to say that they will testify that Omar is a very peaceful and religious man who would never use violence against anyone, and that the victim is a dishonest person and that he is probably faking his deafness.
 - *What actions would you take regarding the five elders and their testimony?*

Practice Exercise – Six

The class is divided into work groups of 4 to 6 participants each. Each group should list the arguments they would present at sentencing, and what witnesses and evidence they would use to support those arguments in the following cases:

1. Your client, Aden, is accused of being a member of an armed group under Article 322 of the Penal Code, for which he may receive a sentence comprising a long term of imprisonment. Your client is 18 years old, but cannot read and write, admits having participated in an armed group that was committing robberies of citizens on the road to Puntland. His uncle is one of the directors of the armed group. Aden has immediately surrendered to the police. He tells you that he is badly in debt and that he does not want to say anything that would harm his uncle because, after his father died, the uncle is like a father to him.
2. Your client, Abdulrahman, is convicted of acting as an accomplice to a kidnapping (seizure), as described under Articles 74 and 460 of the Penal Code. He is 23 years old and he was living on the outskirts of Hargeisa, having run away from his family home in Burco because there was not enough food for him and his two younger brothers. Abdulrahman was given 10,000 SLSH to stand in the road and watch for police while a gang of kidnappers forced the son of a wealthy businessman into their jeep as he tried to walk from his father's shop to his car. The social worker has interviewed Abdulrahman's parents and they are willing to have him move back home. However, the social worker noted that the family is very poor and that Abdulrahman's brothers appear to be underfed. The social worker has also discovered that Abdulrahman's uncle is an auto mechanic in Hargeisa and that he is willing to have Abdulrahman work as his assistant and provide him a place to live.

2.8. Appeal

According to Art.209 of the CPC, the accused has the right to appeal either in person or through his representative. Article 216 states that the grounds of appeal should be specific; if not sufficiently specific the appeal shall not be admissible.

The CPC provides that the accused does not have the right to appeal *“against a judgment for which he has been found guilty when he has already pleaded guilty to such count in accordance with the provisions of this Code”* (Art. 208).

2.8.1. Ensure an accurate trial record

The ostensible purpose of the appeal is to provide a mechanism for the remedy of errors by the primary court. However, errors can only be corrected if they are apparent in the written records that are transferred to the appeal court. Therefore, it is necessary that the advocate examine the file to ensure that the clerk has correctly recorded the important actions that have occurred, as required by the CPC in Articles 94 and 132.

In some parts of the world a *“court reporter”* makes notations to record every word spoken by each person present at every court session. In other systems, audio or video recordings are taken by the court to memorialize the events of the trial. How you create and preserve a record of the trial is not important, provided that an adequate record reaches the appeal court.

2.8.2. Honoring the Client’s Right of Appeal

The question of whether to initiate an appeal is one that should be decided in consultation with the client. The right of appeal belongs to the client, but it is the duty of the advocate to inform the client of this right, and to explain the advantages and risks connected with initiating an appeal. The final decision of whether to appeal rests with the client.

The deadline for initiating an appeal is 30 days from notification of the verdict (Art.214 of the CPC), or 15 days if the appeal is against any other judicial act. The deadline is long enough to allow a busy advocate time to submit the appeal. Failing to meet this deadline would be a major violation of an advocate’s ethical responsibility.

If the client is not held in custody it can sometimes be very difficult to locate them and get them to make an informed decision about whether to appeal their case. The advocate can be placed in the dilemma of choosing between initiating the appeal without the client’s express permission, or letting the deadline pass. In most cases, the advocate should initiate the appeal rather than let the deadline pass. However, normally a mandate is needed to file an appeal.

According to Art.209, para 2, of the CPC, it appears that only in cases *“where a sentence of death has been passed, the Counsel who defended the accused in the trial may appeal without any special mandate to do so and even against the wishes of the convicted person”*. However, as provided in para 4 of Art.209 of the CPC *“the accused may cancel an appeal made by other person on his behalf by giving notice to the Court that*

he does not wish such appeal to be made. If the accused is a minor or is incompetent, the parents or legal representative shall give consent for such notice to be valid”.

The advocate’s duty is to protect the rights of the accused and therefore the advocate may not allow the right of appeal to expire without the consent of the client, unless initiating the appeal is unambiguously against the client’s best interest. Once the deadline is passed, it is only possible to seek revision under articles 237 to 238 of the CPC which provide for only very limited review.

2.8.3. Appeal Strategy

The jurisdictional scope of the Court of Appeal is limited by the CPC Art.85, related to the “*correction of errors*” and Art.238 related to revision. As a matter of strategy, it is best for the advocate to address all possible errors in the act of appeal rather than selecting only what appears to be the most obvious or egregious errors, for it is impossible to fully predict in advance which errors will be most significant in the Court of Appeal.

Whenever possible the advocate should seek to take full advantage of CPC Art.231, para 2(c) which allows the introduction of new evidence. The Court may even, on its own motion, order new evidence.

Having completed the primary court trial phase, the advocate should have a clear idea of what is weak or lacking in the defense case. Article 231, para 2(c) of the CPC is an invitation to repair and strengthen those areas of the defense case that can be improved.

Any witnesses, experts, documents, or proofs rejected by the primary court can be re-introduced and re-examined along with any additional ones that have since come to light. However, the advocate must explain to the court how the new evidence is necessary for a sound decision, and why the existing material is not sufficient.

The Supreme Court, in contrast to the Court of Appeal, only considers legal errors and not factual ones (Art.232, para 2, of the CPC). If new evidence is discovered after the conviction, and after the Court of Appeal has taken a decision or the deadline for appealing has passed, that evidence can only be raised in a petition for revision (Art.237 of the CPC).

Practice Problems - Fourteen

1. The primary court accepts the written defense statement for your client Bashir, but you know that they often refuse to allow advocates to speak during the trial, and you do not think they will let you speak during Bashir’s trial. However, you believe the Court of Appeal may listen to you.
 - *What actions could you take at Bashir’s trial in the primary court to maximize your chances in the Court of Appeal?*

2. Your client, Ibrahim, is convicted by the primary court and given a sentence of three months. Ibrahim has already been in jail for two months so he only needs to serve another thirty days before he is released. Ibrahim is a farmer and he tells you he must be out of jail in forty-five days to harvest his crops or he will lose everything and his family will starve. You know that the primary court made an error of law and that Ibrahim should not have been convicted, however, you believe that if you initiate an appeal Ibrahim will not be released until the appeal is complete, which will take more than forty-five days.
 - *What advice would you give Ibrahim regarding his right to appeal?*
3. Your client, Ahmed, is convicted of adultery under Article 426 of the Penal Code based upon the testimony of the witness Hassan. Your client does not want you to initiate an appeal. One month after the appeal deadline Hassan's friends come to you and inform you that Hassan has told them that his testimony against Ahmed was all lies.
 - *What action, if any, can you take based upon these new witnesses?*

2.8.4. Strategy on procedural points

There is a great deal of variation in how the courts in Somaliland organize and carry out the criminal trials that come before them. Most judges are somewhat familiar with the CPC and many have received training on the CPC. However, sometimes courts do not implement all the CPC provisions.

Generally, when the court deviates from the procedures of the CPC it is the Prosecutor that benefits and the accused that suffers. There are two main reasons that it helps the defense when the procedural rules of the CPC are strictly followed. The first reason is that many articles of the CPC articulate rights belonging to the accused and the defense attorney. Secondly, the accused is usually the least powerful person in the criminal justice system, and in the absence of rules, it is the powerful that thrive.

If you suspect that certain provisions of the CPC or other law are going to be ignored it is advisable that you notify the Court before or at the beginning of the trial that you intend to insist upon compliance with the specific provisions that affect your case.

One method of doing this is to file a written copy of your defense statement and have the first section of the statement address the most important procedural issues in your case. If you believe that the judges have not read your written statement before the trial then you would be wise to raise your procedural concerns verbally at the start of the trial as well.

For example: It is quite common for courts to deny the defense the right to present witnesses. Therefore, if you have defense witnesses to present in your case, it would be appropriate to present written and oral arguments about how Article 116 and 179 of the CPC should be applied in your case.

While it is more likely that a court will follow the CPC if you bring the specific provisions to the judges' attention in the manner suggested, it is still very possible that they will persist in their error. This is one of the reasons that you want your argument to be in writing, so that if you are denied you can have your argument

preserved in the court file where it can be reviewed by the next court on appeal. You should also endeavor to have some written notation placed on the file which reflects the fact that the Court denied your request and the reasons that they did so.

One of the most difficult aspects of being an advocate is that one must repeatedly make the same sort of requests to the court, and may repeatedly have those requests denied. Advocates sometimes convince themselves that it is pointless to raise certain arguments because they have been denied in other cases. However, since each client has individual rights which must be defended, the advocate has a duty to demand those rights for each client regardless of the fact that those rights have been denied to others by the same court.

In addition, the persistence of the advocate can have an impact over time, particularly if a number of advocates repeatedly present the same arguments in the same court. Persistence sends the message that you are certain that you are correct and that these rights are important. Conversely, remaining silent in the face of improper procedures and the denial of rights gives your tacit approval to those practices.

It is a matter of historical record that some legal arguments that were continually denied for decades are eventually and universally accepted. For example, in 1896 the Supreme Court of United States approved racial segregation, and it was not until sixty years later in 1954 that the Court reversed its position and outlawed racial segregation. That change would never have come but for the fact that, twenty years previously in the 1930's, a group of attorneys began to systematically and repeatedly challenge the laws on segregation.¹⁰⁹

No legal system is truly ever static and unchanging, and given that the number and effectiveness of attorneys in the system in Somaliland is going to continue to grow in the years to come, you might well ask yourself what your own vision is for the legal system in Somaliland in twenty years, and begin working for the changes you would like to see.

Practice Problems - Fifteen

1. You are representing Mahmoud who is accused of accidental murder through beating, under Article 434 of the Penal Code. Mahmoud tells you that he is not guilty and that he was at the Mosque studying the Quran with several Mullahs at the time the Police say the crime was committed. In all your past cases in the court where Mahmoud's case will be heard the judges have never allowed you to present defense witnesses.
 - *What actions would you take in Mahmoud's case relating to his alibi?*
2. Your client, Abdul, is accused of leadership of an armed criminal group under Article 234 of the Penal Code. The only evidence connecting him to the crime is the gun he was carrying when he was arrested. An expert examination concluded that a bullet found at the scene of the crime was fired from Abdul's gun. Neither you nor your client were given a written copy of the expert's opinion on the gun and the expert is not going to be present at the trial. You know that the court, where Abdul's case is to be heard, never enforces article 161, para 4, of the CPC.
 - *What actions would you take in Abdul's case relating to the expert examination evidence?*

¹⁰⁹ This phenomenon of long term change can be observed in Islamic Law and Civil Law systems as well.

3. Jama is found not guilty by the primary court of violating article 446 of the Penal Code, but the prosecutor appeals the decision. Jama has now been in custody for four months, which is over both the maximum penalty for violating article 446, and the duration of custody according to Art.47 CPC.
 - *What actions would you take in Jama's case regarding his release?*

2.9. Demeanor in and out of the courtroom

According to Article 129 of CPC, in case of crimes committed during trial for which the law provides a punishment of imprisonment, or a more serious penalty, the President of the Court should:

- a) cause a statement of the offence to be recorded, or
- b) order the immediate arrest of the offender.

If the punishment provided by law for the offence committed during the hearing is not in excess of the jurisdiction of the Court, and such Court is the penal section of the district Court, then according to the same provision: *“the attorney general shall immediately frame a charge and produce it to the Court. The Court, having suspended the trial in progress, or immediately after pronouncing judgment in that trial, shall being the hearing of the new offence. Otherwise, the attorney general shall immediately proceed in accordance with the provisions of sub-paragraph a) of paragraph 1 of article 70.”*

Unlike many other occupations, an attorney's effectiveness is inextricably tied to how the attorney's personality and values are perceived by others. An auto-mechanic can still do a good business even if he is seen as arrogant, angry, unwashed and unfriendly, provided he fixes cars well. An advocate who causes unnecessary offense undermines his or her effectiveness by losing the respect of others in the legal system and the wider community. Treating others with respect is essential to earning and retaining their respect.

It is desirable to maintain cordial and, if possible, friendly relations with all other participants in the criminal justice system, including all functionaries of the police, prosecutor's office, prison department, and the courts. Indeed, a good relationship with the clerks and other administrative staff of these organizations can be a great asset to any advocate, while a poor relationship will be the cause of many problems.

Of course, the advocate can never compromise the interests of his or her client in favor of preserving a relationship with any other person. In fact, it is precisely because the advocate will inevitably and repeatedly be representing unpopular people, and making unpopular demands upon every part of the criminal justice system, that the advocate cannot afford to provoke others for frivolous reasons.

Advocates must often be persistent and, at times, aggressive to represent their clients effectively, but there is rarely any justification for being impolite. Advocates must always remember that they are not engaged in a personal conflict or feud, but are pursuing their professional duties. Advocates should not be surprised when hostility and rudeness is directed at them because of the pettiness and ignorance of others. However, only by not responding in kind to offensive behavior can advocates make it clear that whatever disagreements they may have are solely professional.

Slightly different rules of behavior apply during the conduct of the trial. The trial is a solemn occasion at which substantial formality should be observed. However, the trial is also in some sense a performance and the courtroom a stage upon which the advocate acts a part. In a trial there may be times when it is quite effective for an advocate to display emotion or passion appropriate to the occasion. Yet advocates who are caught up in their emotions lose their ability to react to unexpected events, and to make the dispassionate tactical decisions that trials often require.

Making an enemy of a prosecutor is not in your long-term interests, and may prejudice your future clients. However, making an enemy of a judge is against the immediate interest of whatever client you have before that judge. It can be a challenge to refrain from antagonizing or embarrassing a particularly foolish or ignorant judge, but it is wise to find the strength to do so. Advocates who try to prove that they are clever by humiliating the judge are instead providing proof that they are not clever enough to persuade the judge.

In the case where the advocate represents a victim, his/her goal should be to enlist the prosecutor and the judge as allies in the effort to achieve the outcome that is in the best interest of the client. Neither a prosecutor nor a judge can truly be an ally if they have no real concern for or commitment to the client's best interest.

Practice Problems - Sixteen

1. You come to the courthouse to file your defense statement. The clerk sees you waiting, but ignores you and continues drinking his tea. After ten minutes he tells you he cannot accept your statement unless you show him your advocate's license. After examining the license for several minutes the clerk tells you that he cannot accept the statement because the file is with the judge in his chambers and the judge asked not to be disturbed.
 - *What actions would you take?*
2. Your client is accused of killing a young man from a large family. During the trial the young man's family is in the audience, and when you leave the courthouse they shout insults at you and one feeble looking old man spits on your suit jacket.
 - *What action would you take?*
3. You are cross-examining a witness against your client. You have documents that show that this witness was once convicted for perjury and twice for forgery. The first question you ask him is whether his testimony is truthful in this case. He replies "how dare you accuse me of dishonesty, I have never told a lie in my life, you are the infidel criminal who is protecting a killer!"
 - *What action would you take?*
4. During the first hour of the trial the chief judge says to you that he is "not interested in your longwinded nonsense about the CPC and International Conventions. If you keep talking about it, I will have to have you arrested". An hour later the chief judge orders your client to be taken back to the jail even though the trial is scheduled to continue all day, because "I'm tired of looking at his murderous face".
 - *What action would you take?*

Chapter 3:

Legal Aid at the post-trial stage

Learning objectives

Participants will:

- become aware of the national and international legal framework applying at the post-trial stage;
- make an inventory of various problems related to access to detention centers for legal practitioners and work out solutions.

According to Guideline 6 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems:

“45. States should ensure that imprisoned persons and children deprived of their liberty have access to Legal Aid. Where Legal Aid is not available, states shall ensure that such persons are held in prison in conformity with the law.

46. For this purpose, States should introduce measures:

(a) To provide all persons, on admission to the place of imprisonment and during their detention, with information on the rules of the place of imprisonment and their rights under the law, including the right to confidential Legal Aid, advice and assistance; the possibilities for further review of their case; their rights during disciplinary proceedings; and procedures for complaint, appeal, early release, pardon or clemency. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children and should be in a language the person in need of Legal Aid understands. Information provided to children should be provided in a manner appropriate for their age and maturity. The information material should be supported by visual aids prominently located in those parts of the facilities where prisoners have regular access;

(b) To encourage bar and legal associations and other Legal Aid providers to draw up rosters of lawyers [and paralegals] to visit prisons to provide legal advice and assistance at no cost to prisoners;

(c) To ensure that prisoners have access to Legal Aid for the purpose of submitting appeals and filing requests related to their treatment and the conditions of their imprisonment, including when facing serious disciplinary charges and for requests for pardon, in particular for those prisoners facing the death penalty, as well as, for applications for parole and representation at parole hearings;

(d) To inform foreign prisoners of the possibility, where available, of seeking transfer to serve their sentence in their country of nationality, subject to the consent of the States involved.”

Accredited paralegals –as mentioned above - can play a key role in assisting persons inside prisons. According to Guideline 14.67(f) of the above UN Principles and Guidelines, States should “ensure access by accredited paralegals who are assigned to provide Legal Aid to police stations and prisons, facilities of detention or pre-trial detention centres etc.”

From the texts mentioned in this Manual, those that are especially applicable to detained persons (both adults and children) are the following:

- The 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment;
- The 1955 UN Standard Minimum Rules for the Treatment of Prisoners;
- The UN procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners (adopted by Security Council Resolution 1984/47);
- The 1989 UN Convention of the Rights of the Child and its relevant Protocols;
- The 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules or JDL);
- The 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules);
- The 1997 UN Guidelines for Action on Children in the Criminal Justice System (Recommended by ECOSOC resolution 1997/30 of 21 July 1997);
- The 1988 Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- The 2011 UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders - the Bangkok Rules (Resolution 65/229 adopted by the UN General Assembly on 16 March 2011);
- Recommendation Rec(2008)11 of the Committee of Ministers of the Council of Europe on the European Rules for juvenile offenders subject to sanctions or measures, adopted on 5 November 2008;
- Recommendation Rec(2006)2 on the European Prison Rules;
- The Kampala Declaration on Prison Conditions in Africa¹¹⁰ (1996) and Plan of Action (1997);
- The Kadoma Declaration on Community Service Orders in Africa¹¹¹ and Plan of Action (1997);
- The Dakar Declaration and Recommendations¹¹² (1999);
- The Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa and Plan of Action¹¹³ (2002);
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹¹⁴ (2003);

¹¹⁰ Adopted between 19 and 21 September 1996.

¹¹¹ Adopted during the International Conference on Community Service Orders in Africa held in Kadoma, Zimbabwe from 24 to 28 November 1997.

¹¹² The Resolution on the Right to a Fair Trial and Legal Assistance in Africa was adopted in Dakar, Senegal, from 9 to 11 September 1999 and were then adopted in a Resolution by the African Commission on Human and Peoples' Rights at its 26th Ordinary Session in November 1999.

¹¹³ The African Commission on Human and Peoples' Rights adopted the Declaration with its Resolution 64 in its 34th Ordinary Session held in Banjul, the Gambia from 6 to 20 November 2003.

¹¹⁴ Adopted by the 2nd Ordinary Session of the Assembly of the Organisation of African Unity, Maputo, CAB/LEG/66.6 (Sept. 13, 2000).

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- The Lilongwe Declaration and Plan of Action¹¹⁵ (2004);
 - The Resolution of the African Charter of Fundamental Rights of Prisoners adopted by the African Regional Preparatory Meeting for the Eleventh United Nations Congress on Crime Prevention and Criminal Justice (Addis Ababa, March 2004), and
 - The Abuja Declaration on Alternatives to Imprisonment (2002).

As mentioned above, lawyers and paralegals can assist detained persons at the pre-trial-stage to either obtain bail or an alternative to imprisonment (especially applicable to children), or to accelerate the court procedure. Lawyers and paralegals can also assist convicted persons with a possible appeal against the first instance decision, or any type of complaint for violation of their human rights during their detention, either by officials or by other inmates. Paralegals can assist prisoners in providing legal education, so as to allow prisoners to understand the law, the process and apply this learning in their own case.

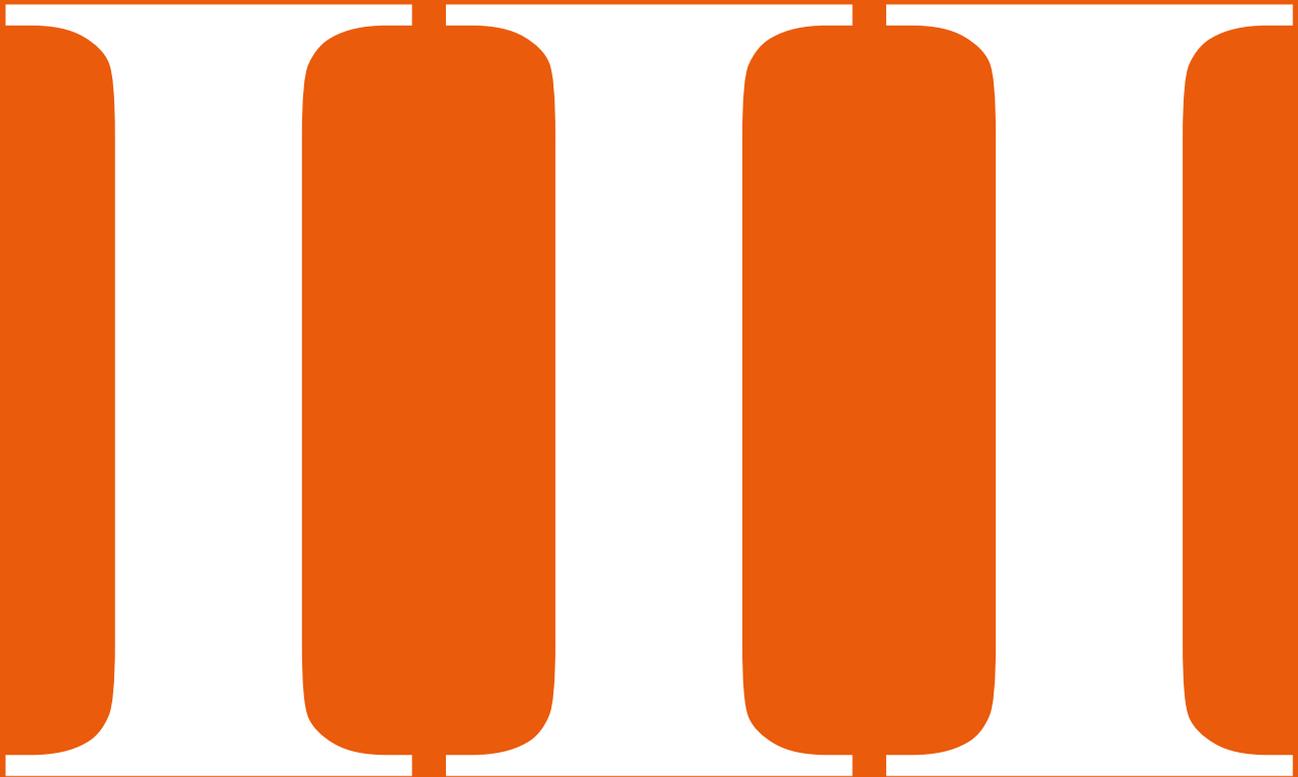
Legal practitioners can especially assist detained vulnerable groups, especially women, women with babies, young persons, refugees and foreign nationals, the aged, terminally and mentally ill, etc.

Class Discussion Seven

The class is asked to think about, and regroup the problems related to, access to Legal Aid inside the detention facilities, as well as the types of legal needs of the detainees, and to work out solutions.

¹¹⁵ Adopted during the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa between 22 and 24 November 2004 in Lilongwe, Malawi.

Part III: Training Guidelines for Lawyers and Legal Aid Providers for Assisting Victims and Vulnerable Groups



Part III: Training Guidelines for Lawyers and Legal Aid Providers for Assisting Victims and Vulnerable Groups

Training objectives

Participants will:

- become aware of the guidelines to lawyers and Legal Aid providers for assisting victims and vulnerable groups according to international standards;
- understand the different existing types of victims, and their degree of vulnerability;
- understand the importance of compensation and restitution for victims;
- become aware of the international legal framework and the particularities of the protection of different vulnerable categories.

This Part contains specific training guidelines and aids for lawyers and Legal Aid providers for assisting women and other vulnerable groups, such as children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally or seriously ill, refugees, internally displaced persons, and foreign nationals who might be involved with the justice system either as an accused, a victim or a witness. Women are included especially in relation to crimes that render them particularly vulnerable, such as crimes of sexual and gender-based violence (SGBV).

According to the UN Basic Principles on the Role of Lawyers (Point 4)¹¹⁶: *“Governments and professional associations of lawyers shall promote programmes to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers”*.

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems suggest that in the design of nationwide Legal Aid schemes, states should take into account the needs: *“...of specific groups including but not limited to the elderly, minorities, persons with disabilities, the mentally ill, persons living with HIV and other severe contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum-seekers, foreign citizens, refugees and internally displaced persons in line with guidelines 9 and 10.”* (Guideline 11.56).

¹¹⁶ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, from August 27 to September 7, 1990.

Chapter 1:

Assisting victims

Training objectives

Participants will:

- Understand different types of vulnerable victims;
- Become aware of different types of victims, and of the specific needs of two categories of vulnerable victims (women and children), and
- Understand the importance of compensation and restitution for victims.

A fair, effective and efficient criminal justice system is a system that respects the fundamental rights of victims, suspects, and offenders. It focuses on the need to prevent victimization, to protect and assist victims, to treat them with compassion, and to respect their dignity. Victims should also have access to judicial and other mechanisms, in order to seek prompt redress for harm they have suffered. Additionally, victims should have access to specialized assistance in dealing with any emotional trauma and other problems caused as a result of victimization.

Crime takes an enormous physical, financial, and emotional toll on victims. However, often victims of crime are forgotten by the criminal justice system or sometimes even re-victimized by the system itself. They are rarely allowed to fully participate in decisions that concern them, and do not always receive the assistance, support, and protection they need. Redress for the harm they have suffered as a result of victimization is often not available and, when it is, it is often insufficient or comes too late.

It is suggested that assistance to victims of crimes follows the guidelines of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹¹⁷, which insists on access to justice and fair treatment of victims as well as on their restitution and compensation.

According to the above Declaration:

“1. “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”

According to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Legal Aid should be foreseen for victims of crime (Principle 4.24). In particular, Guideline 7.47 suggests that states should take adequate measures on Legal Aid for victims, to ensure that:

- “(a) Appropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization;*
- (b) Child victims receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;*
- (c) Victims receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation in separate legal proceedings, whichever is consistent with the relevant national legislation;*
- (d) Victims are promptly informed by the police and other frontline responders (i.e. health, social and child welfare providers) of their right to information, of their entitlement to Legal Aid, to assistance and protection and how to access such rights;*
- (e) The views and concerns of victims are presented and considered at appropriate stages of the criminal justice process where their personal interests are affected or where the interests of justice so requires;*
- (f) Victim services agencies and non-governmental organizations can provide Legal Aid to victims;*
- (g) Mechanisms and procedures are established to ensure close cooperation and appropriate referral systems between Legal Aid providers and other professionals (i.e. health, social and child welfare providers) to obtain a comprehensive understanding of the victim, as well as, an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.”*

Further, Legal Aid for victims is explicitly provided in specific international texts focused on specific types of crimes, for example, trafficking in persons. In that case, the principles and guidelines of the Office of the High Commissioner of Human Rights (OHCHR) suggests that *“victims are provided with legal assistance and other types of assistance in the context of any criminal, civil or other action, brought against traffickers or individuals who exploit others”* (Directive 6, paragraph 5).

In many countries specific units for victim support have been established and collaborate closely with the police and other components of the justice system. For instance, in Zambia, Legal Aid service providers report good working relationships with officers of police victim support units and social workers.¹¹⁸ A formal agreement in the form of a Memorandum of Understanding has been entered into with the police, whereby a police officer from the victim support unit is permanently placed in the offices of the International Justice Mission and the National Legal Aid Clinic for Women to assist with cases.

1.1. The vulnerability of the victim

A lawyer should be trained to defend victims of any type of crime. However, some victims may be more vulnerable than others for various reasons, due to:

¹¹⁸ See, UNODC (2011), *Handbook on Improving Access to Legal Aid in Africa, Criminal Justice Handbook Series*.

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- The type of crime, e.g. sexual or gender-based crimes, or terrorism
 - The means used by the perpetrator, e.g. violence, or torture
 - Biological factors:
 - Age (particularly children and the elderly)
 - Gender
 - Health (physical or/and mental illness, or infirmity of the victim)
 - Psychological factors (mental incapacity or psychological fragility of the victim)
 - Social status (e.g. orphans, divorced women)
 - Legal status (e.g. refugees, displaced persons or illegal migrants)

Some or many of the above vulnerability criteria may accumulate for one individual.

There are factors that, *per se*, render a person vulnerable, such as age and physical integrity. There is no doubt, for example, that a baby and a disabled person are vulnerable. But some of the above criteria of vulnerability may be overcome or not even appear if the individual has developed personal, professional or social skills. For instance, if a person is trained to face difficult situations and even perpetrators due to his/her profession (e.g. a police officer), the crime will not have the same consequences, and so the means used by the perpetrator may not affect him/her or render him/her vulnerable as any other person who has not been

The consequences of the crime for one individual may affect one or more of the areas described below, but these consequences may be more or less severe for the individual if they appear alongside one or more of the vulnerability criteria above. A crime may have consequences in the following spheres:

- Physical
- Psychological
- Economical (especially in crimes against property, but also as an indirect consequence of the crime if the victim can no longer work)
- Social (e.g. disturbance of family peace and isolation from social milieu)
- Professional (e.g. loss of job as a consequence of physical or psychological trauma), and
- On the legal status of a person (e.g. if a crime has been committed by a refugee, depending on the crime, this may result in the cessation of his status).

It should be noted that levels of psychological trauma suffered by some victims (before or during the process of the crime) may be so high that victims¹¹⁹ may never be able to serve as witnesses before the Court, or even to give testimony that could be used as a basis for investigation.

When physical and sexual violence, and frequent and severe abuse take place, this is likely to cause a multitude of health problems to victims, with chronic consequences on both their physical and mental health.

¹¹⁹ Jo-Anne Wemmers, Katie Cyr, *Victims' needs within the context of the criminal justice system*, International Centre for Comparative Criminology, University of Montreal, Sept.2006.

The psychological reactions of SGBV victims can be multiple and severe, and they can be compared to - or even exceed - the symptoms that are described by the victims of torture.

Sometimes, the hostility of the victim may surprise some investigators, who expect to see broken, grieving or fearful victims. However, hostility is a possible reaction to trauma. It is not unusual for a victim to be ‘upset’ or easily irritated by everything, and to even have ‘explosions’ of mood.

The Post-Traumatic Stress Disorder (PTSD):

PTSD is a term which describes a mental health disorder, in part caused by exposure to one or more traumatic events. This disorder manifests itself in a number of serious psychological symptoms suffered by those who have been exposed to one or several horrifying or threatening experiences.¹²⁰ PTSD is the reaction of the victim to the memory of a traumatic experience s/he has experienced.

For instance, for victims of SGBV or trafficking in persons, the traumatic events they suffer are often repetitive and prolonged. Sometimes traumatic experiences can have non-reversible effects for the victims. For many people who have undergone a traumatic event, the post-traumatic effects fade over time, but for some others they may persist in time.¹²¹ Consequently, it happens that victims may refuse to be identified as victims or may refuse to collaborate with authorities. The truth is that we can’t really understand the behaviour of the victim without understanding the experiences of the person or the context in which behavior occurs.

1.2. The right to compensation and restitution for victims

1.2.1. The right to compensation

Victims are entitled to compensation for the harm and/or exploitation they have suffered from the crime. As mentioned above, according to the UN Principles and Guidelines, victims may receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation in separate legal proceedings, whichever is consistent with the relevant national legislation (Guideline 7.47[c]). Furthermore, states could use funds recovered from criminal activities by seizures or fines to cover Legal Aid for victims (Guideline 12.60.b.ii).

¹²⁰ See, Diagnostic and Statistical Manual of Mental Disorders, DSM-IV. Washington, DC: American Psychiatric Association, 1994.

¹²¹ Brown, Schefflin, Hammond (1998), *Memory, Trauma Treatment and the Law*, New York, NY: W. W. Norton; Cahill S.P., Foa E.B. (2004), “A glass half empty or half full? Where we are and directions for future research in the treatment of PTSD”, in: Taylor S. (Ed.), *Advances in the Treatment of Posttraumatic Stress Disorder: Cognitive-behavioral perspectives*, New York: Springer, p. 267-313.

In specific crimes, such as trafficking in persons, the OHCHR, in its Principles and Guidelines on Human Rights and Trafficking in Persons (Directive 9), notes the following:

“International law recognizes to victims of trafficking, as persons whose human rights have been violated, the right to adequate and appropriate remedies. In practice, these persons are usually not able to claim this right because they are not informed of the possibilities and procedures for remedies proposed to obtain redress, particularly in the form of damages, following the crime of which they have been victims. To remedy this problem, we should come to their assistance particularly by Legal Aid, in order to give them the opportunity to realize their right to an effective remedy.”

In general, there are two ways to request compensation for victims:

- through the assets of offenders or
- through a State-funded compensation scheme (if there is one).

The administration of compensation to victims can be (according to the legislation of the state) decided through a judicial process or by an administrative action. A claim for compensation could potentially be composed of several bases, including, but not limited to:

- Salaries unpaid or underpaid;
- Court fees and legal services (if no Legal Aid);
- Medical expenses;
- Loss of job opportunities during the period of victimization;
- Pain and suffering due to physical or psychological violence;
- Compensation for degrading and inhuman treatment;
- Significant bodily injury or impairment of physical or mental health as a result of the crime.

Reparation should include the cost of social and educational reintegration. It needs to be underlined that the right to reparation is not only granted to the direct victims of the crime. The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization, are also entitled to such reparation.

As mentioned above, according to Article A.2 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the term ‘victim’ also includes *“the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”*. This means that these persons are also entitled to compensation for the damage caused to them independently of the victim itself.

1.2.2. The right to restitution

It is very important that the victim denounce the crime and confront any criminal proceedings in order to condemn the offender(s), and is assisted to regain his social life. This assistance must provide the necessary support to reconstitute his social reintegration. The return of the victim to social life includes not only his/her

“*physical and mental*” return, consisting of medical and psychological assistance to lift the victimization and avoid a potential re-victimization in the future (which can also cause by the criminal procedure), but it also extends to the “*economic return*” of the victim, meaning economic restitution for the damage caused by the crime.

Restitution is often confused with the economic compensation in the form of damages, and both are sometimes used interchangeably. However, while damages are generally regarded as a form of compensation for the damage or injury (a form of payment, most commonly in cash, to a person who has suffered injury), the restitution is a broader concept, consisting of measures taken to restore the victim to the position that s/he could be if victimization had not occurred.

Obviously a question that arises is “*how can we speak of restitution in cases where the victim may have no economic, social or professional status previous to the crime e.g. a person living in the street?*”. In this case, the restitution should be understood in the sense of setting the conditions of the victim’s life in dignity.

This is a most difficult provision, because most states do not have the infrastructure required for the (re) integration and full restitution of victims (as is the case in Somaliland).

1.3. Specific types of vulnerable victims

1.3.1. Women victims

Violence against women represents a violation of dignity, safety, and human rights. The issue of violence against women is immense. Yet, it is often seen as a private matter. It is a crime, and the state has a responsibility to protect women that are victims of any type of violence.

Gender-based violence is inflicted on victims because of their gender, and may be inflicted within a family or social group, without overt and obvious activities taking place. It can be expressed physically, psychologically, sexually and economically, and includes areas such as domestic violence, where women, in particular, may be victimized by an aggressive male member of the household.

Around the world, at least one out of three women is beaten, coerced into sex or otherwise abused during her lifetime.¹²² Women are most at risk at home and from men they know, usually a family member or spouse.

In 1993, the UN defined gender violence as: “*any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering for women, including threats of such acts, coercion, or arbitrary deprivations of liberty, whether occurring in public or private life*”. By referring to violence as “*gender-based*”, the UN definition highlights the need to understand violence within the context of women’s and girl’s subordinate status in society. Such violence cannot be understood in isolation

¹²² Ellsberg, M. and Heise L. (2005), *Researching violence against women: A practical guide for researchers and activists*, Geneva, Switzerland, Program for Appropriate Technology in Health, World Health Organization; Morrison, A., M. Ellsberg, et al. (2007). “Addressing Gender-Based Violence: A Critical Review of Interventions”, *The World Bank Research Observer* 22(1): 25-51.

from the norms, social structure and gender roles within the community, which greatly influence women's vulnerability to violence.

Gender-based violence is not only a manifestation of sexual inequality, but also serves to maintain this unequal balance of power.¹²³ According to the World Health Organisation's Multi-Country Study on Women's Health and Domestic Violence against Women¹²⁴, between 15% and 70% of women around the world had experienced some form of physical and/or sexual violence in their lifetime.

Violence against women can take the form of many crimes, such as:

- female infanticide
- neglect, malnutrition of girls
- child sexual abuse
- rape
- assault
- homicide
- injuries/mutilation
- forced prostitution and trafficking in persons
- female genital mutilation
- dowry and “*honor*” related violence (e.g., honour killings)
- sexual harassment at work and at school
- forced marriage

The Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice is one of the main UN instruments that deals with the needs of women victims of crimes of violence¹²⁵ in the criminal justice system.

At present the Somali Penal Code punishes only some of the above crimes against women:

- Art.398-400 (rape and similar crimes)
- Art.401 (“*abduction for purpose of lust or marriage*”)
- Art.408 (“*compulsion to prostitution*”)

123 See, the UN Secretary General's in-depth Study on Violence against Women (2006): <http://www.un.org/womenwatch/daw/vaw/v-sg-study.htm>.

124 The World's Health Organisation (WHO) study was initiated in 1997 with the aim of obtaining reliable and comparable data within and across culturally diverse countries on different forms of violence against women. It collected information from over 24,000 women in 10 different countries, and provides critical information about how women experience violence in different settings:
http://www.who.int/gender/violence/who_multicountry_study/en/.

125 UN General Assembly Resolution 65/228, Strengthening crime prevention and criminal justice responses to violence against women, December 21 2010.

- Art.431 (“*abuse of measures of correction and discipline*”)
- Art.432 (“*ill-treatment of children and members of the family*”)
- Art.434 (“*murder*”)
- Art.435 (“*infanticide*”)
- Art.439, 440 (“*assault*”, “*hurt*”)
- Art.442, 443 (“*homicide or hurt by a parent*”, homicide for reasons of honour”)
- Art.445 (“*death caused by negligence*”)
- Art.449 (“*abandonment of child or new-born for reasons of honour*”)
- Art.455-458 (“*slavery*” and similar crimes)

According to Guideline 9.51 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems:

“States should take applicable and appropriate measures to ensure the right of women to access Legal Aid, including:

(a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to Legal Aid to ensure gender equality and equal and fair access to justice;

(b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims;

(c) Providing Legal Aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization and such other services that may include translation of legal documents where requested or required.”

The international framework for protecting women includes:

- Convention on the Elimination of All forms of Discrimination Against Women (adopted in 1979 by the UN General Assembly);
- Optional Protocol to the above Convention (1999);
- United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders of 2011 (the Bangkok Rules);
- UN Declaration on the Elimination of Violence against Women (Res.1993);
- Protocol on the Rights of Women in Africa (supplementary Protocol to the African Charter on Human and Peoples’ Rights¹²⁶);
- World Health Assembly Resolution on violence as a public health priority (1996).

¹²⁶ The Women’s Rights Protocol was adopted by the African Union in July 2003, in force since 2005.

There are a number of difficulties that are encountered in dealing with allegations of such crimes. It is often difficult for victims to make a complaint or report such crime and abuse. It can be very intimate and personal, and reporting a rape, for example, may place the victim in some embarrassment or even entail honour killing, as it is often difficult to ensure that the victim is seen as an innocent victim of crime. Because of the stigma, few women report sexual crimes in Somaliland because they are afraid.

In Somaliland, it is reported that there are high levels of gang rape, opportunistic rape and rape as a revenge crime for clan-based violence. The majority of such crimes are dealt with by the community elders (contrary to the Declaration of Elders where they committed to refer such cases in the formal justice system). Women express frustration at the level of impunity for perpetrators of sexual violence when dealt with by traditional leaders. All communities reported the practice of forced marriage for victims of rape as common practice, as a means to appease clans. The weak implementation of the secular laws as well as the limited access of women to justice structures (especially for those who cannot afford a lawyer) is a major challenge for Somaliland's women. The Sharia'h system of law offers strict and serious punishment against those who perpetrate gender-based violence (GBV). These laws are stricter than the secular system. In contrast, the traditional law offers less stringent punishments and is more flexible to the perpetrator. Despite the fact that Sharia'h law provides severe punishment for sexual crimes, levels of sexual violence remain high throughout the country.

There is very little support for victims of such crimes¹²⁷, especially in rural areas, and women report being stigmatized when they go to the police. In general, there is an overall lack of gender sensitivity amongst formal justice sector actors. Despite the fact that there is a Sexual and Gender Based Unit situated at the Attorney General's Head Office in Hargeisa to monitor such cases, and to retain data for the development of case handling in this extremely sensitive area of work, it is noted that there are not enough women lawyers. Whilst there are some female lawyers and paralegals in Hargeisa, Gabiley and Burco, there are none elsewhere in Somaliland, leaving a large gap in the level of assistance available to women who face issues relating to gender-based violence.

The problems women face in the justice system of Somaliland are many. However among the major ones are:

1. Customary law removes all rights of women (as the Declaration of Elders does not apply). For example, in rape cases the traditional leaders come to the regional court and settle the case outside of the justice system, sometimes forcing the victim to marry the offender. The Attorney General does not intervene or complain about the fact that outsiders interfere in the justice system. If the victim has money and can support herself she can continue in the justice system. But the main problem is that women do not possess the economic independence to exercise their rights.
2. Women victims receive extreme pressure from the community.
3. In addition, rape cases are very difficult to prove because the judges always need physical evidence (signs/traces), which in many cases is difficult to obtain.

¹²⁷ According to XOQSUR, all efforts to convince the elders not to settle cases outside the formal justice system distil to the fact that there are not enough courts outside Hargeisa. Unless courts are established in all areas of Somaliland, crimes will continue to be settled outside the formal justice system.

1.3.2. Children victims

Children do not have the same needs and capacities as adults, and they probably aren't able to make informed decisions. It should be underlined that children have special rights under the 1989 UN Convention on the Rights of the Child which should be considered when they are called to testify as victims in criminal cases.

Children are particularly vulnerable¹²⁸ and require protection measures beyond those that may apply to adults testifying as victims in the same cases (e.g. in cases concerning sexual crimes).

According to the United Nations Guidelines on Justice in matters involving child victims and witnesses of crime¹²⁹, child victims and witnesses have the following rights:

1. The right to be treated with dignity and compassion. This means that:
 - Every justice system actor should show children respect at all times.
 - Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process.
 - Every child should be treated as an individual with respect shown to his or her own needs, wishes and feelings.
 - Persons who investigate the crime should spend only the amount of time with the child that is necessary to find out what happened.
 - People who interview a child victim or witness should be specially trained so that they ask appropriate questions in the appropriate way. They should think about what the child needs, and treat the child with fairness and with respect.
 - All people who have contact with a child victim or witness should consider the child's needs, thoughts and feelings. They should talk to the child in a place where the child feels comfortable and secure, and in a language that the child uses and understands.
2. The right to be protected from discrimination. This means that:
 - Child victims and witnesses should be treated fairly and equally, no matter who they are, where they live, what their parents do, what language they speak, what their religion is, what they think or say, whether they are boys or girls, rich or poor. This includes migrants and refugees, as well as children who are sick, can't hear or speak, or use a wheelchair or crutches.
 - Some children, because of the way they have been harmed, need special help and protection. This might be the case for children who have been sexually assaulted. Also, it should be noted that girls and boys may have different needs. The protection offered should be adapted to their special needs.
 - Children of all ages have a right to fully participate in the justice process, unless it is not in their best interests. When a child is a witness, the child's testimony should be respected as true unless it is proven

¹²⁸ See, Report of the Secretary-General on Implementation of the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (E/CN.15/2008/11).

¹²⁹ Economic and Social Council resolution 2005/20 of July 22 2005.

otherwise, and as long as the child understands the questions and has responded without assistance. The child should not suffer harm or be at risk for participating in this process.

3. The right to be informed. This means that:

- Children have a right to be told what will happen at all stages of the justice process. Children should be told what is expected of them when they testify, why their testimony is important, when it will happen, and how. They should be told how it will help to establish the truth. They should also be told about the different ways they might be questioned during the investigation and trial.
- They have a right to be told when and where hearings and other important events will take place.
- They have a right to be told what rights child victims and witnesses have, as contained in the Convention on the Rights of the Child and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and how these rights will be protected.
- They have a right to be told what is happening to the accused. This includes being told if the accused has been captured or arrested, where the accused is being held and for how long, and what will happen to the accused after the trial.
- They have a right to be told whether it is possible to receive compensation to help recover from the harm that was done, either from the offender or from the government, and when this is possible and how to receive it.

4. The right to effective assistance. This means that:

- Professionals should make every effort to work together when they help child victims and witnesses so that children don't have to spend more time in the justice process than is necessary.
- Professionals should develop ways to help children testify or give evidence more easily. This may include among other things:
 - Making sure that specialists or close family members are with the child during his or her testimony whenever needed, as long as it's in the child's best interests, and
 - Making sure that an adult is appointed by the court to be the child's "*legal guardian*". This may be necessary if the child's parent or person, who is responsible for that child, is not available to make decisions that are in the best interests of the child.

5. The right to privacy. This means that:

- It is very important that all child victims and witnesses have their privacy protected.
- When a child is involved in the justice process, nobody except those people whom the child trusts has the right to know the child is involved. Adults should keep the child's name private and not give any information that would identify the child.
- To protect the child, the public and the media should be kept out of the courtroom during a child's testimony.

6. The right to be protected from hardship during the justice process. This means that professionals should:
- Make sure that when the child is expected to attend hearings and trials these are planned ahead of time so the child has time to prepare.
 - Make sure that the trials are completed in as short a time as possible, unless a delay is in the child's best interests. Investigations involving children should be conducted as quickly as possible and make sure that cases involving children are heard first. A child should be asked to come to court only when necessary.
 - Make sure that children are questioned in special rooms where they can feel comfortable and safe. Courtrooms should also be set up to make children feel at ease. Children should be able to take breaks during their testimony, and hearings should be scheduled during the time of day that is best for the age and maturity of the child. Everything possible should be done to make it easier for the child to testify.
 - Limit the number of times a child is questioned, gives statements, and attends hearings. One way to do this is by recording what the child says with a video camera.
 - Make sure the child has contact with the accused only when absolutely necessary. When children are questioned in court, it should always be out of sight of the accused. A child should never be questioned by the accused. Separate waiting rooms and private interview areas should be available for children who testify.
 - Make sure, with help from the judge, that children are questioned in court in a way that they understand and that does not frighten them.

However, as we have already mentioned above, it is sometimes difficult to judge if a person is a minor. In this case, one should bear in mind that while children can seem older than their age, they are still children, and that when it is impossible to determine whether a person is a minor or not, it is better to consider this person as a minor. *It is always better to protect a person who does not deserve this protection, than not to protect a person who deserves it.*

What was mentioned about the questioning of witnesses above, also applies to minors. The same principles for adults are valid for child victim-witnesses as well. Additionally the following principles apply:

- A child should never be examined in the same place where the crime or exploitation occurred;
- Questions should be addressed with sensitivity and due consideration of childhood;
- Examination of a child should always start with general questions e.g. about his age, family, nationality (if different), etc.

Further, special techniques to examine children victims and special procedures to avoid the multiple testifying of child victims should be developed. To this end, some countries provide the audiovisual recording of testimonies of children, allowing them to appear at court by videoconference.

Chapter 2:

Assisting vulnerable groups

Training objectives

Participants will:

- become aware of the particularities of the protection of children in conflict with the law and children victims;
- understand the subtle differences between the above two categories and become aware of the legal framework for their protection;
- become aware of the legal framework and the particularities of the protection of women victims and perpetrators;
- become aware of the problems faced by persons suffering from HIV/AIDS and mentally ill persons, and learn how to offer effective legal assistance;
- learn the differences between refugees, IDPs and migrants, and the international framework for their protection;
- learn the techniques to understand hidden victimisation and the methods to deal with hidden victimisation during investigation and in court, and
- become aware of the framework for the protection of victims and witnesses.

Art.172-177 of the Penal Code contain specific provisions for mentally ill, elderly and children perpetrators. Security measures are imposed in these cases instead of criminal punishments as provided by Art.172 (such as their placement in a ‘lunatic asylum’).

According to guideline 5.44.(a) of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Legal Aid should be provided in order “*to ensure that the accused understands the case against him or her and the possible consequences of the trial*”. This is very important when it comes to persons who are mentally ill or mentally deficient persons (due to illness or age), who do not understand what is happening and why, or who do not understand the language of the procedure such as refugees or foreign nationals.

2.1. Children in conflict with the law

Children in conflict with the law, especially those that are sent to prison, are in a very unfavorable situation for themselves and their future, because detention and the placement of children under state custody is not in line with the principle of the best interests of the child, as suggested by the Convention on the Rights of the Child (CRC).¹³⁰

¹³⁰ See, UNODC (2009), *Strategies and Tactics for Defending Juvenile Cases*.

In the pre-adjudication phase, children in conflict with the law frequently deal with the following situations:

- The lack of use of diversion of punishment for children at the early stage of the criminal justice process, namely during the investigation by the Police;
- Overcrowding in detention facilities that hampers the process of care and the fulfillment of rights for children;
- No strict separation between adults and children detainees;
- Some cases show that child suspects are placed in detention facilities despite the fact that their cases are still on trial;
- The basic rights of children, such as quality food, education, health standards, sanitation, recreation, are not met in the detention facilities;
- Violence committed by other older inmates or by detention facilities officers.

In the adjudication phase, children in conflict with the law frequently deal with the following situations:

- Most children suspected of committing petty crimes and crimes with short term sentences are prosecuted and most of the verdicts send children to prisons.

In the post-adjudication phase, children in conflict with the law frequently deal with the following situations:

- Placement together with adult inmates;
- Overcrowding in most correctional facilities that hamper the reintegration process for child inmates;
- Rights of the children, such as adequate food, education, healthcare, freedom to exercise their religion, recreation, visits, are not fully provided;
- Lack of adequate facilities to support a reintegration program for child inmates, such as education facilities, library, sport facilities and sanitary facilities;
- Vulnerability to violation of their rights, as a detainee and as a child, including violence committed by other older inmates or by correctional officers;
- Difficulties faced in obtaining permission to leave, and finally
- Neglect from parents and the society.

Legal providers could assist children to resolve many of the above problems at all stages of the judicial procedure.

2.1.1. International principles

According to Article 37 (b), (c) and (d) of the CRC, the basic principles which should prevail during arrest and investigation are the following:

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

As provided by Art.37(c) of the Convention on the Rights of the Child (CRC), children in detention should be kept separately from adults. Thus, children should be kept separately from adults not only for confinement or after the issuance of the decision on pre-trial detention from the court, *but also during an eventual detention. Considerations regarding the location of 'detention' apply not only to a prison or custodial centre, but also to confinement at the police station or any place where the child offender may be kept by the authorities (e.g. home or even police van). The detention authority is obliged to provide the detained child with immediate access to legal and other services, considering the age and gender requirements of the child.*

According to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems children are always entitled to Legal Aid, without being obliged to prove the difficulty of their economic means. In other words, children are always exempted from the means test in Legal Aid (Guideline 1.40.(c)).

The UN Guidelines (Guideline 10.52) suggest that states should provide special measures for children:

"States should ensure special measures for children to promote children's effective access to justice and to prevent stigmatization and other adverse effects as a result of being involved in the criminal justice system, including:

(a) Ensuring the right of the child to have counsel assigned to represent them in their own name, in proceedings where there is or could be a conflict of interest between the child and his or her parents or other involved parties;

(b) Enabling children who are arrested, detained, suspected of or charged with a crime to contact their parents or guardians at once and prohibiting any interviewing of a child in the absence of his or her lawyer or other Legal Aid provider, and parent or guardian when available and in the best interests of the child;

(c) Ensuring the right of the child to have the matter determined in the presence of the child's parents or legal guardian, unless it is not considered to be in the best interests of the child;

(d) Ensuring that children may consult freely and in full confidentiality with parents and/or guardians and legal representatives;

(e) Providing information on legal rights in a manner appropriate for the child's age and maturity, in a language that the child can understand and that is gender and culture-sensitive. Provision of information to parents, guardians or caregivers should be in addition, and not an alternative, to communicating information to the child;

(f) Promoting, where appropriate, diversion from the formal criminal justice system and ensure that children have the right to Legal Aid at every stage of the process where diversion is applied;

(g) Encouraging, where appropriate, the use of alternative measures and sanctions to deprivation of liberty and to ensure that children have the right to Legal Aid so that deprivation of liberty is a measure of last resort and for the shortest appropriate period of time;

(h) Establishing measures to ensure that judicial and administrative proceedings are conducted in an atmosphere and manner that allow children to be heard either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law. Taking into account the child's age and maturity may also require modified judicial and administrative procedures and practices.

53. The privacy and personal data of a child who is or who has been involved in judicial or non-judicial proceedings and other interventions should be protected at all stages, and such protection should be guaranteed by law. This generally implies that no information or personal data may be made available or published, particularly in the media, which could reveal or indirectly enable the disclosure of the child's identity, including images of the child, detailed descriptions of the child or the child's family, names or addresses and audio and video records."

At the international level, the most important texts related to justice for children are the following:

- Convention on the Rights of the Child (CRC)¹³¹;
- African Charter on the Rights and Welfare of the Child (the Children's Charter)¹³²;
- UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)¹³³;
- UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)¹³⁴;
- UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)¹³⁵;

¹³¹ Adopted and opened for signature, ratification and accession by the UN General Assembly resolution 44/25 of 20 November 1989.

¹³² Adopted by the Organisation of African Unity (OAU) in 1990 (in 2001, the OAU legally became the African Union) and was entered into force in 1999.

¹³³ Adopted by the UN General Assembly resolution 40/33 of 29 November 1985.

¹³⁴ Adopted and proclaimed by the UN General Assembly resolution 45/112 of 14 December 1990.

¹³⁵ Adopted by the UN General Assembly resolution 45/113 of 14 December 1990.

- Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines)¹³⁶;
- Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.¹³⁷

Of course other instruments, although not exclusively applicable to children, may be of direct relevance to issues related to child justice, such as:

- The UN Standard Minimum Rules for the Treatment of Prisoners¹³⁸;
- The UN Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)¹³⁹;
- The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).¹⁴⁰

According to Article 40.2.b (iv) of the CRC, every child alleged of, or accused of, having infringed the penal law has the right “*Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality*”.

Acts which may not be considered to constitute unlawful treatment of an adult might be unacceptable in the case of children because of their specific sensitivity and particular vulnerability.

2.1.2. The National Framework

At the national level, the Juvenile Justice Law (J JL) of 2007 is intended to provide consistency in dealing with young persons who find themselves in conflict with the law. The overriding consideration when dealing with children who are subject to the law, given the vulnerability and inexperience of young people in such circumstances and the potential for their long-term corruption, is that the best interests of the child are paramount, in accordance with Article 6 of the J JL.

According to Article 8 of the J JL:

“1. A child may be deprived of liberty only as a measure of last resort; and only for the minimum necessary period of time.

2. A child may be deprived of liberty only if he is caught in flagrant delicto or accused of committing offenses set forth by law.

3. Children deprived of liberty shall be placed or kept in a safe and secure place permitted by law.”

¹³⁶ Adopted by Resolution 1997/30 of the UN Economic and Social Council on 21 July 1997.

¹³⁷ Adopted by Resolution 2005/20 of the UN Economic and Social Council on 22 July 2005.

¹³⁸ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

¹³⁹ Adopted by the UN General Assembly resolution 45/110 of 14 December 1990.

¹⁴⁰ Resolution 65/229 adopted by the UN General Assembly on 16 March 2011.

It is clear that as an added protection to the vulnerability of the child offender, the use of detention and the deprivation of liberty as a measure to deal with child offenders should be exceptional, and only used as a last resort when there are no other reasonable options. The role of the lawyer is to convince the prosecutor and the court of the above.

It is of value to note the contents of Article 8(2) above – the requirement that detention is only permissible if a child is caught “*in flagrante delicto*” or accused of committing offenses defined in the law. There is no justification for the detention of a child for other reasons, such as unruly behavior that does not constitute an offence, or an inability of the child’s parents to control the child. Any case review of a child in detention must state the reason for detention – that is, identify the offence and the evidence and give consideration to the provision in Article 8(1) that the detention be for the minimum necessary period of time.

Article 9 of JIL expressly provides for the right to legal counsel among other rights:

“Any child deprived of liberty shall have the right to:

- a) To be notified of the charges against him/her.*
- b) Get his/her parents or guardian be informed of the reasons of his/her arrest and establish contacts.*
- c) Be presumed innocent until his/her guilt is proven in a court of law.*
- d) Have legal counsel and to communicate with his/her legal advisers freely.*
- e) Silent and to be questioned only in the presence of his/her parents, guardian or legal counsel.*
- f) Get his/her parents or guardian present at all stages of the proceedings.*
- g) Prompt appearance before the court.*
- h) Be allowed to Call and cross-examine witnesses and examination in chief*
- i) Appeal against any decision or sentence passed on him/her to a higher authority.*
- j) Free interpretation services if the language of the court is not his/her mother tongue.*
- k) Be protected from any form of physical punishment and psychological harassment.*
- l) Be detained separately from adults and girls from boys.*
- m) Adequate food and water; sufficient clothing, bedding and blankets and medical treatment, care and support.*
- n) Education and reading material.*
- o) Regular visit from parents, relatives and/or lawyers.*
- p) A mentally disabled child or unable to speak who is deprived of liberty shall have the provided in the proceeding article, he/she also has the right to have an expert to explain to him/her needs and requirements.”*

Given that many children are not registered at birth, and that there is no reliable system of finding the true age of these children (given that there is currently no possibility of DNA testing in Somaliland), the issue of the age, and the individual’s eligibility for criminal capacity becomes serious. It is extremely important because it is definitive to whether a child can be subject to criminal proceedings. According to Article 61 of the JIL, in the preliminary hearing the judge must determine the age of a child.

Article 10 of the JIL provides that:

“Notwithstanding the provisions of the Penal Code or any other law:

- 1. Whoever, at the time he committed an act, had not attained fifteen years of age shall not be liable.*
- 2. A child who attained fifteen years of age until eighteen years may be liable for criminal responsibility in accordance with the Penal Code, but not full criminal responsibility.*
- 3. Whoever, at the time he committed an act, had attained eighteen years of age shall have complete criminal punishment and shall not be recognized as child or youth.”*

A young person who has not attained the age of 15 years is not liable. Given that provision, there is no justification in the criminal law for the detention or charge of a young person in contemplation of criminal proceedings.

Further, Article 11 of the JIL requires the punishment for a child offender to be proportionate to “...*the circumstances of the child, the gravity and nature of the offence.*” According to the JIL, the maximum punishment for a child offender cannot exceed 15 years of imprisonment. In addition, Article 14 of the JIL provides for the participation of the child in the course of proceedings and the preparation for proceedings as follows:

- “1. Every child who is capable of communicating his/her views shall be given an opportunity to express his/her views in any judicial proceedings concerning the child.*
- 2. Views of the child shall be taken into consideration by the court and shall be given due weight in accordance with the age and maturity of the child.*
- 3. It is the responsibility of the judge to provide a lawyer or interpreter to assist the child that is unable to express his views.*
- 4. The lawyer provided the proceeding article shall not be absent from the court hearings.”*

This ensures that the child has a full role to play in the course of proceedings where possible.

The Pre-Trial Process

Articles 46 to 55 of the JIL deal with issues of a child’s appearance before the Children’s Court. The main issues addressed in this section of the legislation are driven by concerns that the arrest of any child must comply with the relevant laws, specifically the CPC, that the processes established in the JIL are followed, and that the appropriate authorities and persons are informed and notified of any such arrest. There are requirements that parents and guardians are informed, and that they or a legal representative must be present for any interrogation of the child (Articles 47 and 51 of the JIL). There is also provision under Article 55 for the alleged child offender to be granted bail pending a court hearing.

The Preliminary Hearing

The preliminary hearing in a child case requires a number of stages in the court process. First, the preliminary hearing requires the child to answer the allegation (Article 58) before the court discusses the potential for the case to be diverted from the criminal justice system in compliance with Article 59.

Those who must attend the preliminary hearing are described in the JJJ (Article 60). Besides the child offender, the persons allowed to be present are:

- a) The parent or guardian of the child
- b) If the parent or guardian cannot be found, an appropriate adult may be appointed by the judge
- c) The Attorney
- d) The Probation Officer
- e) Any other person accepted by the Judge whose presence is necessary and serves the best interest of the child
- f) The Legal Representative
- g) The Children Police Officer who investigated the case.

Court Proceedings

The specification for court hearings in the Children's Court is laid out in Articles 74 to 86 of the JJJ. Many of the provisions echo the spirit of the law in protecting the rights and integrity of the child involved, and in pursuing a positive outcome to the process that is restorative and rehabilitative in character. Cross-examination of the child in the course of proceedings must not be overtly hostile (in accordance with Article 79 of the JJJ), and the trial itself must be expedited, with as few adjournments as possible and taking as short a time as possible, in line with Article 82.

Where a case against a child alleges that there was joint activity with an adult or adults in the commission of an offence, the preferred conduct of the case is for separate trials to take place for the adults and children accused. If the interests of justice require that the adult and children be tried together, Article 81 of the JJJ states that the joint trials take place in the Children's Court.

2.2. Persons suffering from HIV/AIDS

Africa, in particular sub-Saharan Africa, is the region most severely affected by HIV.¹⁴¹ Nearly two-thirds of all people infected with HIV live in sub-Saharan Africa, and the African continent is the hardest hit by the HIV epidemic in the world. This situation is also reflected in the prisons. However, the situation of HIV in prisons in Africa has been a trouble area and requires urgent attention, including political and financial support. Efforts to control the HIV epidemic without taking into consideration the situation in prisons is doomed to fail.

¹⁴¹ UNODC-UNAIDS-WHO (2004), *Advocacy Guide: HIV/AIDS prevention among injecting drug users*.

Prisoners are exposed to several HIV transmission risks during their detention:

- risks associated with sexual (unprotected) practices, either forced or consensual;
- drug use through injection;
- sharing of razors;
- during pregnancy and breastfeeding, and
- through medical and dental care.

There are not enough alternatives to prison for persons with HIV/AIDS who come into conflict with the justice system, and it is most likely that these persons end up in a detention facility as with any other criminal.

The situation of detained persons with HIV/AIDS¹⁴² is most shocking in many countries, since they are usually being detained under non-existent nursing conditions and miserable conditions of detention. Insufficient care and treatment of prisoners suffering from HIV/AIDS is the subject of case law at the European Court for Human Rights for violation of article 3 of the European Convention on Human Rights.¹⁴³ Persons suffering from HIV/AIDS may become ill from other diseases, such as asthma, bronchitis, hepatitis, psoriasis, etc.

According to the African Declaration of Commitment to prevention, treatment, care and support for HIV/AIDS sufferers in prisons¹⁴⁴, several sub-Saharan African countries report a prevalence of HIV/AIDS by more than 25% at the level of the prison population. These rates may be double or triple the HIV prevalence among the adult population of these countries. Within populations in sub-Saharan Africa, 70% of tuberculosis (TB) patients are HIV-positive. TB is responsible for nearly 40% of deaths of HIV/AIDS sufferers.

The lack of knowledge and education among prisoners and prison staff about the risks of acquiring and transmitting HIV/AIDS, as well as the absence of protection measures and adequate health care services, increases the risk of infection. In this environment, risks to personnel by exposure in the workplace, and then for their families, also increases.

For this reason, the Declaration recognizes the particular vulnerability to HIV/AIDS infection of children, youth, women, persons with disabilities and sexual minorities in prisons, and engages African States to *“the reform of the criminal justice system aimed at improving the living conditions in places of detention, in particular to reduce the overcrowding, developing alternatives to imprisonment and reduce the vulnerability of prisoners”*.

In this respect, the Declaration of Madrid of 2009¹⁴⁵ *“taking note of the current facts and figures regarding communicable diseases such as HIV/AIDS, tuberculosis, hepatitis and sexually transmitted infections in*

142 UNODC-UNAIDS-WHO (2004), *Advocacy Guide: HIV/AIDS prevention among injecting drug users*.

143 See, decisions of ECHR: *Artyomov v. Russia* of 27 May 2010 (application no 14146/02); *Aleksanyan v. Russia* of 22 December 2008 (application no 46468/06) and *Yakovenko v. Ukraine* of 25 October 2007 (application no 15825/06).

144 Adopted on 18 November 2009.

145 UNODC – WHO (2010), *The Madrid Recommendation: Health protection in prisons as an essential part of public health*. See also, UNODC (2010), *From coercion to cohesion. Treating drug dependence through health care, not punishment*, Discussion paper based on a scientific workshop, UNODC, Vienna, October 28-30, 2009.

prisons worldwide and the high rate of post-release mortality, as presented to the meeting by acknowledged international experts; [...] aware of the potential for prisons to contribute to global public health protection and to a reduction of health inequalities; [...] and understanding that effective prevention can gain from early recognition of those at risk at all stages of the criminal justice system; [...] recognised the urgent need in all prison systems for measures to use alternatives to imprisonment where possible and to reduce overcrowding in prisons [...]”.

According to the 15 key interventions suggested by the UNODC, ILO, UNDP, WHO, UNAIDS policy¹⁴⁶ on prevention, treatment and care in prisons and other closed settings: *“All forms of coercion must be avoided and testing must always be done with informed consent, pre-test information, post-test counseling, protection of confidentiality and access to services that include appropriate follow-up, antiretroviral therapy and other treatment as needed.”*¹⁴⁷

In several countries, such as in some States of the USA¹⁴⁸, defendants accused of a sexual offence (which includes sexual intercourse as an element of the crime), are ordered by the court to be tested for HIV once the charge is filed. The test is also ordered prior to incarceration and before release or discharge from the Department of Corrections. The results of the defendant’s tests are to be released to the victim and his or her parent or legal guardian if the victim is a minor. The results of the defendant’s tests are also to be released to the prosecuting attorney and the defendant’s attorney.

2.3. Mentally ill persons¹⁴⁹

The need for Legal Aid for mentally ill or mentally deficient persons occurs:

- in cases where the mentally ill or mentally deficient person is accused of an offence;
- in cases where the mentally ill or mentally deficient person is a victim of a criminal offence (independently of the fact that this person may be inside a mental hospital/institution or outside), or
- in civil cases where the mentally ill or mentally deficient person is already in a mental hospital or institution, for the defence of his legal rights (e.g. inheritance).

In this Manual we deal with the first two cases. What has been already mentioned above for vulnerable victims also covers the case of mentally ill or mentally deficient persons.

¹⁴⁶ UNODC, ILO, UNDP, WHO, UNAIDS, Policy Brief. Prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions, http://www.unodc.org/documents/hiv-aids/HIV_comprehensive_package_prison_2013_eBook.pdf.

¹⁴⁷ United Nations Office on Drugs and Crime, World Health Organization and Joint United Nations Programme on HIV/AIDS (2008), *HIV in Places of Detention: A Toolkit for Policymakers, Programme Managers, Prison Officers and Health Care Providers in Prison Settings* (Vienna, United Nations Office on Drugs and Crime).

¹⁴⁸ For instance: in Missouri. See: <http://rainn.org/public-policy/legal-resources/missouri/hiv-testing>.

¹⁴⁹ Baillargeon J., Penn J.V., Knight K., Harzke A.J., Baillargeon G., Becker E.A. (2010), “Risk of reincarceration among prisoners with co-occurring severe mental illness and substance use disorders”, *Adm. Policy Ment. Health*, 37 (4): 367-74.

As for the mentally ill offenders¹⁵⁰, according to guideline 5.44(a) of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Legal Aid should be provided in order “to ensure that the accused understands the case against him or her and the possible consequences of the trial”. This is very important when it comes to persons who are mentally ill or mentally deficient, and who are incapable of understanding what is happening during investigation and trial in order to defend themselves. In such cases, the role of the lawyer is to make sure that:

- psychiatric expertise is ordered, and
- if the expertise concludes the existence of a mental illness/deficiency of the defendant, to make sure that the court takes into consideration the degree of this illness/deficiency when estimating the culpability of the offender. The degree of mental illness/deficiency has a different impact on the culpability of the offender. A total incapacity should lead to no punishment. In such cases, the court should either relax the defendant or order appropriate therapeutic measures as provided in Art.176 of the Penal Code.

Art.25.3 of the Recommendation Rec(2004)10 of the Committee of Ministers of the Council of Europe¹⁵¹ acknowledges the need for free Legal Aid for persons with a mental disorder: “Member states should consider providing the person with a lawyer for all such proceedings before a court. Where the person cannot act for him or herself, the person should have the right to a lawyer and, according to national law, to free Legal Aid. The lawyer should have access to all the materials, and have the right to challenge the evidence, before the court.”

In Somaliland, according to our preliminary report on findings, no crime offender was held in the psychiatric hospital of Hargeisa in 2013. However, offenders received by the hospital up to 2013 were involved in rape cases, physical assault with a knife, poisoning (one of the most recent cases was of a man who poisoned 3 members of his family), and car window braking by throwing stones.

Normally, patients are held for a period ranging from 3 months to 2 years in the mental institution. However, there are a lot of patients who are held in the Hargeisa prison (30 persons as of March 2013). Some of them were not diagnosed as mentally ill during their trial and some became mentally ill inside the prison.

At the beginning of 2013, the Attorney General sent a letter to the Director General of the Hospital, as a result of which the doctors now check if the accused person is mentally ill. In such cases, this person is referred to the psychiatric hospital. It has been reported that many are referred, but are not held long. Among the needs of mentally ill persons, there is certainly need for legal assistance. Some patients are often exploited by their families. For example, if a parent dies while his son is inside the institution, no one will see that he gets his legal part of the inheritance.

¹⁵⁰ For the needs of the family members of mentally ill offenders, see: Tsang, H.W.H.; Pearson, V.; Yuen, C.H; “Family needs and burdens of mentally ill offenders”, International Journal of Rehabilitation Research: March 2002 - Volume 25 - Issue 1 - pp. 25-32.

¹⁵¹ <https://wcd.coe.int/ViewDoc.jsp?id=775685&Site=COE>.

2.4. Refugees, internally displaced persons and foreign nationals

The distinction between refugees and economic migrants is very clear. When we talk about migrants, we mean people who leave their place to live in another. However, all people who leave their homes do not have the same reasons, and therefore they should not be included in the same category and receive the same treatment. At this point, we need to distinguish between:

- voluntary migration, and
- involuntary migration.

Voluntary migrants are foreign nationals who leave their homes of their own desire, for either financial reasons—and so, they are called “*economic migrants*”—or for other reasons (personal or family reasons). The majority of migrants have financial reasons to leave their home country for a better life.

Involuntary migration is when the decision to flee the home country or place of habitual residence does not depend on the will of the person. In other words, it is not a free (voluntary) option. This category includes refugees, internally displaced persons and under some circumstances the victims of trafficking in persons (if they are displaced or forced to go abroad).

According to the definition given by the 1951 United Nations Convention Relating to the Status of Refugees¹⁵² (Geneva Convention) in Article 1.A.2 a refugee is:

“Any person who: owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country”.¹⁵³

The reasons for persecution must be because of one of the five grounds listed in article 1A(2) of the Geneva Convention:

- race,
- religion,
- nationality,
- membership of a particular social group or
- political opinion.

Persecution based on any other ground does not entitle the individual to claim refugee status.¹⁵⁴

Race is used in the broadest sense and includes ethnic groups and social groups of common descent.

¹⁵² Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

¹⁵³ See, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UNHCR 1979, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992.

¹⁵⁴ For the cessation of the refugee status see: Fitzpatrick Joan and Bonoan Rafael (2003), Cessation of Refugee Protection, Cambridge University Press.

Religion also has a broad meaning, including identification with a group that tends to share common traditions or beliefs, as well as the active practice of religion.

Nationality includes an individual's citizenship. Persecution of ethnic, linguistic and cultural groups within a population may also be described as persecution based on nationality.

A *particular social group* refers to people who share a similar background, habits or social status. This category often overlaps with persecution based on one of the other four grounds. It has applied to families of capitalists in soviet regimes, landowners, homosexuals, entrepreneurs and former members of the military.

Political opinion refers to ideas not tolerated by the authorities, including opinions critical of government policies and methods. It includes opinions attributed to individuals (i.e., the authorities think a person has a certain political opinion), even if the individual does not in fact hold that opinion. Individuals who conceal their political opinions until after they have fled their countries may qualify for refugee status if they can show that their views are likely to subject them to persecution if they return home.

Asylum seekers — that is, those who are seeking refugee status in another country — normally need to establish that their fear of persecution is well-founded and undergo a legal procedure in which the host country decides if she or he qualifies for refugee status. While refugee status must normally be determined on an individual basis, situations also arise in which entire groups are displaced under circumstances indicating that members of the group could be considered individually as refugees. However, during a mass exodus, it may not be possible for a host country to carry out individual screening. In such circumstances, particularly when civilians are fleeing for similar reasons, a 'group' determination of refugee status may be declared, whereby each civilian is considered a refugee, in the absence of evidence to the contrary.

People who may have been forced to flee their homes for the same reasons as refugees but have not crossed an international border are called internally displaced persons.¹⁵⁵ According to Principle 4.2 of the Guiding Principles on Internal Displacement "*Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs*".

Most of the world's refugees wait for durable solutions for their predicament. While most have been granted provisional or temporary asylum in neighbouring countries, they are not able to regularize their status or integrate. Their rights to move and work are often highly restricted, and educational and recreational opportunities are often non-existent or severely lacking. These refugees may also be subject to attack, either by local security forces or by cross-border incursions from the country of origin. In June 2011, the UNHCR estimated the number of refugees to be 15.1 million.¹⁵⁶

¹⁵⁵ See, UNHCR Guiding Principles on Internal Displacement. Also, Amnesty International (1997), *Africa: In Search of Safety - the Forcibly Displaced and Human Rights in Africa*.

¹⁵⁶ See, UNHCR Global Report 2013.

The definition of the 1951 Geneva Convention has been accepted by the Convention Governing the Specific Aspects of Refugee Problems in Africa, as adopted by the Organisation of the African Unity in 1969. The definition was expanded to include people who left their countries of origin not only because of persecution but also due to acts of external aggression, occupation, domination by foreign powers or serious disturbances of public order.

The following international and regional treaties determine standards for the protection of refugees and displaced persons:

- UN Convention relating to the Status of Refugees¹⁵⁷;
- UN Protocol relating to the Status of Refugees¹⁵⁸;
- Convention Governing the Specific Aspects of Refugee Problems in Africa¹⁵⁹;
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Convention against Torture)¹⁶⁰;
- Guiding Principles on Internal Displacement.¹⁶¹

Apart from eventual physical wounds or starvation, a large percentage of refugees develop symptoms of post-traumatic stress disorder (PTSD) with the consequences that were described above.¹⁶²

Refugees and IDPs present a high risk of vulnerability to SGBV, trafficking in persons and victimization from organized criminal groups. Legal assistance should be immediately provided in order for these reasons, in order:

- to have access to status determination procedures,
- to avoid being treated as migrants trespassing or residing illegally in the territory, risking eventual sanctions and immediate deportation or refoulement, and
- to be defended in cases where they are forced to commit crimes by organized groups. The legal assistance provided in this case should not be the same as for any other accused person, but there is a need for specific knowledge. The defence lawyer should be very well acquainted with the Geneva Convention of 1951 and the Protocol relating to the Status of Refugees (Protocol of New York), as well as the Convention Governing the Specific Aspects of Refugee Problems in Africa.

¹⁵⁷ Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

¹⁵⁸ Approved by the Economic and Social Council in resolution 1186 (XLI) of 18 November 1966 and was taken note of by the General Assembly in resolution 2198 (XXI) of 16 December 1966.

¹⁵⁹ Adopted by the Organisation of African Unity on 10 September 1969.

¹⁶⁰ Adopted by the United Nations General Assembly on 10 December 1984.

¹⁶¹ Adopted by the United Nations General Assembly in 1998.

¹⁶² Worldwide, tens of thousands of refugees and former refugees resettled in Western countries probably have post-traumatic stress disorder. See, Fazel M., Wheeler J., Danesh J., Prevalence of serious mental disorder in 7000 refugees resettled in western countries: a systematic review, *Lancet*, 2005 April 9–15;365(9467):1309–14.

According to Art.31 of the Geneva Convention, refugees (including asylum seekers) have the right not to be punished for illegal entry into the territory of a hosting State. In addition, according to Article 32, they have the right not to be expelled, except under certain, strictly defined conditions.

The principle of non-refoulement, which prohibits the return of a refugee to a territory where his or her life or freedom is threatened, is considered a rule of customary international law. As such it is binding on all states, *regardless of whether they have acceded to the 1951 Convention or 1967 Protocol*.¹⁶³ A refugee seeking protection must not be prevented from entering a country as this would amount to refoulement.

Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees.¹⁶⁴ It should be recalled that a refugee is a victim or potential victim of injustice, not a fugitive from justice.

The above distinction may, however, occasionally be obscured. In the first place, a person guilty of a common law offence may be liable to excessive punishment, which may amount to persecution within the meaning of the definition. Moreover, penal prosecution for a reason mentioned in the definition (for example, in respect of “*illegal*” religious instruction given to a child) may in itself amount to persecution.

Secondly, there may be cases in which a person, besides fearing prosecution or punishment for a common law crime, may also have “*a well founded fear of persecution*”. In such cases the person concerned is a refugee. It may, however, be necessary to consider whether the crime in question is of such a serious character as to bring the applicant within the scope of one of the exclusion clauses.

In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards. More often, however, it may not be the law but its application that is discriminatory. Prosecution for an offence against the ‘public order’, for example for the distribution of pamphlets, could become the vehicle for the persecution of the individual on the grounds of the political content of the publication.

In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded.

However, in some cases refugees may be excluded from the status for specific reasons. The 1951 Convention, in Article 1F enumerates the categories of persons who are not considered to be deserving of international protection. Such persons are those who may have committed:

¹⁶³ UNHCR (2011), *The 1951 Convention relating to the status of refugees and its 1967 Protocol*, p.5.

¹⁶⁴ See, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, paras 56 to 60.

“(a) a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) who have been guilty of acts contrary to the purposes and principles of the United Nations.”

Normally it will be during the process of determining a person’s refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that exclusion facts will become known only after a person has been recognized as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously taken. It needs to be noted that a criminal conviction in the host country does not entail the exclusion clause or the cessation of the status of refugee.

It needs to be underlined that only a crime committed or presumed to have been committed by an applicant *“outside the country of refuge prior to his admission to that country as a refugee”* is a ground for exclusion.

A refugee committing a serious crime in the country of refuge is subject to due process of law in that country. In extreme cases, Article 33 (paragraph 2) of the Convention permits a refugee’s expulsion or return to his former home country if, having been convicted by a final judgment of a *“particularly serious”* common crime, he constitutes a danger to the community of his country of refuge.

What constitutes a *“serious”* non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term *“crime”* has different connotations in different legal systems. In some countries the word *“crime”* denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a *“serious”* crime must be a capital crime or a very grave punishable act. However, according to the interpretation of the Geneva Convention in applying this exclusion clause, it is necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has a well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.¹⁶⁵

2.5. When the accused is actually the victim

It is very important to always remember that things might not be as they seem. So, it is likely that persons who are brought as offenders are actually the victims. In particular, in crimes where the offender is a child, the child might feel shame or even be traumatized by being forced to commit the crime, that s/he is unwilling or

¹⁶⁵ See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para 156.

unable to speak the truth. In most occasions, such children remain silent, and their silence may be interpreted as guilt.¹⁶⁶

It may happen – as a consequence of victimisation - that persons who are victimised have memory lapses. In this case, they may feel (under the pressure of the questions asked by the police) that they should fill in the gaps for fear that, if they do not reply correctly, the police officer (or the prosecutor) might think that they are lying. However, this has the risk of provoking a negative result of what the victims expected, and may actually make the police officer believe that they are lying.

If the Police, the Prosecutor and the Judge are not aware of the trauma of the person, it is likely to raise conscious and sub-conscious fears for the victim. Thus, the Police, Prosecutor and Judge should be particularly aware of the problem of sensitivity and *avoid re-traumatizing the victim/witness*.¹⁶⁷

A confession to a crime should be voluntary and given by an accused in a sound state of mind. This means that the confession of the accused is invalid under the following circumstances:

- If the accused's mental condition has led him/her to confess a crime;
- If the confession has been attained by violence, coercion or other unlawful means, or
- If the confession is not voluntary due to other reasons, e.g. the accused confessed a crime fearing retaliation by the true offender.

In order to examine the content of the confession the following questions should be asked:

- *Is the confession manifestly founded?*
- *Does it contain inconsistencies or contradictions?*
- *Is the accused incriminating a third person in his/her confession?*

The defence lawyer should be in a position to check the confession given by the accused during investigation and at the same time should be very skeptical about spontaneous confessions given by the interrogated person to her/him. If the accused is suffering from a post-traumatic syndrome it is likely, as mentioned above, that s/he blames him/herself for what happened and takes the blame by confessing a crime s/he has never committed.

In evaluating a confession one needs to check:

- The *character of confession* (is it voluntary or not?) and
- The *content of the confession* (what is being confessed?)

¹⁶⁶ After any traumatic event, as mentioned above most people, both children and adults, may experience some psychological and physical effects. This is a natural part of the human response to stress. In the case of a traumatic experience these effects persist in time and might cause the temporary loss of memory (symptom of the 'post-traumatic stress disorder' (PTSD). See, Barbara Mitchels, "Let's Talk: Developing Effective Communication with Child Victims of Abuse and Human Trafficking," UNICEF, 2004, accessed at www.childtrafficking.org.

¹⁶⁷ Ibid.

First, as to the character of confession, special attention should be brought to the following: sometimes, especially in cases of children, they may want to feel important and attract attention, ignoring the fact that if they lie about a crime this might have negative consequences for their lives. So, it is important to underline to the child the consequences of his/her confession and of his/her eventual sentencing. It has to be noted that between imagination and judgment, imagination is the first to develop in a child's mind, reaching its highest point between 3 to 5 years of age. From 5 to 10 years of age there is a balance between fantasy and judgment and then again fantasy increases with adolescence (from 12 to 18 years).¹⁶⁸ This means that a juvenile is expected to lie, and this is as a normal part in the process of his/her development.¹⁶⁹ This is why an adolescent is not considered good witness, because it is likely that s/he fills in the gaps by his/her imagination. For the same reason a juvenile who has given a spontaneous confession is likely to be a mythomaniac.¹⁷⁰ According to Comment No. 10 of the UN Convention on the Rights of the Child (point 57): *“The age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as: ‘You can go home as soon as you have given us the true story’, or lighter sanctions or release are promised.”* However, this does not mean that a

¹⁶⁸ A research conducted by the Department of Psychology, University of California USA, examined the development of the ability to monitor memory strength and memory absence at retrieval. In two experiments, 7-year-olds, 10-year-olds, and adults enacted and imagined enacting a series of bizarre and common actions. Two weeks later, they completed a memory test in which they were asked to determine whether each action had been enacted, had been imagined, or was novel and to provide a confidence judgment for each response. Results showed that participants across age groups successfully monitored differences in strength between memories for enacted actions and memories for imagined actions. However, compared with 10-year-olds and adults, 7-year-olds exhibited deficits in monitoring of differences in memory strength among imagined actions as well as deficits in monitoring memory absence. Results underscore meta-memory developments that have important implications for memory accuracy. See, Ghetti S., Lyons K.E., Lazzarin F., Cornoldi C., “The development of meta-memory monitoring during retrieval: the case of memory strength and memory absence”, *Journal of Experimental Child Psychology*, 2008 Mar.; 99(3): 157-81.

¹⁶⁹ See also another research conducted by the Department of Psychology, Yale University, USA. Age differences in reality monitoring of interactive events were examined among 4-year-olds, 8-year-olds, 12-year-olds, and adults. Participants engaged in some interactions and imagined others. Afterward, they were asked to determine whether each action was performed, imagined, or new. This memory test was repeated 1 week later. The 4-year-olds had more difficulty discriminating imagined actions than the two oldest age groups. Imagined actions were more often confused with performed ones than the reverse, though this bias was significant only for the two younger age groups. Reality monitoring decreased over time, especially for imagined items. Activities in which the participant was the agent of action were discriminated better than those in which someone else was the agent of action. Object use during the activity increased the discrimination of imagined actions, especially after the delay. Similarity among actions had no effect. Implications for child eyewitness testimony are discussed. See, Sussman A.L., “Reality monitoring of performed and imagined interactive events: developmental and contextual effects”, *Journal of Experimental Child Psychology*, 2001 June; 79(2): 115-38. Also, Cohen G., Faulkner D., “Age differences in source forgetting: effects on reality monitoring and on eyewitness testimony”, *Psychology and Aging*, 1989 Mar.; 4(1): 10-7; McDaniel M.A., Lyle K.B., Butler K.M., Dornburg C.C., “Age-related deficits in reality monitoring of action memories”, *Psychology and Aging*, 2008 Sept.; 23(3): 646-56.

¹⁷⁰ A mythomaniac is a person lying or exaggerating to an abnormal degree. See, Dike, Charles C. “Pathological Lying: Symptom or Disease?”, *Psychiatric Times*, June 1, 2008.

child should not be heard as a witness, but only that thorough examination of the testimony or parts of it should be taken. Confessions of offences by juveniles should be regarded with much skepticism.¹⁷¹

Further, it is possible that an accused person is in a blackmail situation. For example, a victim of forced prostitution may be threatened by the exploiter that her identity and involvement in prostitution may be revealed to his/her family. It is reported that in one case, an individual was forcing children to steal and then he was threatening them that if they revealed his identity he would kill their families. The children, when arrested for theft, took all the blame, while in reality they were victims in this case.

Of course, a confession alone, detached from other evidence, has no validity. The defence lawyer should convince the police (and later the prosecutor and the court) that they should evaluate the evidential material together with the research conducted in the environment of the accused. If the accused is a child, further research as to the child's social, cultural and family environment as well as details on his/her personality is needed.

*Example*¹⁷²

[Article published in The National on May 2, 2012]

ABU DHABI // Title:

“Ten Somalis who hijacked the UAE ship MV Arrilah were forced to carry out the attack, their lawyer has claimed”

Ahmed Al Othali told the Federal Court yesterday the men could not be held responsible for the attack because their boss, an Iranian man named Abdulmajeed, had threatened them with death if they did not take part.

“We all know the situation of our brothers in Somalia and the poverty they suffer and after the world closed its doors on the defendants they went to seek jobs from a person called Abdullah,” said Mr Al Othali.

He said the men were offered jobs at sea but were surprised to find they would be working for the Iranian and “were unaware of the tasks they were assigned to do”.

When their vessel crossed paths with the MV Arrilah, the men were ordered to jump aboard and “when they refused they were threatened with death”.

Mr Al Othali also denied the men had targeted those aboard the ship. “The case documents mention there were light weapons and RPGs,” he said.

“If their target was to get to the hostages hiding in the engine room, wouldn't the RPG be capable of bursting the door open?”

Mr Al Othali said that as those aboard the MV Arrilah had been hiding in the engine room they could not identify their captors, and could not have seen what was happening on the rest of the ship.

171 In one study of 125 proven false confessions, 33% involved juveniles. See, Steven A. Drizin (Northwestern University), and Richard A. Leo (University of California), (2004), “The Problem of False Confessions in the Post DNA World”, North Carolina Law Review, 82:891-1007.

172 http://hiiraan.com/news4/2012/May/23895/pirates_were_forced_to RAID_uae_vessel.aspx.

“I saw a video of the ship on YouTube. It is huge,” he said.

Statements from the defendants and witnesses were identical, “even the spelling mistakes are repeated”, Mr Al Othali said, adding this raised suspicions over Public Prosecution’s investigation.

“The translator signed the confessions of the defendants that were carried in Arabic – since when does a translator sign on behalf of the defendant?”

Mr Al Othali complained that there was no medical report of the injuries allegedly suffered by those on board the MV Arrilah, while the ship’s capsule, which is the equivalent of an airplane’s black box recorder, had not been retrieved.

The 10 Somalis were caught when counter-terrorism units stormed the bulk oil carrier in April last year after it was hijacked in the Arabian Sea, east of Oman, en route from Australia to Jebel Ali.

The 37,000-tonne ship is owned by two subsidiaries of the Abu Dhabi National Oil Company and the rescue was said at the time to show the UAE’s commitment to act firmly against piracy.

- *The class is expected to discuss the case.*

2.6. Witness Protection

As mentioned above, witnesses are an essential element of a court case. It is the evidence that witnesses are capable of giving to the court, the manner in which the evidence is given and the credibility that the tribunal is able to attach to that evidence, that decides the outcome of a case. The ability of witnesses to give evidence without threat or interference may secure the punishment of these offenders.

According to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Legal Aid should be foreseen for witnesses (Principle 5.25). More particularly, Guideline 8 provides that:

“48. States should take adequate measures, where appropriate, to ensure that:

- a) Witnesses are promptly informed by the relevant authority of their rights to information, of their entitlement to assistance and protection, and how to access such rights;*
- b) Appropriate advice, assistance, care facilities and support are provided to witnesses of crime, throughout the criminal justice process;*
- c) Child witnesses receive legal assistance as required, in line with Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;*
- d) Any statement or testimony given by the witness at all stages of the criminal justice process are accurately interpreted and translated;*

49. States should, where appropriate, provide Legal Aid to witnesses.

50. *The circumstances in which it may be appropriate to provide Legal Aid to witnesses includes, but is not limited to:*

- a) *Where the witness is at risk of incriminating themselves;*
- b) *Where there is a risk to the safety and wellbeing of the witness resulting from their status as such; and*
- c) *Where the witness is particularly vulnerable, including having special needs.”*

For victims, their status as a witness coincides with their status as victim, since they are the principal witness in a criminal case. Witnesses¹⁷³ and members of their family are entitled to protection of their life, physical integrity and private life throughout the judicial process.

The issue of protection of the private life of witnesses is subject to the following questions:

- What is the meaning of private life?
- What is the meaning of “*protection*”?, and
- From whom should we protect the witness and victim (and their families)? And for how long?

The concept of “*Privacy*” covers every event that takes place in the personal or family sphere which the person does not wish to expose in public. Protection of privacy covers not only the personal and family lives of the victim in general, but also the details concerning the criminal incident. This protection is binding on any person acting as a public or private agent, including the media, until the irrevocable decision of the case.

Privacy is protected at the international level by Article 12 of the Universal Declaration of Human Rights of 1948:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Any person has the right to the protection of the law against such interference or such abuses”.

There are a number of levels of witness protection that may be available:

- If there are concerns over witness safety from the accused in criminal proceedings, there is the possibility of imposing bail conditions on the accused to ensure the safety of the witness(es). Such bail conditions may prohibit contact, whether direct or indirect, or making approaches to the witness(es) through third parties and so forth. It may also be possible to impose a prohibition on the accused from going within a certain distance of the address of a witness. There could be a condition of residence in another area to keep the accused away from a witness (which could be subject to specific exceptions for attending court or meeting with legal representatives for a fixed appointment).
- In certain circumstances the identity of witnesses may be kept from the accused, although in the interests of justice this is often viewed as prejudicial, specifically when the witness in question is the principal

¹⁷³ For children witnesses, see ECOSOC Res. 2005/20 of 22.7.2005: Guidelines on Justice in Matters Involving Child victims and Witnesses of Crime.

accuser. In cases where there has been covert police activity, it may be the case that the interests of justice operate to protect such witnesses and covert investigation methods. This would apply in the most serious, organized crime situations.

- The accused can be remanded into custody to ensure that there can be no direct witness interference by the accused.
- Finally, there may be access to a witness protection program, where the witness can be relocated, and efforts made to protect (or change) aspects of witnesses' identities to protect them from interference, and following a trial potential retribution. This is a complex and expensive option, often requiring significant, ongoing protection, and exists mainly in the most advanced countries.

Advocates should take into consideration security issues for the witnesses and members of their families and try to find solutions within the possibilities offered by the system before exposing them in the trial. In collaboration with the police and the Attorney General the best solution for the protection of the witness should be found.

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Annex:

Handouts for Participants

The handouts consist of individual exercises (practice-problems) and collective-class exercises (practice-exercises) as well as of class discussions, questions and case law.

Training Day 1

Handout 1: Questions (Part 1, Chapt. 2)

Handout 2: Practice Problems-One (Part 1, Chapt. 3)

Handout 3: Case Law one (Part 1, Chapt. 3)

Handout 4: Practice Problems-Two (Part 1, Chapt. 3)

Handout 5: Practice Problems-Three (Part 1, Chapt. 3)

Handout 6: Practice Problems-Four (Part 1, Chapt. 3)

Handout 7: Case law two (Part 1, Chapt. 3)

Handout 8: Practice Problems-Five (Part 1, Chapt. 3)

Handout 9: Practice Problems-Six (Part 1, Chapt. 3)

Training Day 2

Handout 10: Practice Problems-Seven (Part 1, Chapt. 3)

Handout 11: Practice Problems-Eight (Part 1, Chapt. 3)

Handout 12: Practice Exercise-One (Part 1, Chapt. 3)

Handout 13: Practice Problems-Nine (Part 1, Chapt. 3)

Handout 14: Questions (Part 1, Chapt. 3)

Handout 15: Practice Exercise-Two (Part 1, Chapt. 3)

Handout 16: Class Discussion-One (Part 2, Chapt. 1)

Handout 17: Class Discussion-Two (Part 2, Chapt. 1)

Handout 18: Class Discussion-Three (Part 2, Chapt. 1)

Handout 19: Class Discussion-Four (Part 2, Chapt. 1)

Handout 20: Practice Exercise-Three (Part 2, Chapt. 1)

Handout 21: Practice Problems-Ten (Part 2, Chapt. 2)

Handout 22: Class Discussion-Five (Part 2, Chapt. 2)

Handout 23: Class Discussion-Six (Part 2, Chapt. 2)

Training Day 3

Handout 24: Practice Problems-Eleven (Part 2, Chapt. 2)

Handout 25: Practice Exercise-Four (Part 2, Chapt. 2)

Handout 26: Practice Problems-Twelve (Part 2, Chapt. 2)

Training Day 4

Handout 27: Practice Exercise-Five (Part 2, Chapt. 2)

Handout 28: Practice Problems-Thirteen (Part 2, Chapt. 2)

Handout 29: Practice Exercise-Six (Part 2, Chapt. 2)

Handout 30: Practice Problems-Fourteen (Part 2, Chapt. 2)

Handout 31: Practice Problems-Fifteen (Part 2, Chapt. 2)

Handout 32: Practice Problems-Sixteen (Part 2, Chapt. 2)

Handout 33: Class discussion Seven (Part 2, Chapt. 3)



UNODC

United Nations Office on Drugs and Crime