



Syria Criminal Defender Manual

Revised First Edition



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First Edition Revised



2019

This Manual is dedicated to the Syrian people, to their protection under the law and to all Syrian defense lawyers working relentlessly to uphold these rights and build the rule of law.

IBJ thanks the following people for their contributions
to the development of this Manual:

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With further thanks to
Muhammad Bakri for leading the translation.

Letter from the CEO

Dear Friends,

Defenders like you are essential to protecting the due process rights of people all over Syria. As you know, early access to counsel is the best way to prevent violations of due process rights, from arbitrary arrest and detention to unfair trials. By working to uphold people's rights, you offer hope not only to the clients you serve, but for the continued development of Syria's legal system, and for the rule of law itself.

International Bridges to Justice (IBJ) was founded nearly two decades ago on the idea that people everywhere in the world have a right to early access to effective legal representation. Defenders – in Syria and in all countries – are critical to maintaining fair, stable justice systems. To support defense lawyers in Syria, IBJ has commissioned this manual, which we hope will serve an important resource for lawyers who seek to strengthen their practice in these challenging times.

Your work is not easy – but it is vitally important. We at IBJ stand shoulder-to-shoulder with you as you defend the due process rights of Syrian people, and we thank you for your dedication to fairness and justice for all.

With gratitude,
Karen I. Tse
CEO and Founder

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Preface

Over the past five decades, Syrian laws and their application have given rise to numerous legal issues both in the legislation and application.. Now more than ever, the Syrian people strive for a society where fundamental human rights of every person are respected, the rule of law is reinforced, inhumane and cruel practices are prevented and justice prevails. The need remains that everyone is treated equally before the law, has the right to due process and is granted a fair trial. However, the rule of law can only be achieved if people have the legal knowledge of citizens' rights and if the institutions cooperate together. For this, experienced lawyers with sufficient expertise and knowledge on how to be the leaders in strengthening justice systems and how to protect due process rights are crucial.

International Bridges to Justice has devoted itself to protecting the fundamental legal rights of ordinary citizens in developing countries. For this reason, it would like to offer lawyers and legal professionals this guide titled "the Defender Manual". The manual is divided into ten chapters that contain the most important information criminal defense lawyers need to represent their clients. This includes themes and topics such as criminal procedure, representing persons who were subjected to torture or ill-treatment, fundamental rights of the accused, trial skills, as well as duties, rights and responsibilities of the defense lawyer, the basic human rights principles for detention officers and the fundamental principles of international humanitarian law and international human rights law.

This manual was based on Syrian laws on the one hand, and the legal principles found in binding international treaties and conventions on the other. The reader can be left with a clear view of gaps in Syrian laws, including the right of the accused to remain silent and the right to counsel. This comparative analysis may lead to a reform in the Syrian justice system with a goal of reconciling it with the basic principles of international humanitarian and human rights law in order to prevent torture and ill-treatment before they occur.

Finally, we hope that this guide is a step forward in assisting those who work in the Syrian justice sector or have an interest in learning more about it, and in building a better system of justice.

About International Bridges to Justice

International Bridges to Justice (IBJ) is a global movement of justice-makers to end torture in the 21st century and strengthen the rule of law across the world. Founded in 2000, IBJ collaborates with state, civil, and community-based organizations to comprehensively reform criminal justice systems that respect the rights of every individual. IBJ works to ensure that legal counsel is provided to the accused at the earliest stages of the criminal process with the aim of significantly reducing instances of torture, human rights abuse and other prohibited treatment. IBJ's primary focus is the empowerment and support of the drivers of the criminal justice system—public defenders. IBJ is a registered U.S. charitable organization with programs in Burundi, Cambodia, China, Democratic Republic of Congo, Mexico, Rwanda, Vietnam, Myanmar, Sri Lanka, Syria, and Zimbabwe.

IBJ'S Vision

We envision a world where the basic legal rights of every man, woman, and child are respected in particular: the right to competent legal representation, the right to be free from torture and cruel treatment and the right to a fair trial. A world where each and every citizen is knowledgeable about his/her rights and is empowered to demand that they are upheld in practice. A world where international human rights standards and relevant local laws are brought to life in the everyday practice of justice.

IBJ'S Mission

In recognition of the fundamental principles of the Universal Declaration of Human Rights, International Bridges to Justice (IBJ) is dedicated to protecting the basic legal rights of ordinary citizens in developing countries. Specifically, IBJ works to guarantee all citizens the right to competent legal representation, the right to be protected from cruel and unusual punishment, and the right to a fair trial.

IBJ'S Approach

IBJ works with legal aid lawyers, state institutions, legal aid organizations, community-based organizations, and other interested stakeholders to fulfill its mission. IBJ engages in a three-pillar programming approach to ensure comprehensive criminal justice transformation:

Defender Capacity Building – as the drivers of the criminal justice system, we focus most of our support on the empowerment of public defenders/legal aid lawyers through skills development, training programs and materials, on-the-ground resource centers, international community-building, and technical support.

Institutional Capacity Building – in recognition that implementation of the rule of law requires the cooperation of all participants within the justice community, IBJ joins

with defenders, prosecutors, judges, police, detention center officials, local government representatives and legal academics in Criminal Justice Roundtable sessions to build mutual respect and establish the foundation for long-term criminal justice reform.

Rights Awareness - the lack of information and knowledge of legal rights by average citizens is a major factor enabling the continuation of rights abuses; thus, IBJ administers Advisement of Rights campaigns through various communication tools (e.g. posters, brochures, street law sessions) to empower citizens to advocate for their own legal rights.

About the Work of International Bridges to Justice in Syria

IBJ's Syria Program: Supporting and Strengthening the capacities of Syrian justice sector actors was launched in November 2017. This program is supported by International Legal Assistance Consortium (ILAC) in Sweden through a project funded by the Swedish International Development Cooperation Agency (SIDA). There is a great need for access to legal counsel in Syria, with many regions of the country deprived of systemic legal aid leaving hundreds, if not thousands of vulnerable Syrians deprived of legal protections.

Despite the strong efforts of committed pro bono lawyers throughout the country, they are in vast need of financial and legal resources to ensure sustained legal counsel.

By assisting lawyers in Syria on pro-bono legal cases, IBJ ensures that every woman, man, and child accused of a crime is judged fairly in a court of law to reduce instances of abuse – which most often happen in pre-trial detention/investigations. IBJ is working with and supporting groups of lawyers in various parts of Syria.

The Syria program will continue to follow its three-pillared approach to programming by building the capacity of lawyers through training workshops, engaging justice stakeholders through roundtable events, and empowering local communities through the dissemination of legal rights awareness campaigns. Nonetheless, to maximize resources within Syria, IBJ will leverage the power of technology to further increase its impact reach - particularly strengthening the capacity of lawyers and raising awareness of due process rights.

The formation of this strengthened partnership will provide IBJ with a valuable opportunity to participate in a crucial juncture in maintaining and improving the Syrian criminal justice system: This criminal defense practice manual is a core part of these efforts.

CHAPTER 1

Syria: Foundational Overview and Country Profile

1.1 Historical and Legal Background

1.1.1 Syria Before and After Independence

Syria Before Independence

Modern day Syria was historically under different rules including the Greek, the Roman, the Umayyad, Mameluk, the Ottoman and the French, among others. As a result, Syria's legal tradition has been formed by a variety of customs, laws, and religions.

However, Syria's legal system, as we know it today, has been mostly shaped by the laws enacted following the independence from France in April 1946. Until 1963, when the Ba'ath Party came to power, the period was marked by a series of turbulent coups. Despite that, many important laws were introduced that laid the foundations of the modern Syrian legal system and that continue their existence today.

Some of the major laws enacted include the Civil Code (promulgated under Legislative Decree No. 84 of May 18), the Criminal Code (Legislative Decree No. 148 of June 22)¹ and the Commercial Code. Women's suffrage was also granted during that time.² Criminal procedure code was enacted by a Legislative Decree No. 112, on 13 March 1950, followed by the civil procedure code issued by a Decree No. 84 on 28 September 1953.³ On 7 September 1953, the Law of Family Rights dating to the Ottoman times was replaced by the Syrian Law of Personal Status (SLPS) enacted by a Legislative Decree No. 59.⁴ The Constitution was enacted in 1950.

Between the 1940s and 1950s, the Syrian society produced many prominent jurists and legal professionals many of whom studied in Sorbonne in France. As a result, Syrian law was influenced by the French legal system and embraced a secular European model. At the same time, the law also turned to the Islamic and Egyptian sources.

1 Euro-Mediterranean Human Rights Network (EMHRN), 'The Reform of Judiciaries in the Wake of Arab Spring', Proceedings of the Seminar : 11-12 February 2012, Rabat, 12 February 2012, ISBN: 978-87-91224-86-7, available at: <https://www.refworld.org/docid/515009ac2.html> [accessed 3 December 2018]

2 Syrian Law Journal, Syria-Brief History, available at: <http://www.syrianlawjournal.com/index.php/brief-history/> [accessed November 30 2018] (hereinafter Syrian Law Journal, Syria-Brief History)

3 *Ibid.*

4 International Legal Assistance Consortium, ILAC Rule of Law Assessment Report: Syria 2017, available at: <http://www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf> [accessed 30 November 2018] (herein-after ILAC 2017)

The United Arab Republic and the Period of Political Instability

In 1950s socialist pan-Arab sentiment spread throughout the Middle East with the Egyptian ruler Gamal Abdel-Nasser at its forefront. Syria and Egypt grew closer together eventually forming the United Arab Republic in February 1958 with Nasser as President. The laws of this time, including the Social Insurance Law, the Unified Labor Law and the Agricultural Reform Law, among others, were influenced by socialist ideas.⁵ However, resentment towards Nasser's policies grew from the military and political factions culminating in a military coup in 1961.

The government in Damascus was later restored and further significant legal changes took place. The Judicial Authority Law was enacted (Legislative Decree No. 98, of 15 November 1961) establishing the court structure in Syria. This law, however, did not grant unlimited jurisdiction, for instance, to religious courts in personal status matters.⁶

After yet another coup in March 1963, a socialist and leftist Ba'ath Party came to power and reinstated many socialist laws from the Nasser's rule era.

1.1.2 Ba'ath Party Rule

The Rule of Hafez al-Assad

The Ba'ath rule was marked by a strong grip on power and a wave of legislative changes that increasingly centralized all power in the hands of the executive. The traditional state structures, including the parliament, were replaced by the National Revolutionary Command Council.⁷ A state of emergency (Legislative Decree No. 51 of 22 December 1962) was declared and martial law imposed under the Military Order No. 2 on 8 March 1963, by the National Revolutionary Command Council, which only ended during the Arab Spring in 2011, following a Decree No. 161 on 21 April 2011. Under the state of emergency, exceptional measures were adopted limiting residence rights, freedom of movement, freedom of association and allowing the arrest of persons due to national security reasons.⁸ The Supreme Judicial Council, which was originally created as an independent body with senior judges as members overseeing the judicial system, was altered and members replaced with most of the officials from the Ministry of Justice. This meant that the Ministry had the power to control transfers, promotions and retirement of judges, prosecutors and other court staff, as well as to discipline and dismiss them.⁹ Moreover, the Ministry of Justice deprived the Supreme Judicial Council - the primary jurisdiction - of all powers, and replaced the Emergency Law with the Law on Terrorism, which, in effect, was no different than the former.

During 1960s numerous courts were established, such as the Supreme State Security Cour

⁵ Euro-Mediterranean Human Rights Network (EMHRN), *supra* 1 at 53

⁶ *Ibid.*

⁷ Syrian Law Journal, Syria-Brief History *supra* 2

⁸ ILAC 2017, *supra* 4 at 21

⁹ *Ibid.*

and military field courts, namely to prosecute alleged violations of the emergency law,¹⁰ as well as deserted soldiers and civilians that were rendered disloyal to the state or affiliated with the Muslim Brotherhood. Immunities for security and military personnel were also expanded, under administrative military orders issued by the Ministry of Defense.

After the 1967 war with Israel, Hafez al-Assad rose in military and political ranks, assumed power in 1970 coup and officially became President in 1971. Right after ascending to power, Hafez formed the national parliament also known as the People's Assembly or the People's Council. 1973 Constitution was drafted and took force expanding the powers of the Ba'ath party that it enjoys until today. Apart from consolidating Ba'ath party's powers, the Constitution was also meant to protect the integrity of the judicial system and ensure judicial independence. In reality, this was not the case. The Constitution entrusted the powers of guarantor of judicial independence to the President of the Republic with the assistance of the Supreme Judicial Council controlled by the Ministry of Justice.¹¹ Furthermore, under the 1973 Constitution, the High Constitutional Court was established as the highest judicial body,¹² which appoints the President of the Republic as judges. The Economic Security Court, which is an exceptional court under the authority of the Authority, was also formed.

The Rule of Bashar al-Assad

Following the death of Hafez al-Assad in 2000, the People's Assembly amended the Constitution lowering the minimum age of a president from 40 to 34 in order to allow for Hafez's son, Bashar al-Assad's, succession. Ba'ath Party immediately and unanimously elected the only candidate, Bashar, as the new President of Syria, with his term renewed for a further 7 years in 2007, and another term again in 2014.¹³

The government began to actively stamp out any activists calling for reforms and handed out prison sentences. In 2005 about 81 judges were dismissed from the judiciary for alleged corruption although no official charges were ever brought.¹⁴ The state became increasingly militarized and people's career opportunities and safety depended on support, loyalty, and pledges to the Ba'ath Party. As a result, judges had to be approved by the state security services and often be members of the Ba'ath Party.¹⁵

After the Arab Spring engulfed the MENA region in 2011 threatening longstanding regimes, including the Syrian regime, Bashar al-Assad started implementing a series of changes

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Alessandro Bacci, "The System of Justice in Syria: Current Organization and Future Challenges", 2010, available at: <http://www.daonline.info/public/foto/BACCI%20-%20The%20System%20Of%20Justice%20In%20Syria.pdf> [accessed 1 December 2018] (hereinafter "Bacci 2010").

¹³ Carnegie Middle East Center, The Syrian Constitution: Assad's Magic Wand, May 2014, available at <https://carnegie-mec.org/diwan/55541?lang=en> [accessed 30 November 2018] (hereinafter Carnegie MEC 2014)

¹⁴ ILAC 2017, *supra* 4 at 23

¹⁵ *Ibid.*, 24

that, according to many legal practitioners, did not have an effect on the situation in Syria. Assad started enacting new laws and signing decrees regarding local administration, media, and electoral procedures, while at the same time cracked down on the protests with force. In November 2011, Bashar appointed a special committee to draft the new constitution. The Constitution was enacted in 2012 introducing a multiparty system and multicandidate presidential elections. Despite this, a total of 24 opposition candidates were registered for the 2014 presidential election, but almost all rejected by the Supreme Constitutional Court, appointed by Assad in 2012.¹⁶ This effectively led to the renewal of another 7-year-term of Bashar's rule.

1.1.3 Syria: The Current Context

Following the agreement between Russia and Turkey in September 2018 to establish a demilitarized zone in Idlib, violence remains moderately contained.

While large swathes of the Syrian territory have been recaptured by the Assad forces with a strong backing of Russia and Iran, other parts have been under the control of the Free Syrian Army, Kurdish groups and various other rebel groups. As a result, there is no uniformity in the application of the law. Nevertheless, most commonly applied laws are the Syrian law, The Unified Arab Code and Sharia law.

1.2 The Justice System in the Syrian Arab Republic

1.2.1 The 2012 Constitution

The 2012 Constitution was designed to introduce some cosmetic changes to the 1973 Constitution amid the growing protests in 2011. For instance, while Article 8 of the old Constitution enshrined power in the Ba'ath party, the first paragraph of Article 8 of the new Constitution stipulates:

*"1. The political system of the state shall be based on the principle of political pluralism, and exercising power democratically through the ballot box;."*¹⁷

Article 88 of the 2012 Constitution sets a limit of a presidential term to only 7 years, with a maximum of one re-election. Article 155 of the Constitution further stipulates the following as applicable to a president:

"The term of office of the current President of the Republic terminates after 7 years of his being sworn in as President. He has the right to stand again for the office of President of the Republic. Provisions of Article 88 of this Constitution apply to him as of the next presidential elections."

¹⁶ Carnegie MEC 2014 *supra* 13

¹⁷ "Constitution of the Syrian Arab Republic – 2012", International Labour Organization. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125885.pdf [accessed 5 December 2018] (hereinafter Constitution of 2012)

But in reality, Ba'ath party remains in control of the state, society, the military and intelligence agencies that for decades functioned under the party's National Security Bureau.¹⁸

Even though Article 132 stipulates that the justice system is independent, its independence is controlled by the Head of State and hence the freedom of the judiciary is flawed.

"The judicial authority is independent and the President of the Republic ensures this independence assisted by the Supreme Judicial Council."

Paragraph 1 of Article 133 further states:

"1. The Supreme Judicial Council is headed by the President of the Republic; and the law states the way it shall be formed, its mandate and its rules of procedures;"

In other words, the justice system's independence is guarded by the President making it partial.

Many individual accounts also reported that on an institutional level judicial independence was practically unattainable. Similarly, it was nearly impossible to act independently as a judge.¹⁹ Corruption and widespread bribery made it even less likely for judicial independence to be achieved.

The new Constitution established the principle of *nullum crimen sine lege*, or the presumption of innocence, as well as non-retroactivity of laws, access to justice, the right to defense, right to be informed of the criminal charges, and prohibition of torture and arbitrary detention (Art. 51-53).²⁰ But in reality, as with other principles, these rights are often violated and are not upheld.

Under the Syrian judicial system, the courts are divided into three types: courts of conciliation (Sulh), also known as the magistrate courts, the courts of the first instance and the courts of appeals. These courts deal with civil and criminal cases, and judgments issued by the appellate courts take precedence over the other courts. The courts are further divided into secular and religious courts. The latter has jurisdiction over personal status and family law matters. Different courts are provided for the Sunni and Shii'a (Shari'a courts), for Druze (Madhabi courts) and for Jews and Christians (Ruhi courts).

Administrative law matters are handled by the courts under the authority of the State Council including the Administrative Court, the Administrative Court of Appeals and the Supreme Administrative Court.

Exceptional courts also exist, for example, military and military field courts and the counter-terrorism court.

¹⁸ Carnegie MEC 2014 *supra*. 13

¹⁹ ILAC 2017, *supra* 4 at 41

²⁰ Constitution of 2012 *supra*. 18

The only crime that the President can be held liable for is treason. The relevant court that has the power to prosecute such a crime is the Supreme Constitutional Court, although its primary purpose is to determine the constitutionality of Laws and review electoral challenges arising from the elections of the People's Council and the President.²¹ The Court is comprised of at least seven members, all of which are appointed by a Presidential decree for a period of four years (Art. 141-143).²²

1.2.2 Legal Framework

The Syrian legal system is based on a civil law tradition, unlike that of the Anglo-Saxon countries where the legal system is based on the common law tradition. The judges, as opposed to the jury, reach judgments and carry out sentencing. Furthermore, Islam is a major source of legislation in Syria as stipulated by Article 3 of the Constitution.

The most important national laws that set out the legal framework for the Syrian Justice System are the following:

- The Civil Code of 1949 (Legislative Decree No. 84, 18 May 1949)
- The Criminal Code of 1949 (Legislative Decree No. 148, 1949)
- The Criminal Procedure Code of 1950 (Legislative Decree No. 112, 13 March 1950)
- The Civil Procedure Code of 1953 (Legislative Decree No. 84, 28 September 1953)
- The Personal Status Code (part of the Legislative Decree No. 59 of 1953),
- The Commercial Code of 2008 (Legislative Decree No. 149, 22 June 1949)
- The Syrian Constitution of 2012

The Legal Framework Outside Government-Controlled Areas

The legal framework after 2011 inside the opposition-held areas, as previously mentioned, differs significantly from one place, group, and community to another. Some remnants of Syrian law can be found, especially in places where record-keeping of births, deaths and other civil matters, are ongoing.²³ In the areas where conservative factions have control, various forms of Sharia law have been used predominantly. Some areas, such as Daraa, and parts of Idlib and Aleppo, have taken the approach of adopting the Unified Arab Code (UAC). The UAC is a set of legal codes that were written by legal and sharia experts and has been endorsed by the Arab League between 1988 and 1996.²⁴ It was not, however, applied anywhere in practice until the current conflict in Syria.

²¹ *Ibid.*

²² Constitution of 2012 *supra*. 18

²³ ILAC 2017, *supra* 4 at 77

²⁴ Maxwell M, "Lawyers, Guns, and Mujahideen", Foreign Policy, October 2014, available at: <https://foreignpolicy.com/2014/10/30/lawyers-guns-and-mujahideen/>

1.2.3 Judicial Structure

Overview

The Syrian court system is composed of secular and religious courts. Exceptional courts were also created in parallel to the regular court system to deal with perceived threats to the state. Additional courts, such as Administrative Courts and the High Constitutional Court exist.

The civil, criminal and religious courts, as well as prosecution, which falls under the same structure, are organized by the Ministry of Justice. The courts hear cases related to civil, criminal and personal status matters. At the lowest level, five courts exist: The Courts of First Instance (Mahakim Al-Bidaya), the Courts of Conciliation (Mahakim Al-Sulh), the Customs Court (Al-Mahkama Al-Jumrukiyya), the Juvenile Courts (Mahakim Al-Adhath) and the Court of Assize.²⁵ The verdicts of the Conciliation Court, The Court of First Instance can be appealed in the Court of Appeals which is comprised of three sections: civil, criminal and personal status.²⁶ Sometimes the judgments rendered by the Court of Appeals, the religious courts, and the Court of Assize can be further referred to the Court of Cassation and overturned.

Ordinary Courts

- i. The Courts of Conciliation / Magistrates' Courts (Mahakim Al-Sulh)

The courts of conciliation have specific responsibilities vested to them by the civil procedure code, in particular, articles 62-64. They hear cases relating to civil or commercial matters.

1. Financial Jurisdiction:

- The Courts of Conciliation hear personal and civil cases that include movable and immovable property whose value does not exceed 10,000 SYP (amended to 200,000 SYP by the law No. 1 of 4 January 2010). The jurisdiction of the said courts thus depends on the value of a claim brought before them.

2. Jurisdiction Ratione Materiae:

- The Courts of Conciliation have the jurisdiction to hear cases on the following cases no matter the value of the claim brought before them:
 - Lease cases and all matters related to the lease contract.
 - Claims related to wages and salaries of both temporary and permanent maids, workers, and employees and all disputes arising from the application of the labor and social security laws.
 - Claims relating to compensation for agricultural damages such as damages

²⁵ Bacci 2010, *supra*. 12

²⁶ International Bar Association, "Human Rights Lawyers and Defenders in Syria: A Watershed for the Rule of Law", July 2011, available at: <https://www.ibanet.org/Document/Default.aspx?DocumentU-id=84C115FA-2FB4-4A70-88EC-45637A1F67E2> [accessed 4 December 2018]

to crops, land, or produce whether caused by people or animals, as well as claims related to water and cleaning of sewage and other waterways.

- Cases related to the termination of joint tenancy; that is that, the division of movable assets.
- Disputes related to the management of the common property.
- The establishment of the contractual easement, and the use of natural, legal, and contractual easement rights.
- The delineation of boundaries and estimation of distances determined by laws, regulations, or custom related to harmful buildings or installations or planting if ownership or origin of the dispute is not in question.
- Possession claims.

It is further within the jurisdiction of the court of conciliation to hear cases related to civil personal status and movable assets the value of which does not exceed 200,000 SYP.

The criminal court of conciliation, on the other hand, has the jurisdiction to hear cases related to:

- All the violations, including misdemeanors, stated in the Criminal Code and other laws when these misdemeanors are punishable by house arrest, fine or imprisonment for up to one year, or by the last two.
- Hiding and selling stolen items or other crimes as stipulated in Article 220 of the Criminal Code.
- Misdemeanors stipulated in the last paragraph of Article 413.
- Gambling stipulated in Article 619.
- Theft of crops stipulated in Article 634.
- Ordinary theft stipulated in Article 634.
- Cutting and damaging trees stipulated in Articles 726 and 727.
- The poisoning of animals stipulated in Article 728.
- Perjury and false oath which occur before the court of conciliation.
- Traffic violations and compensation for damages sustained in traffic accidents.

In addition, the magistrates in the criminal court of conciliation can perform the functions of the judicial police in areas where there are no investigative judges. As such, they can issue summons and arrest warrants, as well as carry out all investigations when the magistrate authorizes them in writing.

The court of conciliation has the jurisdiction to hear cases related to infractions and misdemeanors where the maximum punishment is a fine or up to one year of imprisonment. The judgment issued by the court of conciliation can be appealed at the courts of appeal, civil or criminal, depending on the case.

ii. The Courts of First Instance (Mahakim Al-Bidaya)

The courts of first instance are comprised of civil and criminal divisions and one judge presides over a hearing. The Civil Court of First Instance adjudicates all civil and

commercial cases, as stipulated under Article 77 of the civil procedure code unless another court has jurisdiction. Article 78 further gives the court the right to hear urgent matters, including civil rights and movable assets' claims exceeding 200,000 Syrian pounds. The matters heard in these courts are deemed more significant in nature.

Additional courts belong to the court of first instance, such as the Court of Labor Conflicts and the Customs Court (Al-Mahkama Al-Jumrukiyya) as stipulated by Article 233 of the Customs Law No. 38 of 6 July 2006. The judgments in these courts can be appealed at the Court of Appeals (Mahakim Al-Isti'naf).

Art. 169: "A court of first instance shall hear all the misdemeanors for which the law does not assign other courts. The rulings issued by courts of first instance are subject to the principles stated in Article 165 of this law."

Art. 170: "If a misdemeanor or violation occurs during a session of the court, the Chief justice files an incident report about it, listens to the defendant and witnesses and immediately issues verdicts of the penalties necessary for this crime. This verdict is of final instance."

Art. 171: "A court of first instance shall look into lawsuits within their jurisdiction which are filed to it or and referred to under the provisions of this law."

Specialized courts of first instance include juvenile courts that hear criminal cases where the defendant is a child between 10 and 18 years of age. Nevertheless, many lawyers and judges have noted that it is not uncommon for children to be tried in adult courts even when juvenile courts are available.²⁷

iii. The Court of Appeals

The court of appeals is a second instance court.

Under Article 41 of the Judicial Authority Law promulgated by the Legislative Decree no. 98 of 1961:

- 1. The courts of appeals shall consist of a president, chamber presidents, and advisers*
- 2. These courts shall be divided, if necessary, into chambers, each of which shall be appointed by a president in the court.*
- 3. The number of courts of appeals, chamber presidents, their advisers, and their jurisdiction is set forth in table 9 attached to this law.*
- 4. The President of the Court of Appeals shall preside over the department of his choice at the beginning of his appointment.*
- 5. If for any reason, one of the chamber presidents is unable to carry out his duties, the higher ranking and more senior adviser in that same order shall carry out those duties."*

²⁷ Ibid., 32

Article 42 of the law further stipulates that the court of appeals is comprised of three advisers, one of whom shall be the President.

Article 43 adds:

“The Court of Appeals shall adjudicate criminal cases, cases that were appealed and other cases under its jurisdiction.”

iv. The Court of Cassation

The court of cassation is the highest court vested with the role of monitoring the proper application of the law. This means the court does not analyze the facts of each case but merely the applicable laws that surround them. There are exceptions to this rule such as cases brought to the court for the second time.

Under Article 44 of the Judicial Authority Law:

- “1. The Court of Cassation is based in Damascus and is composed of a president, several deputies, and advisers, as specified in table 10 attached to this law.*
- 2. The President of the Court of Cassation shall preside over the department of his choice at the beginning of each year.”*

Article 45 further provides:

- 1. The court of cassation shall be divided into three departments:*
 - a. Civil and commercial affairs department.*
 - b. A department for criminal cases.*
 - c. A department for personal status issues.*

The court may create as many departments as necessary.

- 2. The decisions of each department are issued by three advisers.*
- 3. The distribution of the work in the court of cassation is determined by a body composed of the president and his deputies at the beginning of every judicial year, and this distribution shall continue to be effective if no decision is made to amend it.*
- 4. If one of the advisers is unable to do his work due to extenuating circumstances, he shall be replaced by the highest ranking adviser and then the more senior in that order.”*

Articles 46-48 further define competencies of the three aforementioned departments and there is another chamber to challenge judges, in particular, file motions for recusal.

Exceptional Courts

The exceptional courts, as noted above, were created to address perceived threats to the state or the Ba'ath party. They are comprised of civilian and military systems. No clear directions exist as to which cases should fall under exceptional courts' jurisdiction. Some legal practitioners have noted that there were times when simple criminal offenses, for

instance, drug crimes, were treated before the exceptional courts. The courts are also infamous for trying the demonstrators, government opponents, and alleged spies under the justification of treason.²⁸ The exceptional courts include Military Field Courts and Military Courts that fall under the Ministry of Defense, and the Counter-Terrorism Court, which falls under the Ministry of Justice.

v. The Military and Military Field Courts

The military courts were designed to try the military and the police. But under the articles 260-339 of the Criminal Code, civilians can also be prosecuted for “state security offences.”²⁹ As a result, demonstrators, activists, and individuals with ties to the opposition have been tried in these courts. According to several accounts from Syrian lawyers sometimes no prosecutorial evidence is considered and only secret military intelligence is taken into account.³⁰ The accused do not have a right to a lawyer, although defense lawyers are allowed to be present, but typically, they are forbidden to actively participate in the trial; their defense arguments are rejected, and they are often refused to meet with their detained clients. The sentences in these courts, as a rule, are much harsher than those handed out in criminal courts.

The military field court was established through a Legislative Decree No. 109 of 17 August 1968 with the purpose of trying soldiers that joined the enemy or prosecuting deserters during armed conflict. A new decree No. 109/32 was issued on 1 July 1980 expanding the court’s jurisdiction to include periods of “domestic unrest.”³¹ The court is resided solely by the military officers who sit as judges. The establishment of the court is subject to the decision by the Minister of Defense. Both the trial and the judgment are kept in complete secret. One report indicates that accused individuals receiving a death sentence may be notified only shortly before the execution.³² The military field courts are not bound by the Syrian criminal procedure code, do not follow any other local or international laws and principles, and the sentences, as a rule, are much harsher. The death penalty requires the signature of the Head of State; all other sentences only need a signature of the Minister of Defense. The judgments are final and no appeal is allowed.

vi. Counter-Terrorism Court (CTC) (previously known as Supreme State Security Court)

In 2011, the state of emergency was lifted and a Counter-Terrorism Law No. 19 of 28 June 2012 was enacted outlining crimes that constitute terrorism. Another counter-terrorism law, No. 22 of 25 July 2012, was issued establishing the Counter-Terrorism Court. It has the power to try any individuals, military or civilian, for allegations of terrorism. Acts that are considered terrorism are wide in scope and include “any action aimed to cause panic

²⁸ *Ibid.*, 43

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.* 45

³² *Ibid.*

among people, disturb public security or harm the State's infrastructure..."³³ The Violations Documentation Center in Syria detailed in their report that frequent charges included participating in demonstrations, contacting opposition abroad, writing anti-government statements on Facebook, delivering food, aid or medicine to opposition-held areas, smuggling weapons to insurgents.³⁴ The Court is exempt from any procedural codes. Some have noted that defense lawyers are not allowed to speak in court, and forced confessions, including the ones extracted through torture, are admissible.³⁵ It is hard to estimate the caseload of the court, but usually tens of thousands of cases are heard each year and the process is extremely speedy.

Other Courts

vii. Personal Status Courts

Personal status courts hear matters on family law and consist of Shari'a, Ruhi and Madhabi courts for the Muslim, Christian, and Druze communities respectively.

Article 486 of Law 1 of the Procedure Code of 2016, provides the following as the jurisdiction of the personal status courts:

"A. The shari'a court has jurisdiction to issue verdicts in the final instance in cases of:

- 1. Legal guardianship, representation, and trusteeship,*
- 2. Proof of death and inheritance;*
- 3. Determining legal capacity and mental maturity;*
- 4. Missing persons;*
- 5. Determining issue and lineal ascendants;*
- 6. Care of relatives that are not spouses or children.*

B. The court does not have jurisdiction over:

- 1. Personal status cases of the followers of the Greek Orthodox, Syriac Orthodox, and the Catholic churches, as per Law No. 10, of 10 September 2003, Law No. 23 of 16 October 2003, and Law No. 31 of 18 June 2006.*
- 2. Cases of inheritance and will of the Greek Orthodox and Syriac Orthodox followers as stipulated in the Legislative Decree No. 7 dated 11 January 2011.*
- 3. The cases stipulated in articles 307 and 308 of the Personal Status Law issued by the Legislative Decree No. 59 of 7 September 1953 and its amendments."*

³³ *Ibid.* 65

³⁴ *Ibid.*

³⁵ *Ibid.*

As per Article 487 of the same law, the shari'a court has jurisdiction over the personal status matters of Muslims in the final instance. These include:

- c. Marriage
- d. Divorce
- e. Dowry
- f. Custody
- g. Alimony
- h. Charitable endowment – *Waqf* - its award, validity, and maintenance.

Article 488 further stipulates that the shari'a court shall have the authority to hear urgent cases under its jurisdiction as mentioned in the articles above. In such cases it has the following powers:

"[...]b. The shari'a court may seize financial assets in cases related to matters of legal guardianship, legal agency, conjugal and matrimonial rights, and shall rule on entitlement that is based on the degree of attachment, in such cases.
c. The rules and procedures provided for in articles 317 to 324 of this Law shall apply to attachment, and decisions issued by the shari'a court."

Under Article 489, the court further:

"a. Authorizes a shari'a agent on the case where such authorization is required from a shari'a judge.
b. Organizes documents relating to the will, waqf and the rights that arise from it, marriage contracts, divorce, documents of inheritance, legal guardianship, alimony, issue, and lineal ascendants, and legal capacity."

Article 490:

"The documents in accordance with the provisions of the preceding article shall be effective until they are nullified or amended by a competent court in the jurisdiction of the dispute."

Article 491:

"Personal status restrictions shall be corrected in accordance with the final rulings of the shari'a court in cases within its jurisdiction, without the need of a ruling from the court of conciliation."

Article 492:

"The shari'a court shall hear all matters within its jurisdiction as prescribed by special laws."

Article 493:

"The shari'a court shall not hear and rule on cases relating to a foreigner who is subject to the law in his own country."

Article 494:

“The shari’a courts shall be subject to the rules of local jurisdiction as stipulated in this Law.”

Article 495:

“The granting of permission to marry shall be within the jurisdiction of the court in which the domicile of one of the spouses is located.”

Article 496:

“Cases relating to affairs of the minor shall be within the jurisdiction of the court in whose jurisdiction the legal guardian resides, or where the inheritance is located.”

Article 497:

“The legal guardianship disputes arising from death shall be within the jurisdiction of the court in whose jurisdiction the deceased is located.”

Article 498:

“[...]b. The legal proceedings shall be conducted in accordance with the procedures of the court of first instance in simple cases.

c. The shari’a court judges shall be subject to the rules and procedures of non-validity, recusal, and methods of appeal provided for in Article 175 and thereafter of this Law.

d. The provisions concerning rendering, correcting and interpreting judgments, and the costs of the proceedings, shall apply to the shari’a court.”

All Syrians are subject to the jurisdiction of the shari’a courts, with the exception of personal status matters of other religious groups where Druze and Christian communities have to refer to their own laws and courts. Rulings of the shari’a courts can be appealed in the relevant chamber of the court of cassation. Similarly, the rulings of other religious courts can be appealed in other appropriate chambers of the court of cassation.³⁶

viii. Administrative Courts (State Council)

The State Council is under the supervision of the prime minister and hears cases related to administrative matters. The administrative courts consist of two levels: 1) Administrative Court and the Administrative Judicial Court both of which are courts of first instance, and 2) the Supreme Administrative Court that serves as an appellate court for administrative matters and renders final judgments.³⁷

The State Council is comprised of administrative courts that exercise judicial supervision on administrative matters in accordance with Law No. 55 of 1959.³⁸

³⁶ ILAC 2017, supra 4 at 35

³⁷ Syrian Law Journal, Syria-Brief History supra. 2

³⁸ المرسوم التشريعي 55 لعام 1959 قانون مجلس الدولة، الجمهورية العربية السورية مجلس الشعب <http://www.parliament.gov.sy/arabic/index.php?node=201&nid=10515&ref=tree&> [accessed 18 December 2018]

Article 1 of the Law No. 55 stipulates:

“The State Council is an independent body under the supervision of the Prime Minister.”

Article 2:

“The State Council consists of two sections:

- a. The Judicial Section*
- b. An advisory section for matters relating to legal opinion and legislation.”*

Article 3:

“The Judicial Section consists of:

- a. The Supreme Administrative Court.*
- b. Administrative Judicial Court.*
- c. Administrative courts.*
- d. The Board of State Commissioners.”*

Article 8:

“The State Council shall have full and exclusive jurisdiction and mandate over the following matters:

- 1. Appeals of the elections of regional and municipal bodies.*
- 2. Disputes concerning salaries, pensions and bonuses.*
- 3. Appeals submitted by the concerned parties to challenge the final administrative decisions regarding appointments for public office and promotions.*
- 4. Public servants’ requests for annulment of final decisions of disciplinary bodies.*
- 5. Public servants’ requests for annulment of administrative decisions regarding retirement or dismissal, other than disciplinary action (except for decrees and decisions issued in accordance with Article 85 of the Public Servants’ Basic Act).*
- 6. Individual or organizations’ requests for annulment of final administrative decisions.*
- 7. Appeals of final decisions issued by the administrative authorities in disputes relating to taxes and other administrative fees.*
- 8. Provisions and final decisions of the Central Body for Financial Supervision.*
- 9. Lawsuits relating to citizenship.”*

Appeals relating to points 3, 4, 5, 6, 8, 9, shall be lodged on the grounds of lack of jurisdiction, a mistake in the format, a violation of the laws or regulations, error in their application or interpretation, and abuse of authority.

The administrative authorities’ refusal to or abstention from making a decision that they should have made in accordance with laws and regulations shall constitute an administrative decision.”

Article 9:

“The State Council, through administrative judiciary body, shall decide on compensation requests for rulings on the matters in the preceding article, if these requests are submitted directly or indirectly.”

Article 10:

“The State Council shall, through an administrative judiciary body, rule in disputes relating to contracts, public works, public supply, or any other administrative contracts.”

Article 11:

“The State Council shall adjudicate, through an administrative judicial body, appeals of final rulings rendered by a relevant administrative judicial body when the reason for the appeal is lack of jurisdiction, a mistake in format, violation of the laws and regulations, or error in their application and interpretation, except in cases where decisions have been issued by an arbitration or reconciliation body in labor disputes and the decisions issued by committees specialized in lawyers’ registration, approval to be present before courts, and disciplinary action against them [lawyers].”

Article 13 :

“Administrative courts:

- 1. Shall adjudicate annulment requests for decisions stipulated in paragraphs 3-5 of Article 8, except when the employees bring cases relating to compensation in the instances that result from such decisions.*
- 2. Shall settle disputes concerning salaries, pensions, and bonuses for parties mentioned above or their heirs.”*

Article 14:

“The administrative court shall adjudicate on disputes stipulated in articles 8, 9, 10 and 11 except for cases fall under the jurisdiction of administrative courts.”

Article 15:

“The decisions rendered by the administrative courts, administrative judicial court, or the disciplinary action courts, may be appealed before the Supreme Administrative Court in the following cases:

- 1. If the judgment in question was reached in violation of the law or it is based on an invalid application or interpretation of the law;*
- 2. If a judgment is invalid or nullified in the course of proceedings;*
- 3. If the judgment was issued contrary to a previous judgment that was final whether this defense was used or not.”*

Article 19:

“The judgments issued by the administrative judicial court, or the administrative courts may be appealed with a purpose of reviewing dates and provisions as stipulated by the Civil Procedure Code and the Civil and Commercial Code of Procedure. This appeal shall not suspend the execution of judgment unless the court so orders. If the appeal is rejected, it is permissible to fine the appellant with no more than 30 Syrian Pounds, or to compel to pay compensation. This does not apply to appeals filed by the State Body of Commissioners.”

If a matter concerns the State Council and the Presidency, the administrative courts under the supervision of the Prime Minister, hear the case.

ix. The Supreme Constitutional Court

The Supreme Constitutional Court (Al Mahkama al-Dusturiyah al-Ulya) is the highest judicial body in Syria. Established under 1973 Constitution articles 139 and 148, it is tasked with three specific areas: ruling on the constitutionality of laws or decrees challenged by the People's Council of Syria or the President, adjudicating electoral disputes related to the People's Council, and prosecuting the head of state for treason. The court, on the other hand, does not decide the constitutionality of laws that were proposed by the President and approved by popular referenda.³⁹ All five judges, with one as the court president, are appointed by the head of state and serve for a renewable term of four years.

The 2012 Constitution includes provisions stipulating that the Court is an independent body, and Article 146 sets out the following as its mandate:

- “1. To guard the constitutionality of the laws, legislative decrees, bylaws, and regulations;*
- 2. To give opinions, upon the request of the President of the Republic, on the constitutionality of the draft laws and legislative decrees and the legality of draft decrees;*
- 3. To supervise the election of the President of the Republic and organize the relevant procedures;*
- 4. To consider appeals regarding the elections of the President of the Republic and members of the People's Council;*
- 5. To try the President of the Republic in the case of high treason;*
- 6. Other competencies as prescribed by the Law.”⁴⁰*

In addition, Legislative Decree No. 35 of 13 May 2012 provided that the Supreme Constitutional Court can have additional powers as provided by the law. This decree was then substituted by Law No. 7 of 16 April 2014 which, in Article 11, sets out that the Court shall have within its jurisdiction the power to:

- “a) Guard the constitutionality of the laws, legislative decrees, bylaws, and regulations;*
- b) Give opinions, upon the request of the President of the Republic, on the constitutionality of the draft laws and legislative decrees and the legality of draft decrees;*
- c) Give opinions on the constitutionality of the draft laws upon request of the People's Council;*
- d) Supervise the election of the President of the Republic and organize the relevant procedures;*
- e) Consider appeals regarding the elections of the President of the Republic;*
- f) Consider appeals regarding the elections of members of the People's Council;*
- g) Try the President of the Republic in the case of high treason;*

³⁹ Article 148, Constitution of 2012, *supra* 18

⁴⁰ Constitute, Constitute Project, 'الجمهورية العربية السورية (الصادر عام 2012, July 2018, available at: https://www.constituteproject.org/constitution/Syria_2012.pdf?lang=ar [accessed 18 December 2018]

- h) To consider cases referred by other courts that challenge constitutionality of legal provisions;*
- i) To interpret provisions of the Constitution upon the request of the President of the Republic, or the Prime Minister, or the President of the People's Council;*
- j) To check and issue a final ruling on whether a candidate meets eligibility requirements to be nominated for the office of President of the Republic;*
- k) To check and issue a final ruling on whether a candidate meets eligibility requirements to be nominated for a seat on the People's Assembly."*

The primary entities that are permitted to challenge the laws are the entities that enact those laws – the President and the People's Council – in addition to courts.⁴¹

x. The Court of Conflicts

Proceedings before the Court of Conflicts take place when there is a conflict over which court has the competence to hear a case.

Article 27 of the Judicial Authority Law No. 98 of 1961 stipulates:

"If a case is brought before the ordinary court and the administrative court and neither waive their right to adjudicate or if both waive this right, a suit shall be submitted to the Court of Conflicts. This Court also has the authority to decide over two contradictory final rulings when one is issued by the ordinary court and the other by the administrative or exceptional court."

Public Prosecution

The Public Prosecutor's Office is an independent judicial body whose mission is to prosecute crimes on behalf of the society and to seek the truth, rather than convict the accused. A prosecutor cannot personally initiate criminal proceedings unless the person in question has been charged as per Article 58 of the criminal procedure code. However, the prosecution can sometimes initiate the proceedings if the injured party filed the lawsuit as a plaintiff.

Article 137 of the Constitution stipulates:

"The Public Prosecutor's Office is a single judicial institution headed by the Minister of Justice. The law regulates its function and mandate."

Article 56 of the Judicial Authority Law stipulates:

- 1. "Judges run the Public Prosecutor's Office. They are under the authority of the Minister of Justice and they exercise the powers that are conferred to them by law.*
- 2. Prosecutors are required to follow written orders issued to them by their superiors."*

⁴¹ ILAC 2017, *supra* 4 at 37

Article 58:

“The Public Prosecution shall exercise powers as conferred to it by law. Unlike other judicial institutions, it has the power to start a criminal process, unless the Law stipulates otherwise.”

Article 59:

“Prosecutors should participate in hearings before the criminal court of appeal. They may actively engage in the hearings before the court of first instance, or may just observe judgments issued by the court of first instance, and if necessary, follow up on the appeals.”

As per Article 14 of the criminal procedure code, the attorney general is the head of the prosecution and the judicial police in the relevant district. All judicial police staff including the investigative judges are headed by the attorney general.

1.2.4 The Legal Profession

Even before 2011 uprisings, the legal profession faced numerous challenges such as inadequate training and no continued legal education. Often the education did not provide practical exposure to the law. Problems with access to legal codes, cases, and legal texts were persistent. Consequentially, ignorance towards national and international law was common, judicial decisions and legal representation were often of poor quality uncommonly resulted in human rights violations.⁴² These problems intensified after 2011 and are especially visible in rural areas.

There were between 1,100 and 1,400 magistrates, including judges and prosecutors, before the start of the conflict, with women accounting for approximately 14% of them, excluding personal status courts, where, in practice, all magistrates were men.⁴³

Lawyers with at least ten years of experience can become judges, including prosecutors, by participating in a competition organized by the Ministry of Justice to appoint judges. The procedure consists of two stages: receiving high marks in a written test and obtaining clearance from the security services who undertake extremely scrupulous background checks. In reality, however, some judges were appointed despite poor grades, sometimes even without any legal training. Nepotism and other forms of corruption were also common in judicial appointments. Furthermore, lawyers, wishing to become judges, were required to be members of the Ba’ath party, albeit not necessarily active ones.⁴⁴ Party membership was also required to be a president or member of the council of any national or local bars.

After gaining experience in lower courts as a general judge for some time, he/she can then specialize and become either a sentencing judge, a prosecutor, an administrative judge, or a judge specialized in hearing juvenile cases. No clear distinction exists between judges and prosecutors, and they can change from one position to the other easily.

⁴² European Commission, “Action Fiche for Syrian Arab Republic”, 2010, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/aap_syrie_2010_ad1.pdf [accessed 5 December 2018] (hereinafter European Commission, 2010)

⁴³ ILAC 2017, *supra* 4 at 37

⁴⁴ *Ibid.*, 38

Judicial education of judges and prosecutors in Syria falls under the responsibility of the Supreme Judicial Training Institute set up by a Legislative Decree No. 42 in 2000. The Institute has a board chaired by the Minister of Justice. The chairman can control the institute's activities and curricula, nominate instructors and lecturers, which are usually endorsed.⁴⁵

Bribing judges and buying verdicts was not uncommon, especially since judges' salaries were small and the workload was high. Many lawyers also recounted that it is practically impossible to win a case if the other side had ties to the government.⁴⁶

In 2010 changes to the law Concerning the Regulation of the Legal Profession (Law No. 30) were enacted imposing restrictions on lawyers' abilities to represent their clients. For instance, in order to see a detained client, permission from the local bar association needed to be obtained first as per Article 74 of the law. Similarly, permission to represent any foreign clients needed to be obtained from the Minister of the Interior or the governor as stipulated in Article 73.⁴⁷

Law No. 30 of 2010 on the legal profession defines a lawyer as follows:

"Law is a free intellectual profession the mission of which is to cooperate with the judiciary to reach justice and defend the rights of the clients in accordance with provisions of this law."

When exercising his work, the lawyer enjoys many rights and carries many responsibilities as stipulated in Law No. 30 of 2010, chapter 4, on the legal profession, where lawyer's rights and obligations are outlined.

After 2011, the biggest challenge that lawyers, and particularly judges, faced is being forced to pick sides. Many of those who fled the regime and nonregime controlled areas had to be affiliated with the local authorities or were forced to do so. This has actively undermined their appearance of impartiality and independence. Numerous reports state that lawyers who refused to support the Syrian regime showed support for protesters or defended them, faced immediate action both from the local bar and the judicial authorities, many of whom ended up being arrested or executed in regime jails.

1.3 Human Rights and Justice in Syria: Challenges

1.3.1 Human Rights Violations and Missing Persons

The armed conflict that followed after the events of 2011 had many tragic consequences. More than 400,000 have died according to the World Bank estimates with over 6 million internally displaced and 5 million refugees. The UN estimated that by June 2017 540,000 people still lived in besieged areas.⁴⁸ Since the beginning of the conflict, educational opportunities were lost, especially for women and girls, and access to safe water, food and health services was restricted.

⁴⁵ *Ibid.*, 40

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Human Rights Watch, "2018 World Report - Syria: Events of 2017", available at: <https://www.hrw.org/world-report/2018/country-chapters/syria> [accessed 4 December 2018]

The ongoing war has further debilitated the infrastructure and practical aspects of the criminal justice system. Access to defense counsel and legal aid is uncommon, or lacks in quality, leaving individuals susceptible to further human rights violations. Especially upon detention, people can face torture, both physical and mental. Forced confessions also continue to be accepted as a legitimate method of investigation. Individuals, whose families or friends are no longer in Syria, are even more at risk to rights' violations since if detained, no one can document the detention and help.

Arbitrary arrests and ill-treatment continue to be rampant in Syria. More than 4,252 individuals faced arbitrary detention in 2017 according to the estimates of the Syrian Network for Human Rights (SNHR).⁴⁹ As of August 2017, more than 80,000 individuals remain disappeared, with fears of many having been summarily executed.⁵⁰ At the beginning of 2019 at least 1,431,76 individuals still remained detained or forcibly disappeared according to the Syria Network for Human Rights.⁵¹

1.3.2 Women Rights and Issues in Syria

2012 constitution grants women equal rights and prohibits discrimination based on gender:

Art. 23: "The state shall provide women with all opportunities enabling them to effectively and fully contribute to the political, economic, social and cultural life, and the state shall work on removing the restrictions that prevent their development and participation in building society."

Art. 33: "[...] 3. Citizens shall be equal in rights and duties without discrimination among them on grounds of sex, origin, language, religion or creed;

4. The state shall guarantee the principle of equal opportunities among citizens."

However, women and girls face many challenges and threats within the Syrian justice system, particularly in the current situation in Syria.

In 2003 Syria ratified the Convention on the Elimination of Discrimination Against Women (CEDAW), however, it also raised many reservations for important parts of the convention which it deems incompatible with the Sharia law and the Syrian Law of Personal Status. A few examples of articles where reservations were made include Article 15(4) concerning the freedom of movement, residence and domicile, and Article 16 that ensures equal rights in marriage and its dissolution, adoption, legal guardianship, etc.⁵²

One issue that women are particularly vulnerable to is domestic violence. Women often do not have the capacity or resources to file formal complaints or fear doing so. According

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Syria Network for Human Rights, 2019, available at: <http://sn4hr.org/arabic/2018/12/31/%D9%85%D8%A7-%D9%84%D8%A7-%D9%8A%D9%82%D9%84-%D8%B9%D9%86-118829-%D8%B4%D8%AE%D8%B5%D8%A7%D9%8B-%D9%84%D8%A7-%D9%8A%D8%B2%D8%A7%D9%84%D9%88%D9%86-%D9%82%D9%8A%D8%AF-%D8%A7%D9%84%D8%A7%D8%B9%D8%AA/> [accessed 20 June 2019]

⁵² ILAC 2017, *supra* 4 at 56

to some lawyers, 99% of women that do file complaints, end up dropping their charges. Those that do not, often see the perpetrators receive strongly reduced sentences.⁵³ In those cases where victims die, many judges reduce men's sentences, especially if the murder is an honor crime under Article 548 of the Criminal Code. It is up to the judge to decide if the man was defending honor.⁵⁴

The mentioned constraints are further exacerbated by the ongoing armed conflict. In certain conservative non-government areas where women's freedom of movement is more restricted, women are even more vulnerable. The need to document marriage, divorce, deaths, and birth at the civil registry is a top priority for women as their status documents are necessary for many daily needs. UN OCHA also estimated that early marriage is a concern for 69 percent of communities.⁵⁵

1.3.3 Housing, Land and Property

The situation of housing, land, and property (HLP) remains challenging as many people were forced to leave the areas they once inhabited and worked in. According to a joint UNHCR and Norwegian Refugee Council survey of the property situation in the Syrian Southern provinces, around 50% of respondents said that prior to their displacement their residence was destroyed or damaged beyond repair. Only 9% said they still owned their property and it was in good condition.⁵⁶

Both national and international laws protect HLP rights. Article 15 of the 2012 Constitution stipulates:

“Collective and individual private ownership shall be protected in accordance with the following basis:

- 1. General confiscation of funds shall be prohibited;*
- 2. Private ownership shall not be removed except in the public interest by a decree and against fair compensation according to the law;*
- 3. Confiscation of private property shall not be imposed without a final court ruling;*
- 4. Private property may be confiscated for necessities of war and disasters by law and against fair compensation;*
- 5. Compensation shall be equivalent to the real value of the property.”*

International treaties, for instance, Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Syria in 1969, recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate

⁵³ *Ibid.*, 57

⁵⁴ *Ibid.*

⁵⁵ UN Women, “Crisis update: Women of Syria, eight years into the crisis”, August 2018, available at: <http://www.unwomen.org/en/news/stories/2018/8/feature-syria-humanitarian-update> [accessed 6 December 2018]

⁵⁶ UNHCR, Norwegian Refugee Council, “Displacement, housing land and property and access to civil documentation in the south of the Syrian Arab Republic”, July 2017, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/final_nrc_displacement_hlp_and_civil_doc_s_syria_23_07_2017_en.pdf [accessed 6 December 2018]

food, clothing, and housing”. Syria (in theory) is also bound by the General Comments of the ICESCR, including General Comment 4 on “The Right to Adequate Housing (Art. 11 (1) of the Covenant)” and General Comment 7 on “The right to adequate housing (Art.11.1)”. Additionally, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Guiding Principles on Internal Displacement protect matters relating to HLP, including protection from pillage and arbitrary deprivation of property.⁵⁷

Many concerns were raised after the Government Decree No. 10 was issued in 2018 under which the state is poised to recognize, redevelop or confiscate residents’ property without due process, fair trial or with limited compensation if any. The new law is an urban planning measure that is on the track to impose serious obstacles to the return of the displaced since scores of people are unable to provide the required documents and risk losing their right to their own property.⁵⁸

1.3.4 Challenges in the Syrian Justice System

Many challenges in the Syrian justice system existed before 2011 and many issues were exacerbated further with the start of the conflict. Corruption is an overriding issue in all legal sectors. Inefficient and outdated filing, archiving and document retrieval systems are at the forefront of basic issues surrounding the system as well.⁵⁹ Poorly trained support staff, lack of necessary infrastructure and technology hamper investigative efforts and, in turn, impedes fair legal processes, which results in human rights violations. Important court decisions are not reported and files are not retained.⁶⁰ Significant digitalization of the system is needed as well as modernization of laws to better reflect international principles. Impartiality of the justice system remains one of the biggest challenges both in the government-controlled areas and outside. The lack of adequate and accessible legal aid means many individuals facing charges do not have legal representation. The stigma of representing individuals on the side of the defense also remains negative.

In areas outside of government control, for instance in Aleppo, Dara’a, and Idlib, there is often no money to pay judges’ salaries and many institutions work with little to no resources in the hope of rebuilding the justice system.

⁵⁷ *Ibid.*

⁵⁸ Human Rights Watch, ‘Q&A: Syria’s New Property Law’, May 2018, available at : https://www.hrw.org/news/2018/05/29/qa-syrias-new-property-law#_What_is_Law [accessed 10 December 2018]

⁵⁹ European Commission, 2010, *supra* 44

⁶⁰ *Ibid.*

CHAPTER 2

Fundamental Rights of the Accused

2.1 Rights of the Accused in Syria

IBJ held a workshop in Gaziantep between 28 April and 1 May 2019. The participants were lawyers who represented several bar associations inside Syria such as Aleppo Bar Association, Idlib Bar Association, Homs Bar Association, and Hama Bar Association. With support from IBJ, participants discussed the importance of issuing a checklist of procedures that ensure preserving the dignity of the accused during arrest and detention, accused's freedom of religion, as well as that a person shall only be detained if she/he have committed a criminal act as stipulated by the law. Moreover, the checklist outlines how juveniles shall be detained and tried in accordance with special procedures, and how the accused and his counsel shall have the right to look at the casefile at all stages of criminal proceedings, as well as all the other rights that are derived and interpreted from the Syrian legislation. Participants concluded the following checklist:

Manifesto of the rights of the accused in accordance with the Syrian law

Assembly of Syrian lawyers, March 31st, 2019 Gaziantep, Turkey:

1. *Arrest or detention could not happen without a legal note provided (Art. 33 of the Syrian Constitution);*
2. *It is not permitted to damage the dignity of the arrested during detention (Art. 33 of the Syrian Constitution);*
3. *It is not permitted to enter private dwellings without special permission (Art. 36(2) of the Syrian Constitution);*
4. *It is not permitted to control the letter or communications without a judicial order (Art. 37 of the Syrian Constitution);*
5. *It is not permitted to prevent an individual from practicing his religion during arrest or detention (Art. 42 of the Syrian Constitution);*
6. *It is not permitted to arrest a person for conduct not prohibited by the law (Art. 51(1) of the Syrian Constitution);*
7. *It is the right of every detainee to have a lawyer to defend him during investigation and trial (Art. 51(3) of the Syrian Constitution);*
8. *It is not permitted to give immunity to any security and administrative authorities for their actions (Art. 51(4) of the Syrian Constitution);*
9. *It is not permitted to arrest or detain a person for the purpose of pressuring the other perpetrators to surrender (Art. 51(1) of the Syrian Constitution);*
10. *It is not permitted to torture the detainees or treat them in a degrading way during the preliminary and judicial investigation (Art. 53(2) of the Syrian Constitution);*
11. *The arrested has to be informed about the reasons for his arrest as well as the*

- arguments rendered in the judicial decision (Art. 53(3) of the Syrian Constitution);*
12. *Continued detention by the administrative authorities is not permitted without the order of the judicial authority (Art. 53(3) of the Syrian Constitution);*
 13. *The juveniles shall be tried in special courts in accordance with special procedures and during the detention process, they shall be placed in special care homes (Art. 31 of the Juvenile Offenders Act);*
 14. *It is not permitted to interrogate the accused during the investigation while he is handcuffed or blindfolded (the Criminal Procedure Code);*
 15. *It is the right of the accused and his defender to see the case file at any stage of the criminal process (Art. 44 of the Code of Civil Procedure);*
 16. *It is the right of every accused to be judged in public (Art. 190 of the Criminal Procedure Code);*
 17. *It is not permitted to stop any person from exercising his judicial rights due to fees (Art. 51(3) of the Syrian Constitution);*
 18. *The detained shall be treated as a normal person until his judgment is released (Art. 51(2) of the Syrian Constitution);*
 19. *Juveniles shall not be placed in adult prisons, but in special rehabilitation centers (Art. 4 of the Juvenile Offenders Act);*
 20. *The supervision of the prisons shall be exercised by the judicial authorities (Public Prosecutor's Office) and not by the executive authority (Art. 15(1) of the Code of Criminal Procedure).*

2.2 International Legal Framework of Rights: The International Bill of Human Rights

Human rights had already found expression in the Covenant of the League of Nations, which also led to the International Labour Organisation. In 1945, at the so-called San Francisco Conference, a proposal to embody a “Declaration on the Essential Rights of Man” was put forward. This conference was held to draft a charter for the United Nations and it clearly speaks of “*promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion*”⁶¹

Following the above and other processes, the General Assembly adopted the Universal Declaration of Human Rights on 10 December 1948. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were adopted by the General Assembly by resolution on 16 December 1966 (entering into force in 1976).

The International Bill of Human Rights consists of the Universal Declaration of Human Rights (the UDHR), the International Covenant on Economic, Social and Cultural Rights (the ICESCR), the International Covenant on Civil and Political Rights (the ICCPR) and its two Optional Protocols are collectively referred to as the International Bill of Human Rights.

Syria acceded to both the ICCPR and ICESCR on 21 April 1969 but is yet to accede, succeed to or ratify the Optional Protocols to the ICCPR.

61 Article 1, Paragraph 3

2.3 Importance and Influence of the International Bill of Rights

The Declaration, and at a later stage the Covenants, exercised a profound influence on the thoughts and actions of individuals and their Governments in all parts of the world.

The International Conference on Human Rights meeting in Teheran from in April 1968 to review the progress since the adoption of the Universal Declaration and formulating a human rights program for the future, declared as follows in the Proclamation of Teheran:

1. *It is imperative that the members of the international community fulfil their solemn obligations to promote and encourage respect for human rights and fundamental freedoms for all without distinctions of any kind such as race, colour, sex, language, religion, political or other opinions;*
2. *The Universal Declaration of Human Rights states a common understanding, of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community;*
3. *The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the International Convention on the Elimination of All Forms of Racial Discrimination as well as other conventions and declarations in the field of human rights adopted under the auspices of the United Nations, the specialized agencies and the regional intergovernmental organizations, have created new standards and obligations to which States should conform.*⁶²

Judges of the International Court of Justice regularly invoke principles contained in the International Bill of Human Rights as the *ratio* for their decisions and national and local tribunals frequently cite the principles set out in the International Bill of Human Rights in their decisions. National constitutional and legislative texts have increasingly provided measures of legal protection for those principles and increasingly more recently adopted national and local laws are modeled on provisions set forth in the Universal Declaration of Human Rights and the International Covenants.

The Universal Declaration remains to be recognized as a historic document articulating a common definition of human dignity and values and embodies a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards everywhere. The coming into force of the Covenants, by which States parties accepted a legal and moral obligation to promote and protect human rights and fundamental freedoms, did not in any way diminish the widespread influence of the Universal Declaration. On the contrary: The fact that they contain the measures of implementation required to ensure the realization of the rights and freedoms set out in the Declaration strengthens the provisions of the Declaration.

62 United Nations, "Final Act of the International Conference on Human Rights," available at: http://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf, [accessed 14 December 2018]

2.4 Specific Rights of the Accused

2.4.1 The Universal Declaration of Human Rights

Relevant to an accused person, the UDHR sets out the following fundamental rights:

Article 3:

“Everyone has the right to life, liberty and security of person.”

Article 4:

“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”

Article 5:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 6:

“Everyone has the right to recognition everywhere as a person before the law.”

Article 7:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Article 8:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Article 9:

“No one shall be subjected to arbitrary arrest, detention or exile.”

Article 10:

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

Article 11:

- “1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence;*
- 2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”*

Article 12:

“No one shall be subjected to arbitrary interference with his privacy, family, home or

correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

2.4.2 The International Covenant on Civil and Political Rights

The ICCPR sets out the following fundamental rights:

2.4.2.1 General

Article 2:

- “1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
- 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
- 3. Each State Party to the present Covenant undertakes:*
 - a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
 - b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
 - c) To ensure that the competent authorities shall enforce such remedies when granted.”*

2.4.2.2 With Particular Relevance to Accused Persons:

Article 6:

- “1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
- 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
- 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*

4. *Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
5. *Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
6. *Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."*

Article 7:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 9:

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*
4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."*

Article 10

1. *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*
2. (a) *Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;*
(b) *Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*
3. *The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."*

Article 11:

“No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.”

Article 12:

- “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
- 2. Everyone shall be free to leave any country, including his own.*
- 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
- 4. No one shall be arbitrarily deprived of the right to enter his own country.”*

Article 13:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority”.

Article 14:

- “1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*
- 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
- 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
 - a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
 - b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
 - c. To be tried without undue delay;*
 - d. 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;*
- e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
 - g. Not to be compelled to testify against himself or to confess guilt.*
- 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*
 - 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*
 - 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*
 - 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."*

Article 15:

- "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*
- 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."*

Article 16:

"Everyone shall have the right to recognition everywhere as a person before the law."

Article 17:

- "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.*
- 2. Everyone has the right to the protection of the law against such interference or attacks."*

2.4.3 The International Covenant on Economic, Cultural and Social Rights

Notable provisions relevant to accused persons in terms of the ICESCR are the following:

Article 10:

“The States Parties to the present Covenant recognize that:

- “1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.*
- 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.*
- 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.”*

Article 11:

- “1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.*
- 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed:*
 - a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;*
 - b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”*

Article 12:

- “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”*

2.5 Other Important International Human Rights Instruments: The Convention Against Torture (CAT) and the Convention on the Rights of the Child (CRC).

2.5.1 The Convention Against Torture: General

The provisions of the CAT are of particular relevance to Syria given the prevailing conflict in the country. This is reiterated by a 2014 UNHCHR report. The report determined as follows:

“Victims of torture and other cruel, inhuman or degrading treatment languish in official and makeshift detention facilities throughout the Syrian Arab Republic (Syria).

Detainees are often held beyond the protection of the law and with no access to the outside world. Families desperately seek news of their loved ones, fearing for their safety given widespread allegations of torture and ill-treatment.

Over many years, even before the current conflict, torture and ill-treatment were consistently reported from Syria, facilitated by arbitrary arrest and detention and enforced disappearances. Both the Human Rights Council-mandated Fact Finding Mission led by OHCHR and the independent international commission of inquiry on the Syrian Arab Republic have concluded that the large- scale practice of torture and other inhuman acts perpetrated by Government forces and its militias since the outbreak of the conflict may amount to crimes against humanity.

When the conflict evolved to an armed conflict, the Commission further found that torture by Government forces and its militia amounted to war crimes. The United Nations Committee against Torture has also expressed deep concern at “consistent, credible, documented and corroborated” allegations about the existence of “widespread and systematic” torture and ill-treatment against the civilian population by the Government and affiliated militias.

Throughout the conflict, men, women and children, have been routinely picked up from the street, their homes and workplaces, or arrested at Government-controlled checkpoints, before being transferred to one of dozens of official or secret Government-run detention facilities. They are often held incommunicado and indefinitely. Facilities include army barracks and airports across the country, and detainees are sometimes transferred from one detention center to another.

Torture survivors interviewed by OHCHR and other human rights entities come from all walks of life, women and men, of varying ages, religious and ethnic backgrounds. Many are activists - often students – as well as lawyers, medical personnel and humanitarian workers, and some who just happened to be in the wrong place at the wrong time.

Torture is most common immediately upon arrest and during the first days or weeks of detention and interrogation. Upon arrival at a detention facility, detainees are routinely beaten and humiliated for several hours by the guards in what has come to be known as the “reception party.” Slurs - including cursing of family members and sectarian affiliation - consistently accompany these beatings. Victims told OHCHR that torture

*and ill-treatment were used to extract confessions about their participation in protests, support for and membership of opposition groups, or location and origin of weapons caches. Torture is also a means to intimidate or punish a detainee for actual or perceived support of the opposition, or that of family, friends or acquaintances.”*⁶³

2.5.2 The Convention Against Torture: Specific Provisions

Syria acceded to the CAT and its provisions on 19 August 2004. Given the above, the following sections are of particular importance:

Article 1:

- “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.*
- 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”*

Article 2:

- “1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
- 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*
- 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.”*

Article 4:

- “1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*
- 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”*

Article 5:

- “1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:*
 - a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;*

⁶³ Office of the United Nations High Commissioner for Human Rights, “Open Wounds: Torture and Ill-treatment in the Syrian Arab Republic”, accessed December 14, 2018, <https://www.ohchr.org/Documents/Countries/SY/PaperOnTorture.pdf>

- b) *When the alleged offender is a national of that State;*
- c) *When the victim is a national of that State if that State considers it appropriate.*
- 2. *Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.*
- 3. *This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.*

Article 6:

- “1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.*
- 2. Such State shall immediately make a preliminary inquiry into the facts.*
- 3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.*
- 4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.”*

Article 10:

- “1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.*
- 2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.”*

Article 11:

“Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”

Article 12:

“Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

Article 13:

“Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

Article 14:

- “1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.*
- 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”*

Article 15:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

2.5.3 The Convention on the Rights of the Child

Syria acceded to the CRC (1 Jul 1993) and signed the Convention on 18 September 1990. The following sections are of relevance for young or child accused:

Article 3:

- “1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
- 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
- 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision”.*

Article 12:

- “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Article 16:

- “1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.”

Article 19:

- “1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

Article 25:

“States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement. “

Article 37:

“States Parties shall ensure that:

- a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- 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."*

2.6 Important Due Process Rights: International Framework

Keeping the above international legal framework in mind the following can serve as a quick reference to an accused person's due process rights:

[a] The right to defense and adduce evidence

- Accused persons have the right to explain evidence and the right to present evidence or witnesses for their own defense.
- **Relevant International Standard:** 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 - International Covenant on Civil and Political Rights, Article, 14(3)(d).

[b] Presumption of innocence

- Every person shall be presumed innocent until he is proved guilty: Provided that the burden of proving particular facts may be placed on an accused person.
- **Relevant International Standards:** Everyone charged with a criminal offense has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defense - Universal Declaration of Human Rights, Article 11(1).
- Every child alleged as or accused of having infringed the criminal law has at least the following guarantees: To be presumed innocent until proven guilty according to the law - Convention on the Rights of the Child, Article 40(2)(b).
- Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to the law - International Covenant on Civil and Political Rights, Article 14(2).

[c] Right not to be tortured or ill-treated

- No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- The accused shall not be induced by a threat, promise, or otherwise to disclose or withhold any matter within his knowledge.
- **Relevant International Standards:** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment - Universal Declaration of Human Rights, Article 5.
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment - International Covenant on Civil and Political Rights, Article 7.
- Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction – Convention Against Torture, Article 2(1).
- 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 – Convention Against Torture, Article 1.

[d] Right to remain silent (right against self-incrimination)

- Confessions made to a Judge may be used as evidence against the accused only if they were made freely and voluntarily.
- An accused must be informed that he/she is not obliged to confess and that the confession may be used as evidence against him/her.
- **Relevant International Standards:** In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... Not to be compelled to testify against himself or to confess guilt – International Covenant on Civil and Political Rights, Article 14(3)(g).

[e] Right to be defended by a lawyer

- Every accused before any criminal court (or forum) may of right be defended by an attorney-at-law (counsel) and every aggrieved party shall have the right to be represented in court by counsel of his or her choosing.
- **Relevant International Standards:** 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 – International Covenant on Civil and Political Rights, Article 14(3)(d).

[f] Fair and Due Process

- No person shall be arrested except according to the procedure established by law. Any person arrested shall be informed of the reason for his arrest.
- **Relevant International Standards:** Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him - Universal Declaration of Human Rights, Section 10.
- In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law – International Covenant on Civil and Political Rights, Article 14(1).
- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law – International Covenant on Civil and Political Rights, Article 9(1).

[g] Right to Equal Protection of the Law

- All persons are equal before the law and entitled to the equal protection of the law.
- No one may be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.
- **Relevant International Standards:** Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or another opinion, national or social origin, property, birth or another status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty - Universal Declaration of Human Rights, Article 2.
- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination – Universal Declaration of Human Rights, Article 7.
- All persons shall be equal before the courts and tribunals – International Covenant on Civil and Political Rights, Article 14(1).

[h] Right Against Double Jeopardy

- Any person once tried for an offense shall not be liable to be tried again for the same offense.
- **Relevant International Standard:** No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and criminal procedure of each country - International Covenant on Civil and Political Rights, Article 14(7).

[i] Right against *Ex Post Facto* Prosecution

- **Relevant International Standards:** No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed - Universal Declaration of Human Rights, Article 11(2).
- No child shall be alleged as, be accused of, or recognized as having infringed the criminal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed - Convention on the Rights of the Child, Article 40(2)(a).

[j] Right to be Informed of Charges

- An accused shall be informed as to the nature of the charge or allegation upon which he is arrested and has the right to be informed of the charges against them.
- **Relevant International Standards:** Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him - International Covenant on Civil and Political Rights Article, 9(2).

[k] Right to Bail

- **Relevant International Standards:** No one shall be subjected to arbitrary arrest, detention or exile - Universal Declaration of Human Rights, Article 9.
- 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 - Convention on the Rights of the Child, Article 37(b).
- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment – International Covenant on Civil and Political Rights, Article 9 (3).
- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful - International Covenant on Civil and Political Rights, Article 9 (4).

[l] Right to Interpretation

- **Relevant International Standard:** In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees,

in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him – International Covenant on Civil and Political Rights, Article 14(3)(a).

[m] Right Against Unlawful Arrests and Searches

- No person shall be arrested except according to the procedure established by law.
- **Relevant International Standard:** Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law – International Covenant on Civil and Political Rights, Article, 9(1).

[n] Right Against Unlawful Police Detention

- Any person held in custody, detained or otherwise deprived of personal liberty must be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.
- **Relevant International Standards:** No one shall be subjected to arbitrary arrest, detention or exile - Universal Declaration of Human Rights, Article 9.
- 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 - Convention on the Rights of the Child Article 37(b).
- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment - International Covenant on Civil and Political Rights, Article 9 (3).
- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful - International Covenant on Civil and Political Rights, Article 9(4).

2.7 The 2012 Syrian Constitution

The Syrian Constitution of 2012 provides for a number of fundamental rights that are of particular relevance to an accused person:

Article 33:

“1. Freedom shall be a sacred right and the state shall guarantee the personal freedom of citizens and preserve their dignity and security;

2. *Citizenship shall be a fundamental principle which involves rights and duties enjoyed by every citizen and exercised according to law;*
3. *Citizens shall be equal in rights and duties without discrimination among them on grounds of sex, origin, language, religion or creed;*
4. *The state shall guarantee the principle of equal opportunities among citizens."*

Article 36:

- "1. The inviolability of private life shall be protected by the law;*
- 2. Houses shall not be entered or inspected except by an order of the competent judicial authority in the cases prescribed by law."*

Article 37:

"Confidentiality of postal correspondence, telecommunications and radio and other communication shall be guaranteed in accordance with the law."

Article 50:

"The rule of law shall be the basis of governance in the state."

Article 51:

- "1. Punishment shall be personal; no crime and no punishment except by a law;*
- 2. Every defendant shall be presumed innocent until convicted by a final court ruling in a fair trial;*
- 3. The right to conduct litigation and remedies, review, and the defense before the judiciary shall be protected by the law, and the state shall guarantee legal aid to those who are incapable to do so, in accordance with the law;*
- 4. Any provision of the law shall prohibit the immunity of any act or administrative decision from judicial review. "*

Article 52

"Provisions of the laws shall only apply to the date of its commencement and shall not have a retroactive effect, and it may apply otherwise in matters other than criminal."

Article 53:

- "1. No one may be investigated or arrested, except under an order or decision issued by the competent judicial authority, or if he was arrested in the case of being caught in the act, or with intent to bring him to the judicial authorities on charges of committing a felony or misdemeanor;*
- 2. No one may be tortured or treated in a humiliating manner, and the law shall define the punishment for those who do so;*
- 3. Any person who is arrested must be informed of the reasons for his arrest and his rights, and may not be incarcerated in front of the administrative authority except by an order of the competent judicial authority;*
- 4. Every person sentenced by a final ruling, carried out his sentence and the ruling proved wrong shall have the right to ask the state for compensation for the damage he suffered."*

Article 54:

“Any assault on individual freedom, on the inviolability of private life or any other rights and public freedoms guaranteed by the Constitution shall be considered a punishable crime by the law.”

CHAPTER 3

Duties, Responsibilities, and Rights of the Defense Lawyer

3.1 General Information and Importance of A Defense Lawyer In The Criminal Justice System

The criminal justice system is viewed as a three-part system consisting in essence of the judge, the prosecutor, and the defense lawyer. Each part of this system has a specific role. The role of the judge and the court is to render an impartial decision based solely on the facts presented and the laws applicable to the charged offense. In order to decide impartially, the judge and the court must be able to hear arguments from both sides.

The prosecutor's role is to argue the side of the state and the society that seeks to prove the defendant's guilt. The defense lawyer's role is to argue on behalf of the defendant. The defendant has no burden of proof. That is, the defendant does not need to prove his innocence. It is enough simply to point out ways in which the state has not established guilt (e.g., an eyewitness has poor eyesight or an accuser has a motive to lie).

Most criminal justice systems recognize that in a criminal proceeding the state is asserting its ultimate authority over a single civilian: it is the defense lawyer's solemn duty to carefully observe the use and exercise of this powerful authority.

Furthermore, different safeguards are in place to prevent abuse of the state's power and it is the defense lawyer's duty to see that these are observed and used when appropriate: The state bears the highest burden of proof, and must show that a defendant is guilty beyond a reasonable doubt of the crimes he is charged with;

- No burden of proof is placed on the defendant. That is, he need not present any evidence of innocence and he need not testify against himself since every individual has the right against self-incrimination. The state may not comment on the defendant's decision to refuse to answer certain questions and the court may not consider it in evaluating the case;
- Many procedures are in place related to the investigation and the arrest of the defendant to ensure all evidence is accurate and that the correct person is charged with a crime;
- Defendants possess civil rights to ensure they are treated fairly and given an opportunity to argue their case.

These safeguards, however, are useless without someone to guarantee or police them and this is the duty of the defense lawyer:

- The defense lawyer presents all evidence to rebut the prosecutor's arguments and challenges all questionable assertions of facts by the prosecutor to ensure that the high burden of proof is met;

- The defense lawyer challenges procedural errors and may seek to have charges dismissed because of unreliable evidence or testimony;
- The defense lawyer informs the defendant of his rights and defends those rights to ensure they have not been violated.

It is important for a defendant to obtain the help of a defense lawyer as early as possible. There are many actions a defense lawyer can take to protect and aid a defendant in the early stages that may not be possible as the case progresses:

- The defense lawyer can inform the defendant of his rights at the outset (such as the right to remain silent) so that the defendant is aware of them and can benefit from them;
- The defense lawyer can seek the temporary release of the defendant through bail, allowing the defendant to better assist in the preparation of defense; and
- The defense lawyer can negotiate with the prosecutor to have charges reduced or even dropped.

In addition, the defense lawyer is able to counsel the defendant on different strategies and arguments that can be used in the case as well as the benefits and drawbacks for each one:

- The defense lawyer works with the defendant and other witnesses to understand the defendant's version of events and to determine an appropriate defense (e.g., alibi, self-defense, misidentification);
- The defense lawyer can determine which witnesses to call and how they should be examined.

3.2 International Framework: Norms and Standards

3.2.1 The United Nations: Basic Principles on the Role of Lawyers (1990)

This document spells out a number of important basic principles on the duties, responsibilities, and rights of lawyers:

Duties and responsibilities

"12. Lawyers shall at all times maintain the honor and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

- 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.

Guarantees for the functioning of lawyers.

16. 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.
17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.
19. 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.
20. 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.
21. It is the duty of the competent authorities 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.
22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

Freedom of Expression and Association

"23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession."

3.2.2 The International Bar Association: Standards for the Independence of the Legal Profession (1990)

The International Bar Association (IBA), established in 1947, is one of the world's leading international organizations of legal practitioners, bar associations and law societies. In publishing the above the IBA refers to a number of duties and rights of lawyers:

Rights and Duties of Lawyers

- “6. Subject to the established rules, standards and ethics of the profession the lawyer in discharging his or her duties shall at all times act freely, diligently and fearlessly in accordance with the legitimate interest of the client and without any inhibition or pressure from the authorities or the public.*
- 7. The lawyer is not to be identified by the authorities or the public with the client or the client’s cause, however popular or unpopular it may be.*
- 8. No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client’s cause.*
- 9. No court or administrative authority shall refuse to recognize the right of a lawyer qualified in that jurisdiction to appear before it for his client.*
- 10. A lawyer shall have the right to raise an objection for good cause to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.*
- 11. Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his or her professional appearances before a court, tribunal or other legal or administrative authority.*
- 12. The independence of lawyers in dealing with persons deprived of their liberty shall be guaranteed so as to ensure that they have free, fair and confidential legal assistance, including the lawyer’s right of access to such persons. Safeguards shall be built to avoid any possible suggestion of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.*
- 13. Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including:*
 - a. Confidentiality of the lawyer-client relationship, including protection of the lawyer’s files and documents from seizure or inspection and protection from interception of the lawyer’s electronic communications;*
 - b. The right to travel and to consult with their clients freely both within their own country and abroad;*
 - c. The right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work.*
- 14. Lawyers shall not by reason of exercising their profession be denied freedom of belief, expression, association and assembly; and in particular they shall have the right to:*
 - a. Take part in public discussion of matters concerning the law and the administration of justice;*
 - b. Join or form freely local, national and international organizations;*
 - c. Propose and recommend well considered law reforms in the public interest and inform the public about such matters.”*

3.2.3 The International Bar Association: International Principles on Conduct for the Legal Profession (2011)

The IBA published the above in 2011 as a directive on internationally accepted principles on conduct for the legal profession:

- **Independence:** *A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.*
- **Honesty, integrity and fairness:** *A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.*
- **Conflicts of interest:** *A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorization.*
- **Confidentiality/professional secrecy:** *A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.*
- **Clients' interest:** *A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.*
- **Lawyers' undertaking:** *A lawyer shall honor any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.*
- **Clients' freedom:** *A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.*
- **Property of clients and third parties:** *A lawyer shall account promptly and faithfully for and prudently hold any property of clients or third parties that comes into the lawyer's trust, and shall keep it separate from the lawyer's own property.*
- **Competence:** *A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.*
- **Fees:** *Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.*

3.3 Conclusion

Lawyers should be able to perform their professional duties freely and independently, without external pressure or fear of reprisal. In the proper administration of justice, this is particularly important where their work does not suit the government, social elite or any other particular interest.

The legal profession in Syria has often been the victim of unwarranted and arbitrary interference:

- As early as 1981 Bar Associations in Syria had to act "in conformity with the principles and resolutions" of the Ba'ath Party and "in coordination with the

competent office” of the party’s regional structures;⁶⁴

- Bar association meetings were canceled if the same were not ordered and attended by a Ba’ath party representative;
- Practicing law was often restricted and lawyers faced arrest or disbarment: Law offices were also often arbitrarily searched;
- The Syrian government often vetted individual applications of lawyers looking to become members of the Bar.

Although some of the above incidents were changed by legislative developments (Law No 30 of July 2010) Syrian lawyers continue to be threatened or harassed for simply doing their job and seeking due process for their clients. Also, the same 2010 law which introduced certain relaxations also introduced new restrictions: For example, lawyers are required “to abstain from visiting prisoners in places of detention” without written permission from the head of the local bar association.⁶⁵

It is therefore important that lawyers know the parameters of their rights, duties, and responsibilities and use all available tools to claim and enforce them.

⁶⁴ Law No 39 of 1981

⁶⁵ Law No 30 of July 2010

CHAPTER 4

Representing a Client Who Was Subjected to Torture and/or Human Rights Abuse

4.1 General Definition of Torture

Torture is any activity that results in unbearable and sometimes long-term suffering, whether psychological or physical, and which avoids, or at least delays, death. Its after-effects can be physical (such as scars and/or mutilations) or psychological (such as trauma and/or post-traumatic stress). The absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment has become an accepted principle of customary international law.

Common forms of torture include, but are not limited to, the following:

Physical:

- Beating, suspension in painful positions, electric shock, asphyxiation, chemical exposure, exposure to loud noises, bright lights, sexual assault, poor conditions of detention and/or starvation.

Psychological:

- Verbal abuse, threats of death, further torture, harm to self or family/friends, mock execution, forced behaviors (ex. forced sexual intercourse or forced engagement in practices against one's religion) and/or sleep deprivation.

An aggravating fact of torture is that the torturer has complete control over the victim and this control is used to inflict either physical or psychological suffering on the victim.

Possible objectives or motivations for torture include the following:

- Obtaining information from the victim;
- Coercing the victim to make admissions and/or confessions;
- Punishment of real and/or fabricated crimes;
- Terrorizing populations or political organizations by using members of a specific group as an example, leading to fear and passivity in the rest of the population who in turn are afraid of becoming victims themselves;
- Sadistic pleasure;
- Psychological preparation used to convince the victim that he/she is weak with the aim of obtaining complete victim submission; and/or
- Self-justification for the torturer who "is following orders" from a superior.

4.2 International Legal Definition of Torture

Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as follows:

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.⁶⁶

Article 16 of CAT also requires parties to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1” in any territory under their jurisdiction.⁶⁷ The CAT is similar to and follows the structure of other international human rights treaties such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These human rights instruments all confirm the right to be free from torture.

Torture is also defined in Article 7(2)(e) of the Rome Statute as the “intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused”.⁶⁸

It must be borne in mind that torture is defined separately from cruel, inhuman or degrading treatment (CID). Cruel, inhuman or degrading treatment, in general, includes acts that inflict mental or physical suffering, anguish, humiliation, fear or debasement, but that fall short of torture.

Most often the phrase “ill-treatment” is used in a generic sense to cover both torture and other methods of abuse prohibited by international law, including inhuman, cruel, humiliating, and degrading treatment, outrages upon personal dignity and physical or moral coercion. As indicated, the legal difference between torture and other forms of ill-treatment lies in the level of severity of pain or suffering imposed.

In addition, torture requires the existence of a specific purpose behind the act – to obtain information, for example. The various terms used to refer to different forms of ill-treatment or infliction of pain is usually explained as follows:

- **Torture:** The existence of a specific purpose plus intentional infliction of severe suffering or pain;
- **Cruel or inhuman treatment:** No specific purpose but a significant level of suffering or pain inflicted;
- **Outrages upon personal dignity:** No specific purpose yet coupled to a significant level of humiliation or degradation.

⁶⁶ Ohchr.org. (n.d.). OHCHR | Convention against Torture. [online] Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> [Accessed 10 Dec. 2019].

⁶⁷ *Ibid.*

⁶⁸ Legal.un.org. (n.d.). Rome Statute of the International Criminal Court. [online] Available at: <http://legal.un.org/icc/statute/romefra.htm> [Accessed 10 May 2019].

Methods of ill-treatment may be both physical and/or psychological in nature and both methods may have physical and psychological effects.

4.3 Preparing for and Conducting an Interview with a Client Who was Subjected to Torture and/or Human Rights Abuse

4.3.1 Enquiring about Incidents of Torture and Approaching Your Client:

- Approach the client with sensitivity and respect;
- Keep in mind that torture survivors are ordinary people;
- Torture survivors may be reluctant to share information with you or feel guilt or shame as a result of the trauma and humiliation they have endured;
- Consider starting with appropriate “small talk” and more mundane questions to break the ice before transitioning to more difficult topics.

4.3.2 Asking Questions:

- Use both open (“then what happened?”) and closed/specific questions (“did the officer say anything while he was hitting you?”) to elicit the responses you need;
- Ask your client permission before moving onto questions directly related to the possible torture;
- Remember to inquire about both physical and/or psychological torture.

4.3.3 Interaction with the Client Guidelines:

- Stay calm;
- Avoid making sounds or facial expressions;
- Listen carefully and avoid distractions;
- While you should allow your client time to share their story, through a well-planned list of open and closed questions, make sure that you lead the interview to get the information you need for your client’s legal matter;
- Refrain from physical comforting;
- Be aware of the client’s as well as your own needs and boundaries;
- If your client is in custody, refrain from acts that would put your client’s safety at risk;
- Be methodological and keep in mind the goals and purpose of the interview.

4.3.4 Important Practical Tips:

- When more comfortable, explain to the client the importance of speaking up and reporting torture; it can be investigated and help bring about change;
- Meet with your client at the earliest point of the criminal justice process – if torture or abuse did occur, it is easier to identify earlier rather than later;
- Physical evidence is often the only proof to substantiate a claim of torture; if the client alleges that he/she had been tortured, insist that a medical examination be conducted;
- Remember that counsel may often be denied access to the client while injuries heal so as to conceal and eliminate evidence thereof;
- If you are illegally denied access, contact the relevant court officials and insist on the client’s right to meet with counsel at the earliest stage possible;

- If access to the client is further denied approach the court and file a ‘denial of access’ motion with the court as this may present evidence of torture.

4.4 Reactions commonly Observed in Victims of Torture

- Victims remain silent – this is often a natural reaction developed by the victim to deal with the trauma they have endured; OR
- Victims are extremely talkative – this is often a reaction developed by the victim who is outraged by what they have endured and they feel the need to ‘purge’ this outrage.
- Keep in mind that a victim may also show signs of both reactions and counsel needs to adapt his/her strategy on questioning and approach accordingly.

4.4.1 When faced with a client who alleges torture and/or who appears to have been mistreated, who chooses to remain silent:

- Do not lose sight of the fact that he/she requires help to talk about his/her experience;
- Resist the temptation to speak on your client’s behalf;
- Ask the client to tell the story of arrest from the beginning during which you ask for more particular details;
- Remember that asking your client for small details often results in him/her answering the bigger question of whether or not he/she was mistreated or tortured;
- Never finish or complete the client’s sentences;
- Pay attention to the details of the victim’s account of what happened to them – the victim’s understanding of certain acts may be different from what is legally prescribed;
- Once the client has begun his/her narrative of events, do not interrupt – try to wait until it’s completed before asking to follow up questions;
- Insofar as possible, allow the client to talk about the physical abuse before proceeding to the psychological effects of the abuse;
- Together with your client, create an inventory of the visible marks that resulted from the abuse, any witnesses, the perpetrator(s), their names (or nicknames) and/or their descriptions.

4.4.2 When Faced with a Client who Alleges Torture or/and who Appears to Have Been Mistreated, who is Outraged at his/her Experience:

- Understand the client’s need to vent – allow him/her an initial “purging” phase during the interview where the client can freely express his/her emotions;
- Use this time to identify possible important elements that can be used to direct the conversation later;
- Expect and make provisions for the possibility of exaggeration;
- Explain to the client how certain details may aid or inform the creation of a defense;
- If possible, try to have the talkative client speak of the mental and psychological torture first;
- If the client’s narrative or flow of the story is interrupted, change the subject for

a while – for example, talk about their family. After this, one can return to the details of the abuse or violence;

- Try and review the physical injuries only near the end of the interview;
- Together with the client draw up an inventory of any witnesses, the perpetrator(s), their names (or nicknames) and/or their descriptions to organize the narrative of what transpired.

4.5 Practical Steps to Approach Either the Prosecutor or Judge if Access to the Client Who Has Been Subjected to Torture and/or Abuse Is Denied

4.5.1 Approaching the Judge

As the ultimate arbiters of justice, judges play a special role in the protection of the rights of citizens;

- International standards create an ethical duty on the part of judges to ensure that the rights of individuals are protected;
- **Principle 6 of the United Nations Basic Principles on the Independence of the Judiciary** states that “the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected”;⁶⁹
- If access to the client is persistently denied approach the court and file a “denial of access” motion with the court.

4.5.2 Approaching the Prosecutor

Similarly, prosecutors have an ethical duty to investigate and prosecute a crime of torture committed by public officials;

- **Article 15 of the United Nations Guidelines on the Role of Prosecutors** states: “Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offenses”;⁷⁰
- If access to the client is persistently denied approach the prosecutor and indicate to him/her that if the situation persists a “denial of access” motion will be filed with the court.

4.6 Information Counsel Should Have at the End of an Interview With a Client Who Was Subjected to Torture and/or Human Rights Abuse

- The time and place of the alleged events;
- The details of the persons present during the event(s) – whether or not they participated in any violence;
- The exact role of each person and especially the nature of the violence inflicted;

69 Hrlibrary.umn.edu. ‘Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders’, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985), available at: <http://hrlibrary.umn.edu/instree/i5b-pij.htm> [accessed 10 December 2018].

70 Ohchr.org. (n.d.). OHCHR | Guidelines on the Role of Prosecutors. [online] Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx> [Accessed 8 Dec. 2018].

- Details of any pressures or threats constituting mental harm and/or psychological torture;
- Details of all physical marks that the client has shown you; and
- Details of any witnesses who can testify as to the events.

4.7 The Istanbul Protocol (2004)

The Protocol provides certain guidelines regarding the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment. It establishes international best-practice principles and guidelines for the assessment of individuals who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or other investigative bodies.⁷¹

The Protocol is clear that for effective investigation of allegations of torture, an investigator should attempt to obtain the following information through the testimony of the alleged victim:

- i. *The circumstances leading up to the torture, including arrest or abduction and detention;*
- ii. *Approximate dates and times of the torture, including when the last instance of torture occurred;*

*** NOTE: Establishing this information may not be easy, as there may be several places and perpetrators (or groups of perpetrators) involved. Separate stories may have to be recorded about the different places. Expect chronologies to be inaccurate and sometimes even confusing; notions of time are often hard to focus on for someone who has been tortured. Separate stories about different places may be useful when trying to get a global picture of the situation. Survivors will often not know exactly where they were taken, having been blindfolded or semi-conscious. By putting together converging testimonies, it may be possible to “map out” specific places, methods, and even perpetrators.**

- iii. *A detailed description of the persons involved in the arrest, detention and torture, including whether he or she knew any of them prior to the events relating to the alleged torture, clothing, rank, scars, birthmarks, tattoos, height, weight (the person may be able to describe the torturer in relation to his or her own size), anything unusual about the perpetrator’s anatomy, language and accent and whether the perpetrators were intoxicated at any time;*
- iv. *Contents of what the person was told or asked: this may provide relevant information when trying to identify secret or unacknowledged places of detention;*
- v. *A description of the usual routine in the place of detention and the pattern of ill-treatment;*
- vi. *A description of the facts of the torture, including the methods of torture used.*⁷²

71 Office of the United Nations High Commissioner for Human Rights Geneva. ‘2004 Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professional Training’, Series No. 8/Rev.1. available at: <https://www.ohchr.org/Documents/Publications/training8rev1en.pdf> [accessed 10 December 2018]

72 Istanbul Protocol; general Considerations for Interviews; Paragraphs 120 - 160

***NOTE: This is understandably often difficult, and investigators should not expect to obtain the full story during one interview. It is important to obtain precise information, but questions related to intimate humiliation and assault will be traumatic, often extremely so.**

vii. Whether the individual was sexually assaulted. Most people will tend to answer a question on sexual assault as meaning actual rape or sodomy.

***NOTE: Investigators should be sensitive to the fact that verbal assaults, disrobing, groping, lewd or humiliating acts or blows or electric shocks to the genitals are often not taken by the victim as constituting sexual assault. These acts all violate the individual's intimacy and should be considered as being part and parcel of sexual assault. Often victims will say nothing about or even deny any sexual assault. It is often only on the second or even third visit if the contact made has been empathic and sensitive to the person's culture and personality, that more of the story will come out.**

viii. Physical injuries sustained in the course of the torture;

ix. A description of weapons or other physical objects used; and

x. The identity of witnesses to the events involving torture.⁷³

***NOTE: The investigator must use care in protecting the safety of witnesses and should consider encrypting the identities of witnesses or keeping these names separate from the substantive interview notes.**

4.8 Gender Issues

The Protocol addresses the issue of gender as follows:

“Ideally, an investigation team should contain specialists of both genders, permitting the person who says that they have been tortured to choose the gender of the investigator and, where necessary, the interpreter. This is particularly important when a woman has been detained in a situation where rape is known to happen, even if she has not, so far, complained of it. Even if no sexual assault takes place, most torture has sexual aspects.

The retraumatization can often be worse if she feels she has to describe what happened to a person who is physically similar to her torturers, who will inevitably have been mostly or entirely men. In some cultures, it would be impossible for a male investigator to question a female victim, and this must be respected. However, in most cultures, if there is only a male physician available, many women would prefer to talk to him rather than a female of another profession in order to gain the medical information and advice that she wants. In such a case, it is essential that the interpreter, if used, be female. Some interviewees may also prefer that the interpreter be from outside their immediate locality, both because of the danger of being reminded of their torture and because of the perceived threat to their confidentiality. If no interpreter is necessary, then a female member of the investigating team should be present as a chaperone throughout at least the physical examination and, if the patient wishes, throughout the entire interview.

⁷³ Ibid.

When the victim is male and has been sexually abused, the situation is more complex because he too will have been sexually abused mostly, or entirely, by men. Some men would, therefore, prefer to describe their experiences to women because their fear of other men is so great, while others would not want to discuss such personal matters in front of a woman.”⁷⁴

4.9 Practical Guidelines From Lawyers in the Field Who Have Interviewed Torture Victims:

- Try to tape-record a detailed statement from the victim and have it transcribed;
- The statement of the victim should be based on answers given in response to your non-leading questions;
- Non-leading questions do not make assumptions or conclusions and allow the victim to offer the most complete and unbiased testimony;
- Examples of non-leading questions are “**What happened to you, and where**” rather than “**Were you tortured in prison**” (the latter question assumes that what happened to the witness was torture and limits the location of the actions to a prison);
- Avoid asking questions with pre-constructed lists, as this can force the individual into giving inaccurate answers if what actually happened does not exactly match one of the options;
- Allow the person to tell his or her own story, but assist by asking questions that increase in specificity;
- Encourage the person to use all his/her senses in describing what has happened to him or her;
- Ask what he or she saw, smelled, heard and felt. This is important, for instance, in situations where the person may have been blindfolded or experienced the assault in the dark.

4.10 Sample Questions for Individuals Who Allege Torture and/or Human Rights Abuse

While this is not an exhaustive list, the following questions may assist you in investigating and confirming whether your client was tortured or subjected to other forms of degrading treatment or punishment. Please keep in mind that answering these questions will be extraordinarily difficult for your client to answer. Be respectful, empathetic, and calming:

- When and where were you arrested?
- How many officers were present when you were arrested?
- Who seemed to be in charge?
- Were they wearing uniforms – if yes, what type?
- Did anyone, in particular, stand out?
- What did the people who arrested you say?
- Did they tell you why you were being arrested?
- Did they tell you about your rights?
- Have you been moved to any other location since you were arrested?

74 Istanbul Protocol; Gender Issues; Paragraphs 154 – 155

- Has anyone been able to visit you?
- Some other people who have been detained in this prison have been beaten up or tortured, did anything like that happen to you?
- Did the police (or other entity) ever beat you up or torture you on the street, in your home, or some other place?
- How many times has it happened? When did it happen and how long did it last?
- Where on your body did they beat or torture you? Can you please show me each part of your body where you were beaten or tortured?
- How many times did they hit you? If more than one person was involved, how many times did each one hit you?
- Did they say anything to you while they beat or tortured you? Were you threatened? Did they ask you to confess?
- Do you remember what you said to them?
- How many people did you see?
- What were they doing?
- Have you seen a judge or any other lawyer?
- Did anyone else see or hear you get beaten up or tortured?
- Have the officers done anything else to you that seemed odd or caused you discomfort?
- Is there anything else you would like to tell me?

CHAPTER 5

Criminal Procedure

The Syrian criminal procedure can be found in the Criminal Procedure Code, issued by the legislative decree no. 112 on March 13th, 1950. It covers some major aspects of the criminal procedure including criminal investigations, trial proceedings and procedure for the appeals. Some areas, such as sentencing, are covered by the criminal code or are established by court practice and precedents if no specific law exists on a particular matter.

5.1 Pre-Trial Matters

5.1.1 Jurisdiction and venue

The court upon which falls the jurisdiction to hear a case depends on the crime. In any case, an inquisitorial magistrate and the referral judge, or the investigative judge, decide to which court a case should be referred to. Misdemeanors and infractions are generally referred to either the Conciliation Court or the Court of First Instance, and serious felonies are tried before the Court of Assize. If there are concurrent crimes, some of which are felonies and the others constitute misdemeanors or infractions, all cases should be tried before the criminal court as one lawsuit.

Article 134 CrPC: *“If the investigation judge finds out that the action constitutes a misdemeanor, he sends the suspect to a reconciliation court or a first instant court according to whose jurisdiction the action falls under. If the defendant was detained and the crime attributed to him merited imprisonment the defendant should remain detained.”*

Article 149 CrPC:

“[...] 2. If it appears to the referral judge that the act is a violation or a misdemeanor, he decides to refer the suspect to the competent magistrate’s court or the court of first instance. The referral judge releases the suspect if the act is a violation or a misdemeanor not punishable with imprisonment.
3. If the act is a felony as per its legal description and there is enough evidence to press charges, the judge refers the suspect to the criminal court.”

Art. 150 CrPC: *“The referral judge issues a single verdict about the concurrent crimes discovered during the course of investigation from the documents presented to him. If some of crimes are felonies and the others are misdemeanors, the judge refers the entire lawsuit to the criminal court.”*

Art. 159 CrPC:

”1. If it appears from the stated investigations that it is necessary to refer the defendant to the criminal court, the referral judge applies the provisions of Articles 149, 152 and 153.
2. If the judge sees it is necessary to refer the defendant to a magistrate’s court or a court

of first instance, he applies the provisions of Article 149 and keeps the defendant in detention if the crime is a misdemeanor punishable with imprisonment.”

Magistrate or Conciliation courts have the jurisdiction to hear and decide on the following:

Art. 165 CrPC: *“The magistrate’s courts issues rulings for lawsuits within their jurisdiction as follows:*

- a. of final instance if the court rules a fine not exceeding one hundred Syrian pounds. However, the public prosecutor may appeal these rulings if there is a contradiction with the law, misapplication or misinterpretation of it. If the lawsuit of personal rights is filed with public interest litigation or depending on it, the parties of both lawsuits, each within their jurisdiction, appeal the ruling issued about the lawsuits. The court of appeal issues its rulings as final.*
- b. of first instance and can be appealed not cassated if it rules of imprisonment for ten days maximum and a fine that does not exceed one hundred Syrian pounds or one of these punishments.*
- c. of first instance and can be appealed, and the ruling of the court of appeal can be cassated, if it rules of a punishment more severe than the one stated in the previous paragraph.”*

Art. 166 CrPC: *“The magistrate’s court issues rulings related to:*

- a. All the violations.*
- b. The misdemeanors stated in the criminal code and other laws when these misdemeanors are punishable by house arrest, a fine or imprisonment for no longer than one year or all of them.*
- c. The following crimes in the criminal code:*
 - 1. Hiding and selling stolen items or item taken by other crimes stated in Article 220.*
 - 2. The misdemeanor stipulated in the last paragraph of Article 413.*
 - 3. Gambling stipulated in Article 619.*
 - 4. Theft of crops stipulated in Article 634.*
 - 5. Ordinary theft stipulated in Article 634.*
 - 6. Cutting and damaging trees stipulated in Articles 726 and 727.*
 - 7. The poisoning of animals stipulated in Article 728.*
 - 8. Perjury and the false oath which occur at a magistrate’s court. “*

The court of first instance hear and decide the following:

Art. 169 CrPC: *“A court of first instance shall look into all the misdemeanors for which the law does not assign other courts, and the rulings they issue are subject to the principles stated in Article 165 of this law.”*

Art. 170 CrPC: *“If a misdemeanor or violation occurs during a session of the court, the Chief justice files an incidents reports about it, listens to the defendant and witnesses and immediately issues verdicts of the penalties necessary for this crime. This verdict is of final instance.”*

Art.171 CrPC: *“A court of first instance shall look into lawsuits within their jurisdiction which are filed to it or and referred to under the provisions of this law.”*

The jurisdiction of the criminal court is outlined by the Art. 172 of the criminal procedure code and stipulates the following:

Art. 172 CrPC: *“The criminal court shall look into crimes which fall into the category of a felony. It also looks into crimes which are considered misdemeanors concurrent with felonies referred to it based on indictment of the referral judge.”*

5.1.2 Indictment

Syrian criminal system follows an inquisitorial procedure, whereby a pretrial hearing is being held before a referral judge to decide if a suspect should be formally accused and issued an indictment. The primary purpose of the pretrial hearing is to determine whether there is enough evidence to formally charge a suspect and move to a trial.

Art. 148 CrPC: *“The referral judge audits the incidents of the case to see whether it is a felony and whether the evidence is enough to press charges against the suspect.”*

Art. 149 CrPC: *“1. If it appears to the referral judge that the suspect act is not a crime and the evidence is not enough to press charges against him, the judge prevents the trial and releases the suspect immediately unless he/she is apprehended for another lawsuit. [...]”*

Art. 152 CrPC:

- “1. When the referral judge decides to press charges against a suspect, he gives orders to arrest the suspect.*
- 2. the arrest warrant includes the defendant’s name and surname, his age, place of birth, home town and profession. It also includes a summary of the act ascribed to the defendant and the legal description of the act along with the legal text which applies to it.”*

If a suspect is accused of a felony, the referral judge examines the evidence against the accused, listens to witness testimonies, the complainants and writes an incident report. If he decides to indict the suspect in question, the latter is brought to the criminal court detention facility within 24 hours and is given a copy of the list of witnesses against him. An arrest order is also included within the indictment.

Art. 153 CrPC: *“The arrest order is listed in the indictment and it includes the decision to transfer the defendant to the apprehension facility which is at the criminal court. “*

Art. 157 CrPC: *“The referral judge listens to the statements of witnesses, interrogates the complainant and writes an incident report about the evidence and clues he has got. Then, he issues a subpoena or a detention warrant as appropriate.”*

Art. 158 CrPC: *“The public prosecutor prepares his report within five days starting from the receipt of documents from the referral judge.”*

Art. 160 CrPC: *“The defendant shall be informed of the verdict of the referral judge to refer him to the criminal court and the list of witnesses. The defendant also gets a copy of the list.”*

Art. 161 CrPC: *“Within 24 hours starting from informing him of the indictment, the defendant shall be sent to the detention facility at the criminal court along with the list of witnesses.”*

The documents and items related to the lawsuit shall be sent to the public prosecution within the aforementioned period.”

5.1.3 Arrest

In Syria, an individual is usually arrested when a charge to be faced could warrant imprisonment. An arrest can be performed in the following ways:

1. With an arrest warrant issued by a referral judge or an inquisitorial magistrate (Art. 106, CrPC);
2. By a subpoena, issued by the public prosecutor or a referral judge, in cases of *in flagrante delicto*⁷⁵, or when there is probable cause, and the suspect is not present and hence an immediate arrest is not possible (Art. 37 CrPC);
3. Without a warrant or subpoena, in cases of *in flagrante delicto*, or when there is probable cause, and a suspect is present and an immediate arrest is possible. The arrest is usually ordered by the public prosecutor (Art. 112 CrPC).

Whichever document is issued for the arrest, it needs to be signed and sealed by the judge (Art. 107 CrPC). The defendant needs to be notified of the arrest and given a copy of the arrest document (Art. 109 CrPC). Subpoenas, arrest warrants, and detention warrants have their power within all territories of Syria (Art. 110 CrPC).

Once arrested, the defendant is usually detained until the judge issues a verdict and a sentence, unless released on bail.

It is important to note that the 2012 Syrian Constitution clearly outlines that no one can be subject to arbitrary arrest or detention.

⁷⁵ The criminal procedure code defines in flagrante delicto as:

Art. 28 CrPC: *“1. Flagrante delicto is an offense witnessed as it is committed or upon completion thereof.*

2. It also includes crimes whose perpetrators are caught based on the shouts of people or arrested with items or weapons inferred from which that the arrested person is the perpetrator, in twenty-four hours of the offense.”

Art. 53 2012 Constitution:

- “1. No one may be investigated or arrested, except under an order or decision issued by the competent judicial authority, or if he was arrested in the case of being caught in the act, or with intent to bring him to the judicial authorities on charges of committing a felony or misdemeanor; [...]*
- 2. Any person who is arrested must be informed of the reasons for his arrest and his rights, and may not be incarcerated in front of the administrative authority except by an order of the competent judicial authority;[...].”*

5.1.3.1 Arrest warrants

An arrest warrant may be issued by the inquisitorial magistrate to a defendant in cases where the crime committed is punishable with imprisonment or a more severe sentence, as well as if the defendant tries to escape from law enforcement (Art. 106(1) CrPC). Similarly, an arrest warrant may be revoked by the inquisitorial magistrate with the consent of the prosecutor (Art. 106(2) CrPC).

Art. 106 CrPC:

- “1. After interrogating the defendant or in case he absconds, the inquisitorial magistrate may issue an arrest warrant if the offense he is accused of is punishable by prison or severer punishment, and he needs to take the prosecutor’s opinion in this regard.*
- 2. During real actions and no matter what crime is committed, the inquisitorial magistrate may recover the arrest warrant by the consent of the prosecutor. The defendant is to choose a home in the center of the inquisitorial magistrate so that he can be notified of all the actions related to the inquisitorial magistrate and verdict enforcement. The inquisitorial magistrate’s decision to recover the arrest warrant is not revocable by any means.”*

An arrest warrant states defendants personal information, physical traits and states the crime and the corresponding article, under which the defendant is being accused (Art. 107-108 CrPC). The defendant is notified of the arrest warrant and is required to be given a copy (Art. 108 CrPC).

Art. 107 CrPC: *“The subpoena, arrest warrant, and detention warrant are to be signed by the judge who issued them and sealed by his department’s seal. They must mention the name of the defendant, surname, and his distinctive traits as much as possible.”*

Art. 108 CrPC: *“The arrest warrant is to state the crime which necessitated its issuance and the legal article that punishes this crime.”*

Art. 109 CrPC: *“The defendant is to be notified of the subpoena, arrest warrant, and detention warrant and given a copy of them.”*

The defendant then awaits prosecution at the center of the inquisitorial magistrate where the arrest warrant was issued. The defendant is also moved to the detention facility following arrest.

Art. 115 CrPC: *“The person arrested by an arrest warrant is moved without delay to the prosecution in the center of the inquisitorial magistrate who issued the arrest warrant. The employee who wrote the warrant is given a receipt indicating that the defendant has been notified, and the latter is moved to the detention cell, and the magistrate is to be notified.”*

Art. 130 CrPC:

- “1. The accused is referred to the criminal court, being detained according to an arrest warrant.*
- 2. This notification is not implemented against those who were not decided to be detained during the investigation or those who were released during the investigation or trial. However, they have to surrender themselves to the court one day before the trial session and they remain detained until a sentence is issued.”*

5.1.3.2 Arrest with a Subpoena

As mentioned above, the defendant can be arrested with a subpoena issued by the public prosecutor if he/she decides there is probable cause for an arrest.

Art. 37 CrPC:

- “1. the public prosecutor, in the case of flagrante delicto punishable by a criminal penalty, can order the arrest of any present person with strong evidence indicating that he is the perpetrator of the offense.*
- 2. If the person is not present, the public prosecutor issues an order to bring him in, and the note containing this order is called a subpoena.”*

A subpoena for arrest can also be issued by a referral judge once determined there is probable cause for an arrest.

Art. 157 CrPC: *“The referral judge listens to the statements of witnesses, interrogates the complainant and writes an incident report about the evidence and clues he has got. Then, he issues a subpoena or a detention warrant as appropriate.”*

5.1.3.3 Arrest without a Warrant

An arrest warrant is not necessary when a person is caught committing a crime, or in other words, is in *flagrante delicto*.

Art. 112 CrPC: *“If a person is caught in flagrante delicto or in an act considered in flagrante delicto committing a misdemeanor, arresting him shall not require an arrest warrant. Any government employee or any person from the public shall arrest him and bring him before the prosecutor.”*

5.1.4 Pre-trial investigation

5.1.4.1 Who investigates?

A pre-trial investigation is carried out by the judicial police that collects evidence and investigates crimes. The functions of the judicial police are usually carried out by the

prosecutor, his delegates, assistants as well as investigating judges. In districts where the aforementioned actors are not available, this function can be carried out by a lower judicial officer, such as the justice of peace. In areas where there are no investigating judges, a magistrate can fulfill the duties of the judicial police.

Art. 6 CrPC: *“The judicial police officers are instructed to investigate crimes, collect evidence, arrest the perpetrators and refer them to the courts that are entrusted with punishing them [perpetrators].”*

Art. 7 CrPC: *“The prosecutor, his delegates, assistants and investigation judges carry out the judicial police functions. Justice of peace also carry out [the functions of the judicial police] in centers where there is no prosecution. All of that [has proceeded] is within the rules set forth in the law.”*

Art. 167 CrPC: *“1. At centers where there are no investigation judges, magistrates perform the task of judicial police at their areas. With this authority, they can issue summons, subpoenas and detention warrants. [...]”*

The prosecutor’s delegates can include the following actors:

Art. 8 CrPC:

“1. The prosecutor helps in conducting the judicial police duties:

- *Governors*
- *District governors*
- *Subdistrict governors*
- *Police general commander*
- *Public security commander*
- *Judicial department commander*
- *Judicial evidence department commander.*
- *Police captains and NCOs who are formally delegated with managing stations and branches.*
- *Department commanders in public security.*
- *Public security supervisors who are formally assigned to managing stations or branches.*
- *Gendarmerie officers of all ranks.*
- *Gendarmerie station commanders of all ranks.*
- *Villages Mukhtars (Mayors) and [local] councils’ members.*
- *Marine and aerial vehicles [department] commanders.*
- *And all staff members who were authorized with the powers of the judicial police as per special laws.*

2. Each of the mentioned staff conducts the duties of the judicial police within the powers given to him in this law and the laws of their own [judicial police].”

An inquisitorial magistrate may also authorize justices of peace or other inquisitorial magistrates to conduct an investigation on his behalf. He may also authorize the judicial police to carry out any investigation that is needed with an exception of interrogating the defendant.

Art. 101 CrPC:

- “1. The inquisitorial magistrate may authorize one of the justices of the peace in his area or another inquisitorial magistrate to conduct one of the investigation actions on his behalf in the jurisdictions of the authorized judge. He may authorize one of the Judicial Police staff members to carry out any investigatory action except for interrogating the defendant.*
- 2. The authorized justice of the peace or the Judicial Police staff member undertakes the functions of the inquisitorial magistrate in the matters indicated in the authorization.”*

Furthermore, magistrates may perform the tasks of the judicial police.

Art. 167 CrPC:

- “1. At centers where there are no investigation judges, magistrates perform the task of judicial police at their areas. With this authority, they can issue summons, subpoenas and detention warrants.*
- 2. They conduct all the investigation of lawsuits delegated to them in writing by the investigation judge. Then, they have the authority granted to the investigation judge by law, and they have the right to release the detainees who have the right to be released or release on bail without getting back to the public prosecution.*
[...]
- 5. After the completion of the investigations, the magistrate refers the documents to the competent investigation judge.”*

5.1.4.2 Investigative tools

In general, anything that is deemed useful to uncovering the truth can be collected and used as evidence during the trial.

Art. 32 CrPC:

- “1. The public prosecutor confiscates weapons and all that appears to have been used in the crime or prepared for that purpose. He also confiscates all the evidence he sees and other things that help reveal the truth.*
- 2. The public prosecutor interrogates the defendant about the confiscated items. Then, he writes a report to be signed by the defendant and if he refuses to sign it, his refusal will be declared in the report.”*

Art. 94 CrPC:

- “1. The inquisitorial magistrate may search the defendant and others if there are strong indications that he is concealing matters conducive to discovering the truth.*
- 2. If the person to be searched is a female, the search must be conducted by a female assigned for this task.”*

Art. 96 CrPC: *“The inquisitorial magistrate may seize all letters, messages, journals, publications, and boxes at the post office and all the telexes at the telex offices. Also, he may keep tabs on the telephone calls if this can contribute to reveal the truth.”*

Concerned people have the right to be present unless it would impede the investigation. If the latter is the case, the inquisitorial magistrate who carries out such an investigation has to nevertheless reveal the results after the investigation has been completed and the necessary evidence obtained.

Art. 70 CrPC:

- “1. The defendant, the compensator, the complainant, and their representatives may attend all the investigation actions except for hearing of witnesses.*
- 2. The persons mentioned in the first paragraph may not see the investigations conducted in their absence if they do not attend the investigations after receiving invitations according to the norms.*
- 3. The inquisitorial magistrate may decide to carry out an investigation without the mentioned persons in case of urgency, or if he sees a necessity to uncover the truth. His decision in this regard is irrevocable, but upon completion of the investigation in this way, he must show it to the concerned people.”*

In flagrante delicto investigations:

Art. 46 CrPC: *“The Judicial Police officers mentioned in Article 44 are required in the case of flagrante delicto or as soon as requested by the owner of the house to write an incident report and listen to the testimonies of the witnesses. Also, they are required to carry out investigations and houses search in addition to other actions which are in such conditions of the functions of the prosecutor. All the above actions must be conducted in accordance with the formulas and rules stated in the special chapter on the functions of the prosecutor.”*

House search can be done by the prosecutor without prior approval from the judge if, based on the nature of the crime, the prosecutor draws a reasonable assumption that the defendant's possessions could be useful in uncovering the truth. The house search needs to be carried out in the presence of the defendant, or his agent, or his two family members, or two witnesses summoned by the prosecutor. The prosecutor can confiscate any items he deems important to uncovering the truth. The prosecutor has to write a report on the items he has confiscated and the defendant, or his representative need to sign it.

Art. 33 CrPC: *“If it appears, from the nature of the crime, that the papers and items possessed by the defendant could be used to infer that he committed the crime, the public prosecutor can move immediately to the defendant's residence to search for things that he considers to be leading to revealing the truth.”*

Art. 34 CrPC:

- “1. If documents and items proving the accusation are found in the defendant’s house, the prosecutor has to confiscate them and write a report.*
- 2. Only the prosecutor and persons appointed according to articles 36 and 97 may read the documents.”*

Art. 35 CrPC:

- “1. He keeps the confiscated items as they were. They are packed or put in a container if that is required due to their nature. In both cases, they are officially sealed.*
- 2. If there are banknotes that are not required to be kept to reveal the truth or keep the rights of both parties, or others’, the prosecutor may allow them to be deposited in the treasury.”*

Art. 36 CrPC:

- “1. Search interactions in the above articles are carried out in the presence of the defendant whether he is detained or not.*
- 2. If he refuses to be present or if it was not possible for him to do so, the interaction is carried out in the presence of his agent or two members of his family; otherwise, the interaction should be carried out in the presence of two witnesses summoned by the public prosecutor.*
- 3. Seized items are presented to the defendant or his representative for approval and signature, and if he refrains, it should be indicated in the incident report.”*

Art. 89 CrPC:

- “1. No one may enter or search a house unless the owner is suspected of being a crime perpetrator, an accomplice, implicated in the crime, owns things related to the crime or hiding a person wanted by the court.*
- 2. If the judge enters a house without the above conditions, his act is considered arbitrary and will make way for a complaint of the judges.”*

Art. 90 CrPC: *“Taking into account the preceding provisions, the inquisitorial magistrate may investigate in all places which are likely to contain exhibits whose discovery would help to uncover the truth.”*

Art. 91 CrPC:

- “1. The search is to take place in the presence of the defendant if he is arrested.*
- 2. If he refuses to attend, cannot attend or arrested outside the area of search, the search is to take place in the presence of his representative in the case of felony.*
- 3. If he does not have a representative and it was not possible to summon him, the inquisitorial magistrate shall appoint a representative for the defendant to attend this task.”*

When witnesses, the defendant, complainants or experts are summoned to give testimony before the inquisitorial magistrate as part of an investigation, the following rules are followed:

Art. 78 CrPC:

- “1. The statement of the witness is to be written in minutes including the questions and his answers to them.*
- 2. The statement of the witness is recited before him to affirm it and sign each page or use his fingerprint if he is illiterate. If he refuses or did not manage to do so, this should be indicated in the minutes.*
- 3. The number of pages of the witness statement is to be mentioned at the end of the minutes, and the inquisitorial magistrate and his stenographer shall sign each page.*
- 4. The same rules are to be followed concerning the complainant, the defendant, and the experts’ statements.*
- 5. At the end of the investigation, a table of the listeners’ names, the date of hearing, and the number of pages of their statements minutes is to be organized.”*

Decisions rendered by an investigative judge can be appealed by the prosecutor, the complainant and the defendant in accordance with the following provisions:

Art. 139 CrPC

- “1. The public prosecutor in all cases may appeal the verdicts of the investigation judge.*
- 2. The complainant may appeal the decisions made in accordance with articles 118, 132, 133, and 134; and the decisions regarding lack of jurisdiction, and all decisions that can affect his personal rights.*
- 3. The defendant may only appeal decisions made in accordance with Article 118 and decisions based on lack of jurisdiction.”*

5.1.5 Detention

A person is considered detained when he has been arrested and temporarily deprived of his liberty. However, if a person is not questioned 24 hours after being detained and is not sent to the prosecutor, his detention is considered arbitrary and those responsible for arbitrary detention are subject to punishment as outlined in Art. 358 of the Criminal Code.

Art. 104 CrPC:

- “1. The inquisitorial magistrate shall immediately investigate with a defendant who is summoned by a subpoena. As for the defendant who is brought by an arrest warrant, the inquisitorial judge shall interrogate him in 24 hours from putting him in the detention cell.*
- 2. Once the 24 hours ended, the detention cell commander, on his own, takes the defendant to the prosecutor who asks the inquisitorial magistrate to interrogate the defendant. If he refuses, was absent, or a legitimate reason prevented him, the prosecutor requests another inquisitorial magistrate, or the head of the first instance court, or the justice of the peace to interrogate him. If it is impossible to interrogate the defendant, the prosecutor gives orders to release him immediately.”*

Art. 105 CrPC: *“If the defendant is detained according to an arrest warrant and remained in the detention cell more than 24 hours without interrogation and is not sent to the prosecutor in accordance with the content of the preceding article, his detention is to be*

considered arbitrary. The concerned officer is to be sued for the crime of constraining personal freedom stated in Article 358 of the criminal code.”

Art. 130 CrPC:

- “1. The accused is referred to the criminal court, being detained according to an arrest warrant.*
- 2. This notification is not implemented against those who were not decided to be detained during the investigation or those who were released during the investigation or trial. However, they have to surrender themselves to the court one day before the trial session, and they remain detained until a sentence is issued. [...]”*

The investigating judge can release the detained if he rules that the suspect committed a criminal infraction or a misdemeanor that does not warrant imprisonment.

Art. 133 CrPC: *“If the investigation judge finds out the action constitutes a breach, he refers the defendant to a reconciliation court and orders him to be released if had been detained.”*

Art. 134 CrPC: *“If the investigation judge finds out that the action constitutes a misdemeanor, he sends the suspect to a reconciliation court or a first instance court according to whose jurisdiction the action falls under. If the defendant was detained and the crime attributed to him merited imprisonment the defendant should remain detained.”*

Art. 135 CrPC: *“The suspect is released if the misdemeanor does not merit imprisonment. However, he needs to be housed within the court premises if he resides somewhere else.”*

5.1.6 Interrogation

A defendant is interrogated in the presence of a lawyer unless he refuses to have one appointed within the 24 hours after appearing before the inquisitorial magistrate for interrogation. A defendant has the right to remain silent if his lawyer is not present. However, if there is fear of losing evidence, it is permitted to interrogate an individual before summoning his lawyer.

Art. 69 CrPC:

- “1. When the defendant appears before the inquisitorial magistrate, the magistrate shall make sure of his identity and brief him with the actions attributed to him. He shall ask him for answers to these actions notifying him that he has the right to remain silent unless in the presence of a lawyer. This notification is to be written down in the minutes of the investigation, and if the defendant refuses to appoint a lawyer within 24 hours, the investigation is to be resumed without a lawyer.*
- 2. If the defendant could not appoint a lawyer in criminal cases and asked the inquisitorial magistrate to appoint him a lawyer, the magistrate shall request the president of the lawyers’ syndicate to appoint him a lawyer if there is a syndicate council in his center. Otherwise, the inquisitorial magistrate shall appoint him a lawyer if there is one in his center.*

3. *In case there is a need to take rapid action because of the fear of loss of evidence, it is possible to interrogate the defendant before inviting his lawyer.”*

Art. 104 CrPC:

- “1. *The inquisitorial magistrate shall immediately investigate with a defendant who is summoned by a subpoena. As for the defendant who is brought by an arrest warrant, the inquisitorial judge shall interrogate him in 24 hours from putting him in the detention cell.*
2. *Once the 24 hours ended, the detention cell commander, on his own, takes the defendant to the prosecutor who asks the inquisitorial magistrate to interrogate the defendant. If he refuses, was absent, or a legitimate reason prevented him, the prosecutor requests another inquisitorial magistrate or the head of the first instance court, or the magistrate to interrogate him. If it is impossible to interrogate the defendant, the prosecutor gives orders to release him immediately.”*

A defendant can also be interrogated by the Chief Justice in a criminal case before the start of the criminal trial. He can take any measures he deems necessary to uncovering the truth that are within his good conscience (Art. 263-265 CrPC).

5.1.7 Bail and Applying for Bail

Any individual has the right to request bail and it is the responsibility of a defense lawyer to request it in any circumstances. This right is inscribed in both the Syrian and International law.

ICCPR Art. 9(3): *It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*

Art. 120 CrPC:

- “1. *The defendant, the suspect, and the accused may request release regardless of the crime in all the proceedings of the investigation and the trial taking into consideration the provisions of Article 130.*
2. *The request is to be submitted to the inquisitorial magistrate or the referral judge based on the situation. During the trial, the request is submitted to the court handling the case.*
3. *After the issuance of accusations or suspicion decision, neither the inquisitorial nor the referral judge nor the court after ruling in the case may consider the release which will be the responsibility of the authority which received the case.[..]”*

Art. 117 CrPC:

- “1. *In all kinds of crimes, the inquisitorial magistrate, after taking the opinion of the prosecutor, may decide to release the defendant provided that the defendant pledges to attend all the proceedings whenever requested and to implement the verdict once issued.*

2. *If the offense is a misdemeanor punishable by a maximum of one year and the defendant has an abode in Syria, he shall be released five days after interrogation. However, the provisions of this paragraph do not include those who have been convicted of a felony or more than three months of imprisonment without suspension.*

Art. 118 CrPC:

- “1. *In situations where the release is not mandatory by right, it is possible to release the defendant with bail or without. The bail ensures:*
 - A. *That the defendant attends all the proceedings of the investigation and the trial, and that he attends once the verdict is issued to enforce it.*
 - B. *The payment of the following expenses respectively:*
 - First - *The fees and costs sped up by the complainant.*
 - Second - *The fees and costs due to the state.*
 - Third - *fin.*
2. *This bail gives priority for those who deserve the previously-stated sums of money.*
3. *In the judge’s decision of release, the amount of bail and the sum earmarked for its two parts are to be specified.”*

Important steps when seeking bail are outlined in the following articles:

Art. 121 CrPC: *“In all the situations stated in the preceding article, the release request is to be submitted by an application to be considered in the deliberation room after taking the opinion of the prosecutor.”*

Art. 122 CrPC:

- “1. *The release decision may be appealed against the prosecutor within 24 hours from the arrival of papers at his registration office for consideration and against the complainant and the defendant within 24 hours from the notification.*
2. *The appeal is to be submitted to the referral judge by the authority which issued the appealed decision if issued by the inquisitorial magistrate or his representative. The appeal is to be submitted to the court if the decision is issued by the magistrate or the first instance court.”*

Art. 123 CrPC: *“If releasing the defendant is contingent upon bail, he or someone else must pay it in cash, by a state guarantee, bank guarantee, real estate guarantee, or commercial guarantee equivalent to the value of the bail.”*

Art. 124 CrPC:

- “1. *If the bail is cash, attributed to the state, or guaranteed by the state, it is to be paid in the treasury, and a receipt is to be taken.*
2. *The receipt, the bank guarantee letter, or the real estate guarantee document marked as antichresis from the real estate registry secretariat, or the commercial guarantee document affirmed by the notary is to be submitted to the authority which issued the release decision so that it will write to the prosecutor to release the defendant.*

3. *The person who is released on bail or without bail must abide in the center of the investigation department or the court which decided to release him.*

5.1.8 Disclosures

As mentioned before the defendant or his representative have the right to attend any investigations that concern the defendant, unless it would compromise the investigation. In any case, the findings need to be disclosed after the investigation has been completed and the necessary evidence obtained. This does not apply to witness statements.

Art. 70 CrPC:

- “1. *The defendant, the compensator, the complainant, and their representatives may attend all the investigation actions except for hearing of witnesses.*
2. *The persons mentioned in the first paragraph may not see the investigations conducted in their absence if they do not attend the investigations after receiving invitations according to the norms.*
3. *The inquisitorial magistrate may decide to carry out an investigation without the mentioned persons in case of urgency, or if he sees a necessity to uncover the truth. His decision in this regard is irrevocable, but upon completion of the investigation in this way, he must show it to the concerned people.”*

The criminal procedure code also foresees for the representative of the accused to be granted access to any documents that he might find useful for the defense during the criminal trial:

Art. 275 CrPC: *“The accused representative may copy at his expense the papers that he considers useful for the defense.”*

5.1.9 Subpoenas

A subpoena is a writ usually issued by a competent court, commanding to appear in court or produce certain evidence or documents. In Syria, in particular, a subpoena can be used by the court to compel the accused to appear before the inquisitorial magistrate for an interrogation (Art. 102(1) CrPC).

If the accused is issued a subpoena, he needs to be notified and issued a copy (Art. 109 CrPC). Subpoenas sent to witnesses should be received at least 24 hours before the required appearance (Art. 75 CrPC). In case of a trial, individuals need to be subpoenaed at least three days before the start of the trial. If this rule is not upheld and a verdict is issued in absentia, it will be considered invalid (Art. 186 CrPC) and subject to an appeal on those grounds.

Just like arrest or detention warrants, a subpoena is enforceable across all Syrian lands and failing to comply can lead to punitive action (Art. 110-111 CrPC).

5.2 Trial Matters

5.2.1 Court Proceedings

All criminal trials need to be accessible to the public with an exception of juvenile trials, or if a court decides that a public trial would pose a threat to public order or ethics. If there is no such threat, a trial that is not held in public will be considered invalid (Art. 190 CrPC). In general, the court proceedings of the Court of First Instance, the Conciliation Court and the Criminal Court, or the Court of Assize, follow the slightly different procedure that is outlined in the criminal procedure code.

Proceedings at the Court of First Instance

One way in which the proceedings at the Court of First Instance differ from those at the Criminal Court is that the presence of the accused is not necessary (unless the court decides otherwise) and his representative may attend the trial instead. This applies, however, only to cases where a potential punishment does not include imprisonment (Art. 187 CrPC). Before the trial commences, the head of the Court of First Instance may draw an estimate of the amount of damage involved in the case, or make any other examinations if the complainant requests it (Art. 185 CrPC).

The procedure followed during the trial:

- The trial begins with the court stenographer reciting the referral decision and the incident report if such is available. The prosecutor and the complainant, or his representative, present their statements. The accused is then interrogated, testimonies of witnesses are heard and the criminal exhibits are shown in the presence of both the accused and the complainant (Art. 191 CrPC). The complainant then conveys his requests, the prosecutor presents his arguments, the defendant and the compensator present their defense. After this, the court issues its verdict during the same session or the next one (Art. 196 CrPC).

Proceedings at the Court of Conciliation

As in the Court of First Instance, the presence of the accused is not required during the trial at the Court of Conciliation and he can be represented by his delegate in cases where charges do not warrant imprisonment (Art. 219 CrPC).

The procedure followed during the trial:

- An author of the incident report provided one exists, recites it. The judge then listens to the complainant, to the defendant's statements and to witness testimonies (Art. 220(1) CrPC).
- The court then moves to issue a verdict during the same, or the following trial session at the latest (Art. 220(2) CrPC).
- The verdict can then be appealed if issued in the first grade (Art. 223(1) CrPC); if issued in the last grade, they are subject to cassation only (Art. 223(2) CrPC).

Proceedings involving *flagrante delicto* misdemeanor cases

In flagrante delicto cases for misdemeanors, the accused is interrogated by the public prosecutor and is brought to an appropriate court (the Court of Conciliation or First Instance) as a detainee, if necessary (Art. 231 CrPC). He is then tried right away. However, the accused can ask for some time to prepare his defense, in which case the court can give him a maximum of three days (Art. 234 CrPC). If the court sentences the defendant to suspended imprisonment or a fine, the defendant is released immediately from detention, even if the verdict is appealed (Art. 236 CrPC).

Proceedings at the Court of Assize

Before the trial begins and after the accused arrives at the court's detention facility, the Chief Judge on the case, or his designated representative, have 24 hours to interrogate the accused (Art. 273 CrPC). The Chief judge has to ask whether the accused has a legal representative and if he does not, the court shall appoint one, otherwise, all subsequent proceedings will be invalid (Art. 274 CrPC).

The procedure followed during the trial:

- The trial commences with the accused appearing before the Criminal Court escorted by the armed forces. The Chief Judge asks the accused his full name, age, profession, place of residence, place of birth (Art. 278 (1)(2) CrPC).
- The Chief Judge warns the defendant's representative to not breach the sanctity of the law and to deliver his defense moderately (Art. 279 CrPC). The Judge then tells the accused to listen to everything that will be recited before him and the court stenographer recites the decision of the referral judge and the indictment. Afterward, the judge tells the accused of potential consequences if he is found guilty and instructs the accused to listen to the evidence that will be presented against him (Art. 280 (1)(2) CrPC).
- The prosecutor details the reasons for an indictment and requests the court stenographer to list his witnesses and the witnesses of the complainant and the defendant. (Art. 281 CrPC).
- If there are no objections on either side the Chief Judge moves to question the accused (Art. 284 CrPC).
- Witnesses for the prosecution and the complainant make their testimonies one by one (Art. 286 CrPC) and the Chief Judge can ask witnesses any questions he deems useful. He can then permit the prosecutor to question the witnesses. Other judges, the defense, and the complainant can direct their questions to the Chief Judge if they so wish (Art. 289 CrPC). This process is repeated with witnesses for the defense (Art. 291 CrPC).
- After all witnesses are heard, the court hears closing statements of the complainant, the prosecutor and the accused or his representative in this order. The end of the trial is announced and the court moves to deliberate, examining all the evidence in their possession (Art. 308-309 CrPC).
- After deliberation, the court returns. The head of the court recites the verdict and

pronounces the sentence, in case of a conviction, in the presence of the accused (Art. 311 CrPC). If the court rules that the accused is innocent, he shall be released immediately, unless he is detained for other reasons (Art. 312 CrPC).

In addition to the above, during the trial, the prosecutor may also submit his requests orally or in writing to the court and the latter shall decide whether to grant them or not (Art. 271-272 CrPC).

The Chief judge, upon hearing the statements of witnesses and the accused, can choose to summon any person or request any additional document if he finds it useful to uncovering the truth (Art. 266(1) CrPC). If the prosecutor, the defense or the complainants object to hearing any of the witnesses, they may still be listened to for information (Art. 266(2) CrPC).

5.3 Rules of Evidence

5.3.1 General

In general, all evidence that is useful in uncovering the truth is admissible and the judge reaches his verdict based on it. He may not, in any way, base his verdict on anything else but the evidence that was presented during the trial.

Art. 175 CrPC:

- “1. Evidence for felonies, misdemeanors, and violations shall be collected by all the means of proof, and the judge shall issue a verdict based on his personal conviction.*
- 2. If the law stated a certain method of proof, it is mandatory to abide by this method.*
- 3. If there is no evidence on the incident, the judge decides the defendant is innocent.”*

Art. 176 CrPC: *“It is impermissible for a judge to adopt anything other than the pieces of evidence presented during the trial and which the conflicting parties have discussed openly.”*

Evidence in a criminal case is a way to establish that the crime has actually happened and that the defendant is, beyond a reasonable doubt, guilty. Because of this, the judge is not constrained by any method of proof in making his/her decision. This principle is called the judge's choice of evidence. The verdict is always reached after examining all the evidence that the court receives. The judge has the freedom of coming to a particular conclusion and verdict during the trial and relying on confessions, testimonies, expertise, written evidence, and exhibits.

In some cases, the evidence before the court is insufficient to fully convict the accused, regardless if he/she was charged. However, sometimes circumstantial evidence can present some weak evidence, thereby enabling the judge to reach a verdict. Circumstantial evidence is an indirect method of proof in criminal evidence. It allows the judge to infer [conclusion] from two correlated incidents with one variable and many constants.

Two outcomes are possible when considering circumstantial evidence:

- Legal inference – stated in the law and which the judge can neither measure nor assess.
- Judicial inference – a judicial conclusion which is not stated in the law and which rendered diligently by the judge after considering the facts of the case.

5.3.2 Documentary Evidence

Documentary evidence, as opposed to oral evidence, includes items such as photographs, documents, emails, video, audio recordings, calls, messages and similar. Documentary evidence is usually obtained during the pretrial investigation by the inquisitorial magistrate. When evidence includes personal papers, only the inquisitorial magistrate or the member of the judicial police on his behalf can examine the papers before seizing them. When evidence includes letters or telexes, only the inquisitorial magistrate is allowed to see the contents.

Art. 96 CrPC: *“The inquisitorial magistrate may seize all letters, messages, journals, publications, and boxes at the post office and all the telexes at the telex offices. Also, he may keep tabs on the telephone calls if this can contribute to reveal the truth.”*

Art. 97 CrPC:

- “1. If the situation calls for searching about papers, the inquisitorial magistrate alone or the Judicial Police staff member acting on behalf of the magistrate may see them according to the norms before seizing them.*
- 2. After the seizure, seals may not be removed, and papers may not be sorted unless in the presence of the defendant or his representative, or in their absence according to the norms if they are invited but did not attend. The person in whose place the actions took place is to be invited to attend.*
- 3. The inquisitorial magistrate alone may look into the content of the seized letters and telexes once received the papers in their sealed envelope. He keeps the letters and telexes which [he] sees necessary to find out the truth and those which may disrupt the investigation if revealed to others. He shall hand the rest to the defendant or the concerned persons.[...]”*

5.3.3 Witness Testimony

Witness testimonies have always been an important part of the evidence, particularly in criminal trials, and especially before the advent of scientific evidence, such as the DNA.

Testimony is an account of what an individual has seen, heard or is aware of. There are two types of testimonies: direct and indirect. A direct testimony concerns the first-hand experience of an event. This is generally accepted as proper evidence. Indirect testimony, or hearsay, is a testimony made by a witness who is quoting someone else, or is testifying about something that he/she knows based on somebody else's information or experience. This type of testimony is not considered as evidence, but a mere inference. Thus, it is not considered as sufficient in itself, unless there is other evidence that strengthens the indirect testimony.

In courts that hear cases of less serious offenses, such as the Court of First Instance, the procedure followed in regards to witness testimonies is outlined as follows:

Art. 192 CrPC: “The Head of the Court shall ask the witness about his forename, surname, age, profession, place of residence, whether married or in service of one of the parties or related to one of the parties and about the degree of kinship. After that, he shall ask him to swear to bear witness to reality without exaggerations or understatements and writes all that in the minutes.”

The procedure followed by the Court of Assize is more detailed and stringent:

- During the trial, all witnesses need to remain in the special room prepared for them and they can only leave its premises when they are testifying. Measures need to be taken to make sure the witnesses don't talk amongst themselves about the case and anything relating to it (Art. 285 CrPC).
- Before, during or after the testimony, the court may order any one of the accused to leave the court hall. However, the trial proceedings may not be resumed before the accused is present and briefed about the matters that took place in his absence (Art. 297 CrPC).
- Witnesses are asked their full name, age, occupation, place of residence, whether the witness knows the accused before the crime in question, is he a relative and what is the degree of kinship, does he work for one of the two parties [defendant or complainant]. The witness is then sworn in and testifies. A testimony delivered without taking the legal oath is considered invalid (Art. 286 CrPC).
- After finishing the testimony, the Chief judge asks the witness whether the accused described by the testimony is present and whether that accused has any objections regarding the delivered testimony (Art. 288 CrPC).
- The Chief judge, and the prosecutor, with the judge's permission, may ask any questions or clarifications after the testimony is delivered. The accused or his representative, as well as other judges and the complainant, may only raise questions through the Chief judge (Art. 289 CrPC).
- The court may also hear testimonies of witnesses who were not heard during the investigation or summoned to testify, but they should nevertheless be mentioned in the list that is presented at the beginning of the trial (Art. 294 CrPC).
- If the witness (or the defendant) does not speak Arabic, a court shall appoint an interpreter that has to be sworn in (Art. 303 CrPC).
- If the witness (or the defendant) is deaf, mute, or illiterate, the head of the court appoints a sign language interpreter or any other qualified professional that can communicate with the witness (Art. 306 CrPC).

5.3.4 Witness Credibility

Witness credibility is something that is decided by the judge upon issuing a verdict. However, testimonies of some witnesses may be rejected during the trial if the complainant or the defendant objects to them (for legal reasons, based on the degree of kinship between the parties to the case).

Art. 193 CrPC: *“The testimony of the descendants and ascendants of the defendant shall not be accepted, nor the testimony of his brothers, sisters, or brothers and sisters in law, and spouse, even after divorce verdict. However, if their testimonies are heard without the objection of the complainant or defendant, they shall not be considered invalid.”*

Art. 292 CrPC:

- “1. The testimony of the following persons may not be accepted:*
 - a) The predecessors and offspring of the accused.*
 - b) His brothers and sisters.*
 - c) His in-laws who have this degree of kinship.*
 - d) Husband and wife after divorce.*
 - e) The informers who are granted a financial reward by the law for the information.*
- 2. If their testimony is heard and the prosecutor, the complainant, or the defendant do not object to it, it shall not be invalid. If there is an objection to hearing it, the Chief Judge may decide to hear it for the sake of information.”*

Art. 293 CrPC: *“The testimony of the informers who are granted a monetary reward by the law is accepted. However, the prosecutor must notify the court of their situation.”*

5.3.5 Juvenile Delinquents

Articles 39 to 55 of the second chapter of part II of the Juvenile Offenders Act, Law No. 18 of 1974, guarantee certain rights and principles to juvenile offenders facing prosecution.

Article 39:

- “a. The special provisions set out in this law shall apply to juvenile cases whether in the public prosecution, or investigation departments or in juvenile courts.*
- b. General laws shall apply in all cases that are not stipulated in this law.”*

Article 40:

“If one crime involved juveniles and non-juveniles, they shall be separated. Juveniles shall have a special folder containing all matters related to them. This procedure shall take place according to the following norms:

- a. The Public Prosecution shall distinguish the cases that they will refer directly to the court.*
- b. The examining magistrate shall make a distinction in the cases that he/she will investigate when making a preliminary decision.*
- c. The referral judge shall distinguish in the cases brought to him upon issuance of the indictment.”*

Article 41:

“Juveniles may not face the same criminal procedure followed in flagrante delicto cases or other case-related procedure before the court directly. However, a case may be brought directly before the court for infractions and misdemeanors punishable by a fine or imprisonment or both punishments for a term not exceeding one year.”

Article 42:

“The personal rights lawsuit is brought before the Juvenile Court in accordance with the ordinary rules. However, if the persons responsible for the offense are juveniles and non-juveniles, the personal rights lawsuit may be brought before the ordinary competent criminal court for non-juveniles. In such a case, the juvenile is not required to appear before the ordinary court but may be represented by his guardian or any legal representative. If the juvenile’s participation in the offense is not determined, the ordinary court may delay the decision on the personal rights lawsuit until the competent juvenile court passes its ruling.”

Article 43:

“The court may relinquish the case of a juvenile if it is in his/her interest or if the case so requires. The court may also refer the case to another court located in the area where the juvenile, his parent, the correctional institute, or the observation center is located. Such relinquishment shall not result in the obstruction of the trial.”

Article 44:

“a. The juvenile court shall, in all cases, summon the juvenile’s parent, guardian, trustee, or the person or institution in whose care the juvenile is and the representative of the social services, if available. If not, the court shall summon the probation officer. The court shall listen to those it summoned with the juvenile and shall do the following:

- 1. Obtain all possible information regarding juvenile’s material and social conditions, his/her moral character, level of intelligence, the environment he/she was raised in, the school he/she attended, his/her health and previous criminal history and measures prescribed, whether from the social services officer, probation officer, care center, or in the absence of those, through a regular inquiry conducted directly or by juvenile police.*
- 2. Drop the investigation of offenses that constitute an infraction or a misdemeanor.*
- 3. Order a physical and psychological examination of the juvenile by a specialized doctor, if necessary.*

b. The juvenile’s guardian, or the person in whose care the juvenile is, shall be informed about the necessity of assigning a lawyer to the juvenile in case the act is a felony or a misdemeanor. If such an appointment fails, the court shall appoint a lawyer to the juvenile. The provisions of this paragraph shall also apply before the investigating magistrate.

c. The Magistrate’s Court shall be exempted as a juvenile court from inviting the representative of the social service office, the observation center, and the probation officer.”

Article 45:

“The court or the investigating judge may not detain the juvenile but may keep him/her in the observation centers established or recognized by the Ministry of Social Affairs and Labor. In the absence of such centers, the juvenile shall be placed in a special juvenile detention center.”

Article 46:

“The investigating judge and the juvenile court shall rule on the cases referred to them as soon as possible in the interest of the juvenile.”

Article 47:

“If the judge deems the physical or psychological condition of the juvenile requires extensive monitoring and care, he/she may decide to place the juvenile temporarily in an observation center for a period not exceeding six months.

The judge may cancel such a measure if it is required to uphold juvenile’s best interest and adjourns the final ruling until the period of observation and care expires.”

Article 48:

“The court may exempt the juvenile from attending the trial if it deems it necessary to uphold the juvenile’s best interest. In this case, only the parent, guardian, or lawyer may be present at the trial.”

Article 49:

- a. Subject to the provisions of paragraph (c) of Article 44 of this Law, juveniles shall be tried in secret in the presence of the juvenile, his or her guardian, or the person in whose care the juvenile is, the plaintiff and their representative, the representative of the social services office or the observation center and the probation officer.*
- b. The Court may order that the juvenile be removed from the hearing after being questioned if it is deemed necessary and, where appropriate, may conduct the trial in isolation from the parent, guardian, or the person in whose care the juvenile is.*
- c. The Court shall pronounce its verdict in a public hearing.”*

Article 50:

“a. The juvenile courts shall render their verdicts in the last instance and may issue accelerated judgments if necessary to uphold the best interest of the juvenile.

The appeal shall be accepted if made by the juvenile’s parent, their guardian or another recognized caretaker, whoever is called to the court, or if it was made by the prosecutor and the plaintiff.

b. The juvenile courts’ rulings with regard to the release requests are final unless those rulings are issued by the court of the magistrate in its capacity as a juvenile court, in which case the rulings can be appealed in accordance with the provisions of paragraph (3) of Article 167 of the Criminal Procedure Code.”

Article 51:

- “a. The Court shall send the case files to the Public Prosecution which were not immediately reviewed following the expiry of the date of objection or the period for appeal by way of cassation against the defendant and the complainant.*
- b. The period for requesting cassation against the Public Prosecution shall commence on the date on which the judgment was issued in the presence of a representative of the prosecution. If the representative of the prosecution is not present at the hearing,*

then the cassation shall commence on the date of arrival of the judgment, that is subject to observation, to the prosecution's registration office.

c. The period for requesting cassation is specified in paragraphs 1 and 2 of Article (343) of the Criminal Procedure Code."

Article 52:

"Juveniles shall be exempted from the payment of fees, legal deposits, and stamps in all cases considered by juvenile courts in accordance with the provisions of this law."

Article 53:

"a. The Court may directly, or at the request of the juvenile, his parent, his guardian, his counsel, or the probation officer, alter or modify a prescribed corrective measure at least six months after its commencement.

b. The decision of the court in this respect shall be conclusive, but a new application may be filed again three months after the said decision.

c. In cases of homelessness and begging, the court may, directly or at the request of the juvenile, his parent, guardian, probation officer, counsel, or director of the institute of reform, alter or modify the prescribed corrective measure without complying with the periods specified if the court deems that in the juvenile's best interest."

Article 54:

"a. It is prohibited to publish the photograph of the juvenile defendant in question and to publish the proceedings, their summary, or the summary of the judgment in the books, newspapers, and cinema in any manner, unless the competent court so permits.

b. Any violation of the provisions of this Article shall be punishable under Article 410 of the criminal code."

Article 55:

"As set in Article 166 of the criminal code, limitations outlined in provisions of the criminal code and the criminal procedure code that concern crimes, penalties, corrective measures, civil obligations and the deprivation of the public interest litigation and the individual rights may be reduced to half for all juvenile crimes."

5.3.6 Accomplices

In the criminal code, the term 'criminal participation' denotes the degree and type of involvement in a crime. Other terms such as 'perpetrator', 'accomplice', 'instigator', 'abettor' and 'hider' are mentioned in articles 211 to 221.

Article 211:

"The perpetrator of the crime is the person who made the elements forming the crime possible or contributed directly to its perpetration."

Article 212:

- “1 Each accomplice of the crime is liable for receiving a penalty specified in the law.*
- 2. In accordance with the conditions set forth in article 247, a penalty shall be aggravated for a person who ordered the act or for the specific conduct of a crime or managed the roles of those who participated in a crime.”*

Article 213:

“The accomplice of the crime committed by means referred to in the second paragraph of Article 208 or if the offense is committed by one of the means mentioned in paragraph 3 of the same article shall be the author of the speech or the writing and the publisher, unless that person proves that the publication was made without his consent.”

Article 214:

“When a crime is committed by means of a newspaper, then the publisher is the director of the publication. If there’s no such position, then the publisher is the editor or the editor in chief.”

Article 215:

- “1. Circumstances that aggravate, mitigate or exempt from the penalty apply to both the accomplices and abettors in the crime.*
- 2. Personal or double aggravating circumstances that facilitated the perpetration of a crime also apply to them.*
- 3. Other circumstances only affect the person with a connection to those circumstances.”*

Article 216:

- “1. An instigator is any person who instigated or tried to foment another person, in any way, to perpetrate a crime.*
- 2. The repercussions for the instigator are independent of the person who was instigated to commit the crime.”*

Article 217:

- “1. The instigator is punished for the crime that he wanted to be committed, whether the crime was completed, attempted, or incomplete.*
- 2. If the instigator’s incitement does not result in the perpetration of a felony or a misdemeanor, the sentence shall be mitigated as defined in Article 219 in its paragraphs 2, 3 and 4.*
- 3. Incitement to commit an infraction is not punishable if the incitement did not result in an action.*
- 4. The measures shall be taken against the instigator as if he was the perpetrator of the crime.”*

Article 218:

- “An abettor in a felony or a misdemeanor is someone:*
- a) Who gave instructions for committing a crime, even if these instructions did not help the perpetrator to commit the act.*

- b) *Who strengthened the determination of the perpetrator by any means.*
- c) *Who accepted, for a material or moral interest, the perpetrator's offer to commit the crime.*
- d) *Who helped or assisted the perpetrator in the acts that created or facilitated the crime or acts that completed the crime.*
- e) *Who agrees with the perpetrator or one of the abettors prior to the perpetration of the crime and contributes to concealing the crime, concealing, hiding, or disposing of the objects involved in a crime, or harboring one or more of those who have participated in the crime.*
- f) *Who knew the criminal record of the evildoers who commit highway robbery and other acts of violence against state security or public safety, or against persons or property and still provided them with food, shelter, hiding place or a meeting place."*

Article 219:

- "1. The abettor, without whose assistance the crime would not have been committed, shall be punished as if he was the actual perpetrator.*
 - 2. All other abettors shall be punished by hard labor, whether temporary or permanent, from twelve to twenty years if the perpetrator is sentenced to death.*
- If the punishment of the perpetrator is hard labor or life imprisonment, the abettors shall be sentenced to the same penalty with a minimum sentence of at least ten years.*
- In other cases, half of the sentence that the perpetrator receives shall be applied to abettors. However, abettors shall receive the same precautionary measures that perpetrators receive."*

Article 220:

- "1. He who tries knowingly to hide, sell, buy, or exchange someone else's property, which was taken by force, embezzled, or acquired through a felony or a misdemeanor, shall be sentenced to 3 to 24 months of imprisonment and shall be fined 100 to 200 SYP except for the cases stipulated in paragraph 5 of Article 218.*
- 2. If, however, the missing objects referred to in the first paragraph are the result of a misdemeanor, the penalty cannot exceed two-thirds of the maximum sentence for the same misdemeanor."*

Article 221:

- "1. Except for cases provided for in paragraphs 5 and 6 of Article 218, he who hides a person that, he knows, has committed a felony or helped that person escape from law enforcement shall be punished by imprisonment from three months to two years.*
- 2. The perpetrator's ascendants, descendants, spouses and even their ex-spouse, brothers, sisters, or brothers or sisters in law who hide the perpetrator shall be exempted from punishment."*

5.3.7 Experts

Experts can be heard if the nature of the crimes requires such input. The prosecutor has the right to consult an expert from the appropriate field he deems necessary. In particular,

the prosecutor has the right to consult a medical professional to produce a report if the case at hand is murder or death resulting from unknown or suspicious causes. All experts need to be sworn in before carrying out the necessary tasks.

Art. 39 CrPC: “If recognizing the nature of the crime and its details requires technical or professional knowledge, the prosecutor has the right to consult one or more people from the required field.”

Art. 40 CrPC: “If someone is murdered or dies of unknown, and suspicious, causes, the prosecutor has the right to consult a physician or more, to write the report about the causes of death and the body.”

Art. 41 CrPC: “Physicians and experts referred to in articles 39 and 40 have to swear an oath to do the required tasks honestly.”

5.3.8 Forensic and Physical Evidence, Such As DNA Samples, Fingerprints, Palm Print, Handwriting and Ballistics

Scientific research and studies have established that DNA, fingerprints, and palm prints are among the most accurate evidence in the field of forensic evidence, through which criminals can be identified. Such evidence can be obtained when conducting crime scene searches. Fingerprints can be found and taken from the crime scene together with other suspicious and valuable evidence that can help establish the truth, such as documents, ballistic evidence, weapons, or any other tools that may have been involved in a crime.

This evidence is generally acquired immediately after the crime is reported by trained police officers and specialists after discovery, and as per the judge’s order, are brought to the scene. The group of specialists and officers is called the Discovery Committee and it is comprised of the prosecutor or the investigative judge, the stenographer, the coroner as well as the criminal evidence officers.

Under Article 39 of the criminal procedure code, if the nature of the crime and its evidence requires technical and professional knowledge, the prosecutor must consult one or more specialists from the required field.

The accused is then brought before the court together with the incident report, the evidence, and forensic and technical reports provided by the Criminal Evidence Department and DNA Analysis Department, if applicable.

It should be noted that the evidence in the case file is available to different parties and is subject to a discussion. The evidence gathered must be in accordance with proper legal procedures and any party can challenge the validity of the evidence and request technical expertise from competent specialists. As a result, the judge can choose evidence, at his discretion, that he finds reassuring and relevant to the case.

5.3.9 Computer Evidence

Legislative Decree No. 17 of 2012 defines computer evidence as digital data stored in or transferred to computer hardware or information systems that can be used to prove or deny a cybercrime.

Electronic data investigation is also defined as the legal authorized access to information or traffic data in information systems or networks with the purpose of tracking, seizure, or investigation.

Article 25 of the aforementioned legislative decree stipulates:

- “a. The value of computer evidence shall be valued by the Court, provided that the following criteria are met:*
- 1. The computer hardware or information systems, that the evidence is obtained from, work properly.*
 - 2. The evidence submitted to the Court shall not change during the period of its preservation.*
- b. The computer evidence submitted to the Court is valid when it meets the two requirements set out in paragraph (a) of this article unless proven otherwise.”*

5.3.10 Confessions

Confession is the act of the defendant admitting to all or some alleged criminal facts. There are several types of confessions:

1. Full confession - the defendant acknowledges everything that is attributed to him.
2. Partial confession - the defendant acknowledges some of the allegations against him.
3. Judicial confession - the defendant admits what is attributed to him at the Judicial Council.
4. Non-judicial confession - the defendant admits to things attributed to him outside the Judicial Council.
5. Simple confession - the defendant admits to just committing a crime alone.
6. Prescribed confession - the defendant adds words or actions to his statement to mitigate his liability.

To be valid, a confession has to meet the following criteria:

1. it must be clear, unequivocal, unambiguous, and factual. Therefore, the silence of the accused is not an acknowledgment of what he did or didn't do. This is an application of the legal rule “No statement shall be attributed to a person who remains silent”.
2. The person confessing must be in capacity and have a free will to do so. If it turns out that the defendant has a mental illness or is insane, his confession has no evidentiary value. Any confession made under the influence of torture or coercion cannot be used and shall be ignored because the person who made the confession has neither the free will or clear thought.

3. The confessions must be made by the defendant himself because confession is a personal right. Therefore, confessions made by the client's counsel or by the juvenile's parent do not constitute evidence or proof and such confessions shall be dismissed.
4. The confession must be acquired following correct procedures. If the confession was a result of unlawful and invalid legal procedures, the confession is null and shall not be taken into consideration as proof or evidence, even if such a confession was true.

The legal value of confessions in criminal proceedings:

- If a confession, that meets the validity criteria is made, then it will be, just as other evidence, left to the judge's discretion. The judge has absolute power to consider or dismiss that confession. The confession of the accused is not binding to the judge, who, at his own discretion, decides whether or not to accept the accused's confession. That is because in modern jurisprudence confessions are no longer the ultimate proof since the judges take into consideration that a false confession may be made to mitigate a greater risk or to serve personal interest. That is why it is the judge who determines the value and significance of the confession made, as well as its' motives (whether the confession is a judicial confession or not).
- After examining the confession, the judge decides what he will consider and what he will leave out in reaching a judgment which he has the right to do as long as the reasons for it are acceptable and logical.

5.4 Post Trial Matters

5.4.1 Sentencing: General

After the accused is convicted of a crime, sentencing takes place, usually, right after the trial, particularly when a crime is a misdemeanor.

Standard sentences for felonies are outlined in Article 37 of the Criminal Code and include:

- Death penalty.
- Hard labor.
- Life imprisonment.
- Temporary hard labor.
- Temporary imprisonment.

Additional sentences include house arrest, deprivation of some liberties and a fine. The duration of different sentences is outlined in the Criminal Code, however, in cases when they are not, the minimum sentence for temporary hard labor, imprisonment, house arrest, and civil deprivation is 3 years and the maximum duration is 15 years (Art. 44 CrC).

5.4.2 Sentencing: Mitigating and Aggravating Factors

When reaching a sentencing decision, the judge has to take mitigating and aggravating factors into consideration that could result in a stricter or reduced and more lenient penalty. Mitigating and aggravating circumstances can usually be found outlined under each individual crime.

Art. 259 CrC⁷⁶: *“The judge shall determine in the judgment the effect of each of the aggravating or mitigating circumstances for the sentence imposed.”*

Mitigating Factors

Some of the mitigating factors include:

- Using excessive force in self-defense if it was accompanied by a state of agitation (Art. 227(2) CrC);
- Defense of others and their property (Art. 228 CrC);
- Insanity (Art. 230 CrC);
- If all the preparations to commit a felony were made but did not result in a felony for reasons unrelated to the perpetrator’s will (Art. 200 CrC);
- Genetic mental infirmity (Art.200 CrC).

Art. 227 CrC: *“[...] 2. However, if the perpetrator of the crime excessively exercised his right to self-defense, he shall not be punished if he commits the act overwhelmed with intense emotions, without the consciousness or the will of perpetrating the crime.”*

Art. 228 CrC: *“The perpetrator shall not be punished for a crime he committed in an effort to protect himself or others, or to protect his property or the property of others from the grave and imminent danger that he did not deliberately cause provided that the action employed was proportionate to the danger.”*

Art. 230 CrC: *“Those who are in a state of insanity are exempt from punishment.”*

Art. 200 CrC: *“If all acts intended to perpetrate a crime have been committed but have not been effective because of circumstances unrelated to the will of the perpetrator, the penalties may be reduced as follows:*

- *Death can be substituted by hard labor, temporary or permanent, for a period of 12 to 20 years.*
- *And to replace permanent hard labor with temporary hard labor from 10 to 20 years.*
- *And to replace life imprisonment with temporary imprisonment from 10 to 20 years. Any other penalty may be halved.*
- *The penalties mentioned in this article may be reduced by up to two-thirds if the perpetrator acts with his own free will to prevent the effects of his actions.”*

Art. 232 CrC: *“He who has a mental infirmity, be that genetic or acquired, that led to diminishing his consciousness or ability to choose, can legally benefit from replacing or mitigating his penalty according to the provisions of Article 241.”*

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/ 148/ /1949 , available at : http://parliament.gov.sy/laws/Decree/1949/penal_18.htm [accessed 20 December 2018]

The following sentence reductions apply when there are mitigating circumstances:

Art. 241 CrC:

“1. When the law provides for a mitigating excuse:

- If the act is a felony punishable by death, hard labor, or life imprisonment, the penalty can be mitigated to at least one-year-imprisonment.*
- If the act constitutes one of the other offenses, the penalty can be mitigated to imprisonment from six months to two years.*
- If the act is a misdemeanor, the penalty shall not exceed six months and may be converted to a custodial punishment.*
- If the act is an infraction, the judge may mitigate the penalty to half the fine.*

2. A beneficiary of the mitigating excuse may still be subject to precautionary measures, except for isolation, if he had been sentenced to the penalty prescribed by law.”

Aggravating Factors

Some aggravating factors include:

- Committing another offense while still serving a previous sentence, and repeat offenses (Article 248(1)(2) CrC).
- Committing a crime by a group (Article 369(2) CrC).

Art. 248 CrC:

“1. A person who receives hard labor as a final sentence and commits another felony shall be punished by death.

2. Whoever is sentenced to a criminal sentence and committed another crime before the expiration of fifteen years from the expiry of the penalty or the statute of limitations, shall be sentenced to a maximum penalty of up to double temporary hard labor, if the second offense is to be sentenced to temporary hard labor. [...]”

Art. 369 CrC:

“1. Whoever attacks or violently resists a law enforcement officer, levying duties and taxes, implementing a judicial order or a judicial warrant or any order issued by the competent authority, shall be punished by at least two years of imprisonment if he was armed, and imprisoned from six months to two years if he was not armed.

2. The penalty shall be doubled if there are two or more perpetrators.”

5.4.3 Sentencing Outcomes

5.4.3.1 Monetary Fine

An individual is usually sentenced to a fine in misdemeanor cases and infraction, although he may be sentenced to a fine in addition to a stricter penalty, for instance, imprisonment. Fines can range from around 5 Syrian pounds to as much as one hundred thousand pounds. If found guilty, the defendant may also be asked to pay damages to the complainant and fees to the state.

Art. 318 CrPC: *“A judgment is issued compelling the convicted suspect to pay the fees and expenses of the case due to the state and the complainant.”*

Art. 64 CrC: *“1. The criminal fine ranges between 50 and 3,000 SYP. It is subject to the provisions of articles 53 and 54 related to misdemeanor’s fine.[...]”*

If the individual in question does not pay the fine, he will face temporary imprisonment.

Art. 54 CrC: *“1. The fine shall be replaced by simple imprisonment if it is not paid within thirty days from the date of the conclusion of the judgment, without prior notice, in accordance with the established rules. [...]”*

5.4.3.2 House Arrest

In misdemeanor cases, instead of prison time, house arrest can often be given as a sentence. The duration of house arrests can range from three months to three years. The convicted can also be sentenced to a house arrest in criminal cases, and the same conditions apply, although the duration may be longer. If a person violated the terms of the house arrest he can be imprisoned, but his imprisonment cannot exceed the length of the remaining sentence.

Art. 53 CrC:

- “1. The duration of house arrest in misdemeanors ranges from three months to three years and is carried out under the same conditions of house arrest in felonies.*
- 2. If the sentenced person leaves the place designated for his house arrest for any period of time, he shall be subject to simple imprisonment for a period not exceeding the remaining time of the sentence.”*

5.4.3.3 Imprisonment

The convicted can be sentenced to temporary and life imprisonment and it may or may not include forced labor. In misdemeanor cases, imprisonment usually does not exceed 3 years and can be as short as a few days. In criminal cases, imprisonment can last from a few years to a lifetime. In the case of serious felonies, imprisonment may be accompanied by forced labor (discussed below).

Art. 80 CrC: *“If a felony or misdemeanor is committed under the influence of alcoholic beverages, the judge may prevent the convict from visiting bars where alcoholic drinks are sold for a period of one to three years, subject to imprisonment from ten days to three months.”*

The following offenses carry imprisonment sentences between 10 days and two years:

- 1. Hiding and selling stolen items or items taken by means of other crimes stated in Article 220.*
- 2. The misdemeanor stipulated in the last paragraph of Article 413.*
- 3. Gambling stipulated in Article 619.*
- 4. Theft of crops stipulated in Article 634.*
- 5. Ordinary theft stipulated in Article 634.*
- 6. Cutting and damaging trees stipulated in Articles 726 and 727.*
- 7. The poisoning of animals stipulated in Article 728.*
- 8. Perjury and the false oath which occur at a magistrate’s court.*

Life imprisonment is usually prescribed for crimes of political nature, such as an attempt to provoke an insurrection or attempting any violent and unsanctioned action against the state.

Art. 293 CrC:

- “1. Any act committed with the intention of provoking an armed insurrection against the authorities, established under the Constitution, shall be punishable by temporary imprisonment.*
- 2. If the insurrection is committed, the instigator shall be punished with life imprisonment and the rest of the insurgents shall be subject to temporary imprisonment for at least five years.”*

Art. 291 CrC:

- “1. An attack aimed at changing the constitution of the State, by unlawful means, is punishable by at least five years of temporary imprisonment.*
- 2. The penalty shall be life imprisonment if the perpetrator resorted to violence.”*

5.4.3.4 Suspended Sentences

The judge may, upon issuing a custodial punishment or a punishment for a misdemeanor, order the suspension of the execution of a sentence.

Art. 168 CrC:

- “1. The judge may, upon issuing a custodial punishment or a punishment for a misdemeanor, order the suspension of its execution if the convict has not previously been sentenced to a similar or a more severe penalty.*
- 2. The sentenced person shall not be granted a stay for the execution of a sentence if he does not have a real residence in Syria or if a judicial or an administrative decision to expel him is reached.*
- 3. This stay of execution shall not interrupt the implementation of additional or subsidiary sanctions or precautionary measures.”*

Art. 169 CrC: *“The stay of the execution may, if the judge so chooses, be contingent on one of the following duties:*

- 1. The convict shall provide a bail bond.*
- 2. He shall be subject to care.*
- 3. The complainant shall obtain all or part of the compensation in a period not exceeding two years in misdemeanors or six months in infractions.”*

Art. 170 CrC: *“A person who commits an offense, that necessitates a misdemeanor’s penalty or a custodial punishment, within 5 years or two years respectively and where the sentence of the second offense is similar to or severer than the first sentence, or if it was proven that he violated the duties that the judge had imposed according to the previous article, will lose his stay of execution.”*

Art. 171 CrC:

- “1. If the stay of execution is not expired, the sentence shall be nullified at the expiry of the probation period. Additional penalties and precautionary measures shall not apply, except for protective custody, confiscation, and closure of the premises provided for in Article 104.*
- 2. Stay of execution may be revoked even after the expiry of the probation period in case an appeal is made or in case of prosecution of a new offense that was committed before the expiry of the said period.”*

However, the execution of the sentence could also be delayed:

Art. 55 CrC:

- “1. The penalty of imprisonment shall not commence with an undetained pregnant woman until after 6 weeks of her delivering a baby.*
- 2. The married couple who are sentenced to this penalty for a period of less than one year and are not detained shall undergo the penalty one at a time if they have a child under 18 years of age and if they prove that they have a place of residence.”*

5.4.3.5 Rehabilitation

There is no doubt that nowadays prisons are not solely concerned with depriving individuals' freedom as a means of punishment, but also aim at reforming and rehabilitating the prisoner, paving the way for reintegrating him/her into the society. This is the case with adults, a fortiori, juveniles as per Article 3 of Law No. 18 of 1974, as amended by Legislative Decree No. 52 of 2003:

- “a. If a juvenile who has turned 10 but has not reached the age of 18 committed any crime, he shall be subject only to the corrective measures provided for in this Law. A number of reform measures may be combined.*
- b. A juvenile who is over fifteen years of age and older and who has committed a felony, the penalties provided for in this Law shall apply.”*

Article 4 of the aforementioned law stipulates the rehabilitating measures as follows:

- a) Handing the juvenile over to one or both parents or his legal guardian.*
- b) Handing the juvenile over to a family member.*
- c) Handing the juvenile over to an institution capable of securing his upbringing.*
- d) Placing the juvenile in the observation center.*
- e) Placing the juvenile in a juvenile reform institution.*
- f) Placing the juvenile in protective custody.*
- g) Probation.*
- h) Restricted residence.*
- i) Prohibition from frequenting places of ill repute.*
- j) Prohibiting from engaging in a certain type of work.*
- k) Subjecting to receiving mandatory care.*

Art. 84(1) CrC: *“The purpose of probation is to verify the good character of the sentenced person and to facilitate his reintegration within the community.”*

Art. 87 CrC:

- “1. Care shall be entrusted to private institutions recognized by the State.*
- 2. The institution shall provide work for the convict. The institution’s delegates shall carefully monitor convict’s way of life and provide him with advice and assistance. The institution may receive the money that the released prisoner had saved so that the money can be used in the prisoner’s best interest.*
- 3. A report on the status and conduct of the convict shall be submitted to the judicial body that issued the sentence at least once every three months.”*

Art. 233(1) CrC: *“Anyone who has been sentenced to a criminal penalty or misdemeanor penalty, that involves imprisonment, and who has benefited from the reduction or replacement of the penalty due to dementia, or that who have received a penalty and has been proven to be possessed or addicted to drugs or alcohol, or if he poses a risk to public safety, shall be placed in a protective custody and treated there during his sentence.”*

The Syrian legislation has also provided ways to deal with drug addicts so that treatment can be provided instead of a standard punitive measure.

Art. 43(f) of the Narcotics Act No. 2 of 1993: *“A drug abuser shall not face prosecution if he came to an official authority asking for treatment of his own volition or at the request of his spouse or a relative be that a first or even second-degree relative.”*

Art. 43 (a),(b) of the Narcotics Act No. 2 of 1993:

- “a. Anyone who has obtained, made, bought, transferred, delivered or received narcotic substances for personal use, in circumstances other than those authorized by law, shall be punished by temporary imprisonment and a fine of 100,000 to 500,000 SYP.*
- b. When sentencing an addict to the penalty provided for in the preceding paragraph, the court may order the stay of execution and the placement of the person who was proved to be addicted to narcotic substances in a rehabilitation center. The release of the applicant after his recovery is subject to a court decision following the report of the competent committee that supervises the applicants at the rehabilitation center. The convict’s stay at the rehabilitation center may not be less than three months or more than a year.”*

Art. 71 of the Narcotics Act No. 2 of 1993: *“The ministry shall establish rehabilitation centers to treat addicts. Private rehabilitation centers may also be established to treat addicts.”*

Art. 72 of the Narcotics Act No. 2 of 1993: *“The Ministry of Social Affairs and Labor shall establish a care institution for persons who are to be released from the rehabilitation center when they need it.”*

5.4.3.6 Hard Labor

Individuals who have committed serious felonies are often sentenced to hard labor. This entails imprisonment alongside physical work commensurate with sex and age both inside and outside the prison.

Art. 45 CrC: *“Those sentenced to hard labor are forced to perform stressful work commensurate with their sex and age, both inside and outside the prison.”*

Generally, the duration of hard labor is prescribed by the Criminal Code under each crime that requires it. This usually includes murder and political crimes, including the death penalty reduced to a hard labor sentence. If the duration of temporary hard labor is not specified, it shall be between 3 years and 15 years (Art. 44 CrC).

Art. 533 CrC: *“Anyone who intentionally kills a person is punished by hard labor from 15 to 20 years.”*

Art. 268 CrC: *“1. Every Syrian who knowingly provides accommodation, food, clothing, or assistance to escapee, to a spy, or reconnaissance soldier of the enemy, shall be punished by temporary hard labor.”*

Art. 200 CrC: *“If all elements of a crime have been committed but have not been effective because of circumstances unrelated to the will of the perpetrator, the penalty may be reduced as follows:*

- *Death can be substituted for temporary or permanent hard labor for a period of 12 to 20 years;*
- *Permanent hard labor can be substituted for temporary hard labor from 10 to 20 years;*
- *Life imprisonment can be substituted for temporary imprisonment from 10 to 20 years. Any other penalty may be halved;*
- *The penalties mentioned in this article may be reduced by up to two-thirds if the perpetrator averts, by his absolute free will, the results of his acts.”*

5.4.3.7 Death Penalty and Capital Punishment in Syria

It is hard to estimate how often and how many people are sentenced to death each year for criminal offenses due to the ongoing conflict. However, there have been numerous reports of mass executions ranging between 5,000 and 13,000 outside of the formal judicial framework over the course of five years between 2011 and 2015 at Saydnaya prison on charges of collaborating with the opposition.⁷⁷ Such sentences are being pronounced at military and military field courts and not the regular criminal courts.

The death penalty is carried out in the form of hanging for regular criminal offenses and by shooting for military crimes. If the criminal court issues a death penalty, it has to be approved by the President first.

Art. 43 CrC:

- “1. A death sentence shall be carried out only after reviewing the opinion of the Amnesty Committee and with the approval of the President of the State.*
- 2. The person sentenced to death shall be hanged inside the prison building or in another place stipulated for in the decree of the penalty execution.*

⁷⁷ BBC, ‘Syria conflict: Thousands hanged at Saydnaya prison, Amnesty says,’ available at: <https://www.bbc.com/news/world-middle-east-38885901> [accessed 11 February 2019]

3. *Execution of death sentence is prohibited on Fridays, Sundays, and nation-al or religious holidays.*
4. *The execution of death penalty of a pregnant woman shall be postponed until she delivers her baby."*

Since the death penalty is the most severe punishment, as a rule, it is given for political crimes. The mere affiliation with an opposition party can lead to the death penalty. A clear example of this is Article 1 of Law No. 49 of 1980:

"Any affiliation with the Muslim Brotherhood shall be considered a criminal act and shall be punished by death."

A special pardon can be requested in certain cases. The following rules apply:

Art. 459 CrPC: *"All requests of special pardon shall be considered in accordance with the following norms: a committee formed of five judges of the first rank, one of them shall be the chief, and they shall be appointed by a decree."*

Art. 460 CrPC:

1. *The request for pardon is sent to the President of the State either directly or through the Minister of Justice based on a form signed by the convict, his representative, or one of his family members.*
2. *The stamps and fees of the form shall be waived."*

Art. 461 CrPC: *"When the verdict of the death penalty is issued, the Minister of Justice shall immediately refer the papers of the case enclosed with the report of the prosecutor of the court which issued the verdict to the Pardon Committee. It will consider the case and give its opinion on the necessity of the execution of the death penalty or replace it with another penalty during five days at most."*

Art. 464 CrCP: *"After hearing the statement and seeing the papers, the committee shall consider the accusation and the evidence it was built on, the reasons for the request for a pardon, and the reasons for the enforcement of the death penalty or replacing it with another. It shall give its opinion unanimously or by the majority to accept the pardon request, or enforce the death penalty, or replace it with another based on a report submitted to the Minister of Justice."*

5.4.3.8 Sentencing: Women and Children

In certain cases, different sentencing rules may apply for women, for instance when they are pregnant. As an example, a death penalty for a pregnant woman can only be carried out after she gives birth (Art. 454 CrPC).

For juvenile crimes, sentencing is outlined in the Juvenile Offenders Act No. 18 of 1974. Juvenile delinquents are tried in special courts and sentences tend to be of a rehabilitative nature rather than punitive. Minors are defined as being under the age of 18, however, those that are under the age of 10, are not penalized for any crime as established by Art. 3 of the Juvenile Delinquents Act, amended by the Legislative Decree no. 52 of 2003.

The corrective measures that a juvenile will usually be prescribed are outlined in Article 4 of the act. In some cases, the court may order detention if it sees it in the interest of the juvenile. The period of detention should not exceed one month and the juvenile should be placed in the special observation center.

Art. 10 Juvenile Offenders Act: *“The court may decide to detain the juvenile for a period of no more than one month in the observation center if it finds that the juvenile’s interest so requires.”*

Juveniles can be sentenced to a minimum of six months at a correctional facility if the court sees it necessary. After six months the status of the juvenile is subject to a review. The juvenile can serve the sentence at the correctional facility until he reaches 22.

Art. 11 Juvenile Offenders Act:

- “a. A juvenile shall be sentenced to a placement in a juvenile correctional facility for a period of not less than six months if the court finds that the juvenile’s situation so requires.*
- b. The director of the correctional facility shall submit a report to the court after six months on the status of the juvenile indicating the juvenile’s situation. The director may propose exempting the juvenile from the rest of the sentence or imposing another remedial measure that he deems necessary. He shall also submit periodic reports to the Court every three months until the juvenile is released.*
- c. The Court alone may decide whether to exempt the juvenile from carrying out the rest of the sentence or to change the measure with another remedial measure.*
- d. The juvenile placement at a correctional facility shall be terminated when the juvenile turns 22.”*

The duration of the penalty for those younger than 16 is 6 months to 3 years (Art. 21 Juvenile Offenders Act). If the defendant is 16 and older the following punishments apply:

Art. 29 Juvenile Offenders Act: *“The following penalties shall be imposed on juvenile offenders who have completed the fifteenth year:*

- a. If the juvenile’s crime is one of the felonies punishable by the death penalty, he shall be imprisoned with labor from 6 to 12 years.*
- b. If his crime is one of the felonies punishable by hard labor or life imprisonment, he shall be imprisoned with labor for 5 to 10 years.*
- c. If his crime is one of the felonies punishable by temporary hard labor or temporary imprisonment, he shall be imprisoned with labor for one to five years.*

The court may also impose remedial measures, provided for in paragraphs (f), (g), (h), (i), (j), and (k) of Article 4 of this law, on juveniles sentenced to one of the penalties stipulated above.”

Cases that are not addressed by this law are subject to regular laws.

Art. 39 Juvenile Offenders Act: *“[...] B. General laws shall apply in all cases not provided for in this Law.”*

All trials and verdicts are secret unless the court permits otherwise.

Art. 49 Juvenile Offenders Act:

- a. Subject to the provisions of paragraph (c) of Article 44 of this Law, juveniles shall be tried in secret in the presence of the juvenile, his or her parent, trustee or the person in whose care the juvenile is, the plaintiff, his delegates, the representative of the social services office or the care center, and the probation officer.*
- b. The Court may order that the juvenile be removed from the hearing after being questioned if it is deemed necessary and, where appropriate, may conduct the trial in isolation from the guardian, trustee or the person in whose care the juvenile is.*
- c. The Court shall pronounce its verdict in a public hearing.”*

Art. 54 Juvenile Offenders Act:

- a. It is prohibited to publish the photograph of the defendant in question and to publish the proceedings, their summary, or summary of the judgment in the books, newspapers, and cinema in any manner unless the competent court so permits.*
- b. Any violation of the provisions of this article shall be punishable under Article 410 of the Criminal Code.”*

In case of good behavior, the juvenile, his guardians, counsel or probation officer can request the sentence to be modified by the court. Such a request is allowed 6 months after the commencement of the sentence (Art. 53(1) Juvenile Offenders Act).

A special police force needs to be assigned to handle juvenile cases. The functions of the police and the rules which they abide by shall be determined by the Minister of Interior after taking the opinion of the Ministry of Social Affairs and Labor and the Ministry of Justice (Art. 57 Juvenile Offenders Act).

5.4.4 Appeals

Verdicts issued in all three courts (Court of Conciliation, Court of First Instance, Court of Assize) that handle criminal and misdemeanor cases can be appealed on the basis of fact or law. Verdicts that are issued by the Court of Assize and are appealed, can be further referred to the Court of Cassation. The right to appeal belongs to the prosecutor, the complainant, the defendant, and the compensator.

Art. 250 CrPC:

- “1. The appeal is the right of the prosecutor, the complainant, the defendant, and the compensator.*
- 2. The prosecution is committed to appealing the verdict if requested by the defendant.”*

Appeal and cassation procedures differ between verdicts that are reached in absentia or otherwise in propria persona. The verdict reached by the Court of First Instance in absentia can be firstly objected by the defendant without necessarily being referred to the Court of Appeals. The procedure is outlined in the following articles:

Art. 205 CrPC: *“The sentenced person may object to the verdict in five days excluding the travel time starting from the next day after receiving the verdict. The objection is carried out by a form submitted directly to the court which issued the verdict whether directly or through the court of his residence.”*

Art. 206 CrPC:

- “1. The objection is waived after the time stated in the previous article elapses.*
- 2. If the sentenced person is not notified personally, or if the verdict enforcement procedures do not show that the sentenced person has known the verdict, the objection remains acceptable until the punishment is waived by the statute of limitations.”*

Art. 207 CrPC: *“The objection shall be rejected if the sentenced person does not attend the first session of the objection trial or is not present before his objection is formally accepted.”*

Art. 212 CrPC: *“The following verdicts accept revocation by way of appeal:*

- 1. The verdict ruling on the merits of the lawsuit.*
- 2. The verdicts stating lack of jurisdiction or repealing the case based on the statute of limitations or other reasons.*
- 3. The decisions issued to waive the defense for lack of jurisdiction.”*

Art. 213 CrPC:

- “1. Except for the provisions stated in the preceding article, it is not acceptable to appeal the decisions stating the rejection of defense after hearing the case whether waiving it for the statute of limitations or other reasons. Also, [it is not acceptable to appeal] the preliminary decisions and the circumstantial evidence decisions and other decisions issued during the proceedings of the lawsuit unless after the issuance of the original verdict and along with this verdict. [...]”*

Art. 215 CrPC:

- “1. The verdict shall not be executed before the end of the appeal period, nor before the ruling in the appeal once made.*
- 3. However, if the defendant is arrested and the court issues a first-degree innocence verdict, suspended prison, or fine, he shall be released once the verdict is issued despite the appeal. If the verdict is a prison sentence, he shall be released after the enforcement of the punishment.”*

The following procedure is applicable to the court of first Instance:

Art. 251 CrPC:

- “1. The appeal request is sent to the competent appeal court either directly or through the court that issued the appealed verdict within ten days from the day following the issuance of the verdict, if it is in the presence, and following the day of informing it, if in absentia, or equivalent to in presence. Time for the distance is added to the deadline mentioned above.*

2. *The appeal is rejected in the form if submitted after this time.*
3. *The prosecutor may appeal the sentence at the same time. He commences his right from the day following the issuance of the verdict if issued by the first instance court or the day of the arrival of the papers to the Bureau of the prosecution if issued by the magistrate.*
4. *The Appeal Court is formed from the chief and two judges in the presence of the prosecutor, and issues its ruling unanimously or by the majority."*

Art. 253 CrPC: *"If the appeal is submitted to the Court of First Instance, the court shall send it with the case papers to the registry of the Court of Appeal by the prosecutor within three days from submission. If the defendant is detained, it is sent upon the order of the prosecutor to the place of detention at the Appeal Court."*

Art. 254 CrPC: *"A member of the court shall write a report on the lawsuit stating its proceedings, the nature of the appealed verdict, and the reasons for the appeal."*

When a sentence has been issued by the Court of Assize, 'appeal by rejection' is possible. It is permitted to send the case to the Court of Cassation for a further appeal, but the appeal may not be accepted if an appeal by rejection is still a possibility.

Art. 338 CrPC: *"Appeal by cassation shall not be accepted in the verdict which may be appealed by rejection."*

Art. 339 CrPC: *"The prosecution, the complainant, and the compensator, each within their powers, may appeal for cassation in the felony verdict in absentia issued by the criminal court."*

The Court of Cassation considers appeals in the following cases:

Art. 342 CrPC: *"Appeal for cassation may not be accepted except in the following situations:*

1. *If the appealed sentence is built on the violation of law or an error in its interpretation.*
2. *If the sentence is invalid.*
3. *If invalidity occurred in the procedure and impacted the sentence.*
4. *Being oblivious to give a decision in one of the requests or the verdict exceeding the request of the opponent.*
5. *The issuance of two contradictory sentences in the same incident.*
6. *The sentence is void of grounds or the reasons because the sentence is inadequate or vague. Originally, the procedures will be considered taken into account in the case. Nonetheless, the concerned person may always try to prove that these procedures have been ignored or violated if it is not mentioned in the meetings of the session that these procedures have been observed. If it is mentioned in one of them that they were observed, it can only be disputed with the appeal of forgery."*

Art. 343 CrPC: *"1. The period of the request for cassation is thirty days.[...]"*

5.4.5 Retrial

A retrial can be requested in the following cases:

Art. 367 CrPC: *“It is possible to request repeating the trial in cases concerning felonies and misdemeanors, whichever court ruled on them and regardless of the penalty prescribed. This provision applies to the following situations:*

- a. If a person is convicted of murder and sufficient evidence shows that the murdered person is still alive.*
- b. If a person is convicted of a felony or a misdemeanor and later someone else was convicted of the same crime and both verdicts cannot be reconciled and result in supporting the innocence of one of the convicted.*
- c. If a person was sentenced and after the sentence, there was a ruling of false testimony against all the witnesses who testified against him in the trial, the testimony of this witness shall not be accepted in the new trial.*
- d. If a new incident occurred after a sentence or new documents unknown during the trial were presented, and that could prove the innocence of the convicted.”*

CHAPTER 6

Basic Human Rights Principles for Detention Officers

6.1 Introduction

Arbitrary arrests and detention in Syria take many forms, often targeting civilians perceived to be either supporting a party to the conflict or insufficiently loyal to another.

Arrests are also regularly carried out for expressing hostile opinions, having a family member affiliated to a party to the conflict, infracting religious codes, conscription into armed forces, hostage taking, and administrative detention (internment). Detainees held by all parties have been beaten to death or died as a result of injuries sustained due to torture. Others have perished as a consequence of neglect and grossly inhumane living conditions. Tens of thousands have disappeared. Most of these arrests are organized by the Assad regime as an organized crime which amounts to crimes against humanity.

In Syria, regular forms of torture include dulab (placing detainees inside a wheel prior to beating them), shabeh (hanging them from the ceiling by their wrists), and beatings with objects including pipes. In many instances, electrocution is also used - including to the genitals.

International human rights and humanitarian law impose clear obligations on States and, during times of armed conflict, all parties, for basic humane and dignified treatment and protection of all persons in their custody. Detainees must be treated humanely and protected from violence or life-threatening conditions, including from any form of torture or ill-treatment, and sufficient food, water, and medical care are to be provided.

The information set out in this chapter is based on standards agreed to in international regulations and seeks to cover the main aspects of daily life in places of detention in Syria.

6.2 Basic Principles: International Standards

The rights of anyone subject to detention and imprisonment are protected by several United Nations treaties. Some of these set out rules for the treatment of prisoners and detainees and include the following:

- *International Covenant on Civil and Political Rights;*
- *Standard Minimum Rules for the Treatment of Prisoners;*
- *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;*
- *Basic Principles for the Treatment of Prisoners; and*
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

6.3 What do these Standards Tell Us?

- All detainees and prisoners lose their right to freedom of movement but they keep their rights as human beings when they are in detention.
- They must not be treated in an inhuman or degrading way.
- International standards forbid all forms of torture. Torture does not just mean inflicting physical or mental pain. It includes all forms of inhuman or degrading treatment.

6.4 Why is it Better to Manage in This Way?

- Treating prisoners and detainees as human beings is not just a question of following international standards - it is also of benefit to staff.
- People who have worked in some of the most difficult prisons in the world are convinced that this is also the most effective and efficient way to manage a prison and build trust.

6.5 On First Detention or Arrest

The greatest risk of mistreatment is when people are first detained.

6.5.1 Lawful Detention Order

- People can only be detained in accordance with Syrian law.
- The police may hold someone in detention for 48 hours on reasonable suspicion that they have been involved in a crime.
- After the first 48 hours, detainees can only be held on the orders of a judge.
- Detention officers must not receive anyone into detention without a valid order from a judge.

6.5.2 Recording the Details

It is important that a full record is kept of the details of each detainee. As a minimum this record must include:

- The personal details of the detainee (for example date of birth, weight, height, name, and gender);
- The reasons for detention;
- The judicial authority who approved the detention;
- The day and time of detention;
- The date of release (convicted prisoners);
- The date of any court appearance (pre-trial prisoners).

6.5.3 Notifying the Family and/or Legal Representative

- One must allow detainees to let their families or friends know where they are as soon as possible.
- The detention center should allow detainees to make a free telephone call for this purpose.
- One must also allow detainees to consult a legal representative, especially if they have not yet been convicted of an offense.

6.5.4 Information to Prisoners

- One must explain to detainees what their rights and responsibilities are in detention.
- One must ensure that detainees who cannot read are able to understand all of these rules and procedures.
- As a minimum the following information should be available to detainees:
 - Their rights in detention;
 - The rules and disciplinary procedures of the detention center;
 - How to make a complaint if needed; and
 - Any other information that may make it easier for them to adapt to life in detention.

6.5.5 Medical Examination

- Everyone received into detention must be given a medical examination as soon as possible.
- This is more fully explained in Section 4.

6.6 Physical Conditions of Detention Accommodation**6.6.1 Basic conditions**

- One must keep different categories of detainees and prisoners separately from each other;
- Pre-trial detainees must be kept separate from convicted prisoners;
- Women must be held separately from men;
- If children and young persons are detained they must be kept separate from adults;
- If detainees or prisoners are held in dormitories or shared cells, one must assess whether they are suitable to live together;
- Each detainee must have enough space;
- All cells and dormitories must have adequate heating, lighting, and ventilation;
- Every detainee or prisoner should have his/her own bed or mattress with clean bedding.

6.6.2 Food

- One must serve sufficient food free of charge for all detainees and prisoners at normal times each day.
- The food must be of sufficient quantity and quality to maintain good health.
- The food must also meet the medical, religious and cultural needs of individual detainees and prisoners.

6.6.3 Water

- Clean drinking water must be provided to all detainees and prisoners whenever they need it.

6.6.4 Hygiene

- All detainees and prisoners must have access to facilities which allow them to keep themselves clean.

- They must be able to bathe or shower as often as is necessary to maintain their personal hygiene.
- The detention center must provide soap and towels.
- Sanitary installations must be sufficient to allow detainees and prisoners to comply with their bodily needs in private and in a clean and decent manner.

6.6.5 Clothing

- Unconvicted detainees are normally allowed to wear their own clothes.
- The authorities must supply clothing to any detainees who do not have their own suitable clothing.
- All clothing must be suitable for the region and the weather conditions.
- Detainees and prisoners must be allowed to wear their own clothing in public, for example when being taken to appear in court.
- The clothing or uniform supplied by the authorities must be appropriate and must not humiliate the detainee. The clothing must be of the normal type worn in the region.
- The detention center must provide suitable facilities to wash clothing and uniforms.

6.6.6 Exercise and Fresh Air

- All detainees and prisoners are entitled to exercise every day in the open air.
- In prisons or detention centers where prisoners or detainees work, any who do not work outside must be able to spend at least one hour in the open air each day.

6.6.7 Association with Other Prisoners

- If detainees and prisoners are kept in individual cells they must have the opportunity to spend time with others for part of each day unless it is strictly necessary for health or security reasons. The medical officer must authorize any refusal of the association on medical grounds.

6.7 Healthcare: General Principles

- When the state imprisons or detains someone it takes on the responsibility to look after their health.
- The state must provide individual medical treatment for detainees and prisoners and healthy living conditions.
- All necessary medical care and treatment must be provided free of charge.
- The standard of medical care must be at least the same as that in the outside community.

6.7.1 Admission

- Detainees must be offered a medical examination when they first arrive in detention.
- If a doctor is not immediately available, detainees must be seen by a suitably qualified nurse. The nurse must report any concerns as soon as possible to the doctor.
- The medical examination will identify and ensure proper treatment for any existing medical condition.

- It will also identify any injuries and may protect detention officers from false allegations.
- The person carrying out the examination must report any injuries immediately to the appropriate authorities.

6.7.2 Treatment

- Detainees and prisoners must be able to see a suitably qualified medical officer on a regular basis.
- Women and juveniles must also be able to see specialists in women's and children's medicine.
- The prison administration must provide suitable premises and equipment for consultation and for emergency treatment
- They must also supply an adequate quantity of appropriate medicines.

6.7.3 Confidentiality

- Detainees and prisoners who require medical attention are patients. They are entitled to privacy both in consultation with medical staff and in their treatment.
- All medical consultations and treatments are confidential.
- They must be based on the needs of the detainee or prisoner and not on those of the administration.
- If safety is a serious concern, consultations may take place within sight but not within hearing of a detention officer.
- The medical records of all detainees and prisoners must remain under the control of the medical officer. They are not part of the general prison records.

6.7.4 Healthy Environment

- Healthy living conditions for detainees and prisoners: these requirements are set out in Section 6.7.
- The prison doctor must inspect these facilities regularly and ensure that they are healthy.
- He/she should advise the center's director of any concerns.
- There is a particular risk of spreading diseases in detention if hygiene is poor or living conditions are overcrowded.
- This presents a risk not simply to the detainees and prisoners but to staff and to the wider community.

6.7.5 Mental Health

- Detention officers must monitor the effect of detention on the mental health of detainees and prisoners.
- Any concerns must be reported immediately to a doctor, superior or the governor.

6.8 Contact With Family and the Outside World: Basic Principles

- Detainees and prisoners lose the right to freedom of movement and association - this does not mean that they lose the right to communication and contact with the outside world.

- In particular, they have the right to contact with their families and with their legal representatives.
- Family members outside prison also have the right to contact with the detainee or prisoner.
- The prison administration must make the best possible arrangements to ensure that contact between a detainee or prisoner and his family is maintained.

6.8.1 Visits

- Visits, especially with close family members, are not privileges. They are part of the right to family life.
- These visits should take place in conditions which are as natural as possible, especially if the visitors include children.

6.8.2 Access to Legal Representation

- All detainees and prisoners have the right of access to their legal representative: This is one most basic, universal human and due process rights and must be respected at all times.
- This is especially important for pre-trial detainees and convicted prisoners who are still involved in the judicial process (for example when lodging an appeal).
- It is imperative not to restrict a detainee or prisoner's access to his/her legal representative.
- Interviews and correspondence between detainees or prisoners and their legal representatives are private and confidential.
- Visits by legal representatives must take place out of the hearing of detention officers.

6.8.3 Correspondence and Telephone Calls

- Detainees and prisoners must be allowed to send and receive correspondence.
- They also must be allowed to make and receive telephone calls where circumstances permit.
- Any restrictions on correspondence and telephone calls need to be justified as strictly necessary in each case.

6.9 Complaints Procedures

Detainees and prisoners who feel that their rights have been violated are entitled to make a complaint.

6.9.1 Information About the Complaints System

- Clear information must be available to detainees and prisoners about the method of making a complaint when they first come into prison.
- One must give this information orally to detainees and prisoners who have difficulty with reading and where they do not speak the national language, it must be translated.
- This information should ideally be clearly displayed in the areas where detainees and prisoners live and work.

6.9.2 Submitting a Complaint

- Detainees and prisoners must be able to submit a complaint without fear of reprisals.
- It must also be allowed for someone acting on behalf of the detainee or prisoner to submit a complaint on his/her behalf.
- Detainees and prisoners should have an opportunity each day to submit requests and complaints to the director of the detention center or his/her authorized representative.

6.9.3 Response to Complaints

- All requests and complaints must be dealt with as quickly as possible and properly investigated where appropriate.
- An appropriate response must be given to the detainee or prisoner as quickly as possible.

6.10 Disciplinary Matters and Offences

- The rule of law applies in all prisons and detention centers.
- If an incident appears to be a breach of criminal law it must be reported.
- Where authorities from outside the prison investigate offenses they must follow the same procedures that they use outside the prison.
- Breaches of discipline which are against prison rules must be dealt with in accordance with a set of published procedures.
- The system and the law do not allow unofficial punishments.
- The prohibition against torture, inhuman and degrading treatment applies in prison at all times.

6.11 Vulnerable Groups: Basic Principles

Most detainees and prisoners are adult males. Other groups of detainees often have different needs. They require special attention. These groups may include the following:

- Women;
- Children and young persons;
- The elderly, mentally ill and infirm; and
- People of different nationalities or cultural groups

6.11.1 Women detainees

- The situation of women detainees and prisoners is usually very different from that of men.
- If pregnant women are held in detention they must have access to civilian hospitals for childbirth. The child's place of birth must not be recorded as the detention center.
- Women detainees and prisoners have specific healthcare needs: these must be recognized and attended to.
- Wherever possible women detainees should be treated by women doctors and nurses.
- Women detainees and prisoners must always be kept in completely separate accommodation from men. They must be supervised by women staff.

- Male detention officers must never be in sole charge of women prisoners or detainees. A female member of staff must always be present.
- The detention center must also provide the necessary personal hygiene materials.
- Special attention must be given to the needs of women with small children.

6.11.2 Juveniles and Young Detainees

There are special rules for the treatment of children and juveniles in detention. The most important are:

- UN Convention on the Rights of the Child;
- UN Standard Minimum Rules for the Administration of Juvenile Justice; and
- UN Rules for the Protection of Juveniles Deprived of Their Liberty.

These state that detention should be used as a last resort and for the shortest possible time. Further to this:

- Family links are especially important.
- Women detainees and prisoners who are mothers must be given every opportunity to maintain links with their children.
- Similarly, children and young persons must be afforded every opportunity to maintain links with their parents and/or family members.
- The welfare of children must always be considered of great importance.
- Young persons have specific welfare, educational and health needs.
- The activities and facilities available to them in detention must meet those special needs.
- Young people must be able to carry out activities which will help their continuing development.
- The authorities responsible for juvenile detainees must establish and maintain links with the authorities responsible for the education, welfare, and health of young people in the outside community.

6.11.3 Other Groups

- The authorities responsible for places of detention must also give particular attention to the needs of other specific groups, especially those who are old, infirm, mentally ill or from minority groups.
- The detention center must allow foreign nationals to contact representatives of their own government, for example, consular or diplomatic representatives.

6.12 Monitoring and Inspection: Basic Principles

- Under international law, detention centers should be visited regularly by qualified and experienced persons who do not work for the prison authorities.
- Prison authorities will also have their own separate arrangements to inspect detention centers.
- All detainees and prisoners have the right to communicate freely and in private with these official visitors.
- These interviews may take place within sight of detention officers but they must not be within hearing.

CHAPTER 7

The Client

7.1 Initial Client Interview

The initial interview with the client is potentially the most important meeting defense counsel will have with his/her client. It sets out an essential basis for the attorney-client relationship and affords the defense lawyer an opportunity to get to know the defendant and begin to understand the basic facts of the case.

During the initial interview, the defense lawyer will learn critical information such as the identity of witnesses, the identity of co-defendants, the location of evidence, and details concerning any potential violations of the defendant's legal rights. This information is vital to the development of a successful defense strategy and should be obtained as quickly as practicable. Developing a good defense extends beyond just understanding your client's version of the events. While it is important to know your client's "story," it is also important to test that story against what others say. For example, if your client is charged with assaulting another, and he denies the assault, you should learn from others whether he is known to be a violent person. You should also consider whether, for example, the alleged victim is much larger than the defendant and therefore an unlikely target for assault.

The defense lawyer should use the initial interview as a forum to advise the defendant of his/her legal rights, explain the parameters of the attorney-client relationship and discuss the legal procedures involved in the case. A simple structure of this is as follows:

The 6-Step Interview Structure

01

Introduction and
Parameter
Settings

02

Solicitations of
Narratives

03

Client Narratives

04

Elaborative
Dialogue

05

Issue Definition

06

The Agreement

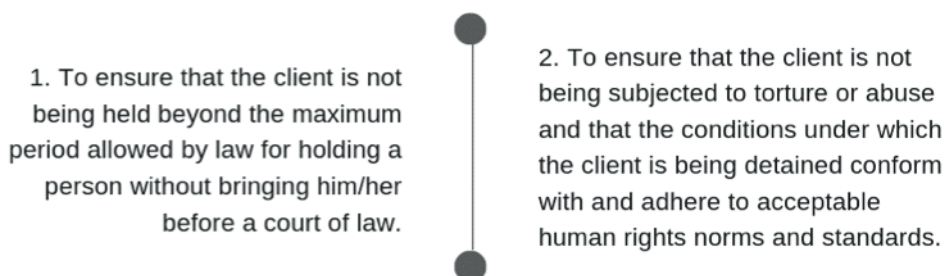
It is therefore very important for defense counsel to meet with his/her client as soon as possible in order to:

- Provide necessary legal assistance to the client as early as possible;
- Start gathering preliminary information about the case;
- Ascertain the client's version of the facts and events;
- Take instructions from the client;
- Start building a defense;

- Start developing the theory and theme of the case; and
- Consider and initiate any preliminary legal steps that need to be taken in order to safeguard the best interests of the client.

Empathy and compassion are imperative during the initial visit with the client. A defense lawyer must earn the clients trust in order to effectively represent the client. It is important to explain to the client that the meeting is privileged and confidential. The client should be informed not to discuss the charges or facts of the case with anyone, including friends and family. Lastly, stress the importance of honesty and to tell the truth at all costs.

Another important purpose of the initial client interview is to ascertain whether the police have reasonable grounds for keeping the client in custody. The defense lawyer should be aware of the legal criteria for obtaining the release of the client prior to trial:



7.2 Practical Tips for Establishing the Lawyer-Client Relationship Through the Initial Interview

In order to gain the client's trust and elicit information relevant to, and necessary for, proceeding with the case, consider the following:

7.2.1 Listen to Your Client's Story:

- Use your basic listening and interviewing skills;
- Try to understand your client's concerns and position;
- Listen to and observe your client;
- Use body language that indicates to the client you are listening and paying attention;
- Indicate interest to the client by making steady eye contact;
- Encourage the client to provide a full narrative of what transpired;
- If possible, have the client write down his/her version of events;
- Let the client know you are there not to judge him/her.

7.2.2 Be Emphatic, Yet Firm:

- Show concern for the client;
- While showing concern, however, maintain professional distance and demeanor as counsel.

7.2.3 Cede Some Control to the Client During the Beginning Portion of the Interview:

- Allow the client to ‘vent’;
- Remember: you are the problem-solver and the client needs to explain his/her troubles and problems to you.

7.2.4 Ask Open-Ended Questions:

- Ask questions requiring an explanation or narrative from the client;
- Remember: Open-ended questions are the WWWHW-questions: WHO, WHEN, WHY, HOW and WHERE;
- Avoid closed-ended questions – they provide less information than open-ended questions and has the effect of leading the client.

7.2.5 Avoid Confronting the Client:

- Do not interrogate your own client;
- Try to avoid a direct line of questioning;
- Try, at this stage, to avoid pointing out any contradictions or inconsistencies in the client’s account with other witnesses’ accounts; that can come later in follow up consultations and preparation for trial.

7.2.6 Ask questions, but do not talk too much:

- An experienced interviewer listens more than he/she talks;
- Ask follow-up or probing questions if certain information is unclear.

7.2.7 Always end the interview with a promise of positive action:

- No matter how big or small, leave your client with an indication of the next action or practical step you as defense counsel will take;
- Schedule a follow-up interview;
- Never make promises to your client you can’t keep.

7.3 Establishing the Lawyer-Client Relationship

The client will form the first impression of defense counsel and defense counsel will similarly form a first impression of the client. One of defense counsel’s primary objectives with the initial client interview will be to establish a positive attorney-client relationship based on mutual confidence, trust, and respect. In order to provide the most effective legal representation, the defense lawyer should meet with the defendant as soon as possible to conduct an initial interview.

The lawyer has a right to interview his client in private without any police officer or prison officer present. The police cannot insist that the client be interviewed within their presence or with a police officer within earshot who can hear what is being said between the lawyer and his client.

The defense lawyer should make sure to set aside enough time to conduct a thorough interview. In preparation for the initial interview, the defense lawyer should become familiar with the elements of the defendant’s alleged crime and its accompanying punishment. If

possible, the defense lawyer should also obtain copies of any relevant documents such as arrest warrants, search warrants, police reports, and any additional documents that relate to the criminal charges. The inability to obtain these documents should not delay the interview. (If these cannot be obtained before the initial interview, they should be obtained as soon as possible following the interview.)

7.4 Initial Client Interview Checklist

The following points serve as a useful guideline as to what information ought to be gathered during the initial interview with the client:

7.4.1 Client background information

During the initial interview, the defense lawyer should obtain the following background information from the defendant. This information allows the defense lawyer to get to know the defendant, as well as informs the lawyer's defense strategy:

- Name
- Parents' names
- Address
- Telephone Number(s)
- Date of Birth
- Ties to the community (including time at current address, family relationships, immigration status (if applicable))
- Height, Weight, and Identifying Features
- Armed Services History
- Educational History
- Employment History
- Criminal History
- Family History
- Physical and Mental Health
- Immediate Medical Needs
- Emergency Contact Information

7.4.2 Arrest

- When were you arrested?
- Where were you arrested?
- Who arrested you?
- Were you informed of the reason for your arrest?
- Did you understand the reason for your arrest?
- At the time of your arrest, were you shown an arrest warrant or summons?
- Were you able to read and understand the arrest warrant?
- Were you provided a copy of the warrant or summons?
- Were you informed of your legal rights, in particular, the right to remain silent?
- Was your family or work unit notified of the reasons for your detainment and of the place of custody within 24 hours of your detainment?

- Was anyone else arrested at the same time you were? If so, do you know their names, addresses and telephone numbers and how to contact their family members? Do you know what offenses they were charged with?

7.4.3 Search and seizure

- Were you strip-searched?
- What has been taken from your person?
- Were any of your clothes seized? Were any articles taken from your clothes?
- Were any of your bodily fluids, fingerprints or hairs taken for testing?
- Was a search conducted at the place of your arrest?
- Was a search conducted at your residence?
- Was a search conducted at your workplace?
- Do you know of any other people or places that were searched? If so, what are the people's names, addresses, and telephone numbers? What are the addresses of the places searched, and what types of places are they (e.g., residences, workplaces)?
- Did you see the police or investigators seize any evidence?
- What objects were seized?
- Was there a search warrant, and did you see it? Did you understand it?
- Were there any witnesses present at the time of the search? If so, what are their names, addresses and telephone numbers?
- Was the search recorded? Did the investigators sign it? Did you sign it? Did anyone else sign it? Did anyone refuse to sign it, and if so, why?
- Did the investigators make a detailed list and duplicate copy of the articles and documents seized at the scene? Did they give a copy of the list to the owner of the seized items?

7.4.4 Interrogation

- What was said to you at the time of your arrest?
- What was said to you after your arrest?
- Were you interrogated within 24 hours after your arrest?
- Who interrogated you? How many people interrogated you?
- Who initiated the conversation with you?
- How did you respond to them?
- What was your state of mind at the time?
- Were your statements recorded?
- Did you write your statement yourself?
- Were you allowed to adequately review and modify your statements?
- Were you allowed to write down your opinions?
- Have your co-defendants been interrogated? If so, do you know what they said about you?

7.4.5 Requests for legal aid and family

- Did you ask for a legal defender?
- Did anyone inform you that you could have a legal defender?
- When were you informed that you could have a legal defender?

- After your arrest, did you request to see a family member, friend or co-worker?
- Have you seen your family members, friends, or co-workers after the arrest?
- Was your family notified of the circumstances and the place where you were being held within 24 hours of your detention and arrest?

7.4.6 Detention

- Describe the place where you were detained after your arrest.
- How many public security officers were present during your arrest?
- Were any compulsory measures taken against you before your interrogation?
- Were you threatened with physical abuse during and after the arrest?
- Were you treated with violence during or after the arrest?
- Were you verbally abused or threatened during and after the arrest?

7.4.7 Information about the alleged victim

- Do you know the alleged victim? If so, describe your relationship with the alleged victim.
- Do you know the alleged victim's name, age, address, telephone number, education, and vocation? Does he/she have a criminal record?
- Has the alleged victim been physically or mentally injured? If so, what type of injuries and how serious are the injuries? Has the alleged victim recovered? Has the alleged victim suffered any property damage? If so, tell me about the nature and the extent of the damage.
- Has the alleged victim received any compensation? If so, when, how much and who paid the compensation?
- What are your feelings towards the alleged victim?

7.4.8 Information about the co-defendants

- Do you know the co-defendants? If so, describe your relationship with them.
- What are the names, ages, addresses, telephone numbers, vocations and criminal histories of the co-defendants?
- Do you know whether the alleged co-defendants have been arrested? If so, do you know what items, if any, were seized from them?
- Do you know what statements, if any, the co-defendants made about you? What is your response to their version of events?

7.4.9 The criminal charges

- Do you understand the nature of the criminal charges against you?
- Do you understand the legal meanings of the charges?
- Do you understand the defenses you might have to the charges?
- Is there anyone who can attest that they were with you at the time of the crime, but away from the scene of the crime? If so, what are their name, address and telephone number?
- What part of the charges do you believe to be inaccurate?
- Is there anyone else who was charged or who should be charged? If so, what are their names, addresses and telephone numbers? How would you describe their involvement in the case?

7.4.10 Quick investigation

- Who should I contact? What are their names, addresses and phone numbers?
- Are there any witnesses I should talk with? If so, can you give me their names, addresses and telephone numbers? What information do you think they might be able to provide? Do you think they are credible?
- Is there any evidence that must be secured? If so, can you tell me what it is and where I can find it? Do you know whether it has already been seized?

7.4.11 In order to prevent unnecessary trouble or risks defense counsel is to avoid the following actions and behavior during the interview:

- To leak information about the case to the client, including information relating to written accusations and exposure;
- To instigate the client to lie about his part in the case;
- To lend your own cellphone to the client;
- To give material articles to the client in private;
- To bring a non-lawyer or the client's family members when meeting the client.

ALWAYS REMEMBER: When interviewing a client, whether in custody or not, the lawyer must be careful not to concoct a defense for the client. The lawyer must find out what the client's story is – that is to say, what the client alleges are the facts of the case – and the lawyer may suggest possible defenses for the client that is supportable on the basis of those facts. For a lawyer to invent or suggest defenses for a client that go beyond the facts disclosed by the client is unethical.

7.5 Special Populations

'Special populations' is a term that is generally used to refer to a specific disadvantaged or vulnerable group. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 10 states the following:

"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 those groups, including gender-sensitive and age-appropriate measures."

For purposes of this manual four groups of special populations as potential clients in Syria will be examined - children, women, internally displaced persons (IDP's) and the mentally ill.

7.5.1 Children

Children possess more protection than adults, but, unfortunately, often face mistreatment throughout different stages of criminal justice. It is important to remember that children under the age of 10 are not liable for any crime and cannot face punishment (Art. 3 Juvenile Offenders Act, as Amended by Legislative Decree No. 52 of 2003). Moreover, those tried that are between the ages of 10 and 17 should only be facing corrective measures prescribed by special laws with the juvenile's interest at the core of them.

When it comes to juvenile criminal proceedings, children enjoy special provisions under the Juvenile Offenders Act No. 18 of 1974. Syria has also signed and ratified the United Nations Convention on the Rights of the Child which is binding in the territory of Syria and grants an additional layer of protection and rights to children.

It is therefore crucial as a defense lawyer to make sure these rights are upheld regardless of the circumstances or seriousness of crimes a child has been accused of. Since children may often face difficulties understanding the charges and proceedings against them due to their age, it is the responsibility of a defense lawyer to make sure that their juvenile clients understand the case against them, or what the police, judges and other justice actors say during all stages of the justice process. A child may also be frightened or shy to ask for an explanation, so it is important to always check if the juvenile has a good understanding of the case and the proceedings at all times.

Finally, confidentiality is paramount to juvenile cases since the mere accusation of a crime, even if the child is found innocent, can poorly affect his/her future. Article 49 of the Juvenile Offenders Act requires that all juvenile trials be held in secrecy for this reason. But it is further crucial to ensure that a juvenile client's identity and all information is kept private from the public, including media, not only during the trial but during the pre-trial stages and after the trial.

7.5.1.1 Interviewing children

Because of their particular vulnerability juvenile clients often present unique challenges for the defense lawyer, one of the most important being the potential conflict of interest between the parent and the juvenile defendant.

To avoid potential complications, it is necessary for counsel to assert him/herself at the start of the initial interview in order to make it clear that he represents the child and the child's interests and that in the event of a disagreement between the parent and the child, the lawyer must act on behalf of the child, not the parent. The defense lawyer must also consider whether or not the parent should remain in the room for the initial interview.

To preserve the attorney-client privilege, the defense lawyer may want to conduct the initial interview of a juvenile defendant without the defendant's parent present. Yet, other considerations such as the juvenile's age, mental condition, and stated preference may favor the parent's presence at the interview, despite the potential compromise of privilege. Defense counsel should be sensitive to the unique needs of the child defendant, who may be even more nervous and anxious at an initial client interview than his adult counterpart. Juvenile defendants may require more follow up questions and additional explanation of the process.

The defense lawyer should make sure the juvenile defendant understands everything discussed in the initial client interview and should conclude the interview with an opportunity for the juvenile to ask questions.

A particularly important focus should be put on making sure children's rights are protected. To that end, it can be useful during children's interviews to include questions such as:

1. *The behavior of the police at the arrest*
 - Did the police identify himself or herself?
 - What was he/she wearing?
 - What did he/she say?
 - Did he/she explain, in plain language, the child's rights?
 - Were the child's parents present for any of this?
2. *Parental involvement*
 - Were the parents informed?
 - Were they present for any interrogation
 - Why not?
3. *Location of questioning*
 - Where did questioning happen?
 - Was it in a police station, a cell, an office?
 - Was the child handcuffed?
 - Was the child sitting or standing?
4. *Length of interrogation*
 - How long did interrogation last?
 - Was it more than an hour?
 - Was it taken at night?
5. *Health of child*
 - Was the health of a child checked at a hospital?
 - When?
 - Is this information on file?

If from the interview it becomes clear that the rights of a juvenile were violated, the defense counsel needs to raise these issues as soon as possible with the judge.

7.5.2 Women

In Syria, women can often encounter substantial obstacles when it comes to criminal justice. They may face increased restrictions on freedom of movement, economic hardship, and stigmatization. The conflict has also made it increasingly harder to obtain necessary civil registry documentation which is particularly important to women and their daily lives. Furthermore, in some cases, women are afraid of their spouse and family retaliation and decide not to pursue formal legal remedies. Combined, these are just a few reasons why women are vulnerable to facing an unfair trial.

As a defense counsel, one should be incredibly sensitive to the circumstances of each female client and treat cases in a delicate manner. In some cases, women can be victims of emotional and physical abuse at the hand of those closest to them, including their spouse, and be afraid of revealing this fearing for their safety. It is important that the female client understands that she can trust the defense lawyer and that their private communications cannot be made available to her spouse, family or anyone else.

Defense counsel should be cautious of domestic violence cases and bear in mind that it is prohibited.

The Arab Charter on Human Rights (2004) (adopted by Syria in 2007):

Article 33:

"[...] 2. The State and society provide for the protection of the family and its members, for the strengthening of its bonds. All forms of violence and abusive treatment in the relations between family members, especially towards women and children, shall be prohibited. The State and society undertake to provide outstanding care and special protection for mothers, children and the elderly. Young persons have the right to be ensured maximum opportunities for physical and mental development."⁷⁸

Defense counsel should also make sure that high standards of proof are upheld during trials of female defendants and that strong evidence is presented in the same way it would be if the accused was male.

7.5.3 Internally Displaced Persons

Defense lawyers should always be aware of the circumstances and the background of their clients. In light of the Syrian conflict, internally displaced persons (IDPs) may face increased hardships and not be able to perform basic tasks such as traveling to a court hearing or being able to provide the necessary documentation. If this is the case, the lawyer should try and assist the client in the criminal process as much as possible so that the client's circumstances do not adversely affect his/her case.

7.5.4 Mentally Ill

Sometime defense attorneys will represent clients that have mental health issues. It is absolutely crucial to identify those, since the client may profit from a less severe sentence or, in case of insanity, be exempt from punishment altogether (CrC Art. 230).

If, as a result of interviews with the client, the defense lawyer considers that the client is not mentally fit to stand trial, the lawyer should liaise with the prosecutor in the case so that the mental condition of the accused can be brought to the attention of a judge and an order

⁷⁸ The Swedish Foundation for Human Rights, 'Arab Charter on Human Rights', [online] Available at: <http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf> [Accessed 12 Feb. 2019]

can be made for a psychiatric investigation into the mental competency of the accused to take place.

The defense lawyer must also consider whether the client was suffering from a mental disorder at the time that the accused committed the act constituting the charge. Mental disorder does not have to be a permanent disorder. The crucial question is whether the disorder existed at the time the “crime” was committed.

Where the crime is apparently motiveless, this should alert the defense lawyer to the possibility that the client may have been suffering from some form of mental instability when he committed the crime. In the case of murder, odd, inexplicable and bizarre behavior before, during or after the killing or from the way in which the accused instructs the lawyer or the way in which he behaves must not be ignored, as it may provide the basis for establishing that the accused had an unsound mind.

If the client was suffering from a temporary mental disorder at the time of the act but is now mentally stable, the accused may be reluctant to allow the lawyer to plead unsound mind. The client may fear that if this route is taken, he or she may end up being incarcerated at a mental asylum for the criminally insane. The lawyer should explain to the client that if the defense succeeds and the court also decides that the accused is no longer suffering a mental disorder, it can simply order that he be released from custody.

The assessment of a person for criminal responsibility due to unsoundness of mind requires specialist expertise and moves to call upon an expert for the determination.

The defense of insanity is based on the principle that a person who is of unsound mind or insane at the time of the offense is unable to form the mens rea necessary for the act constituting the crime and thus not subject to punishment.

The following are the clues that a client may be of a mentally unsound mind:⁷⁹

1. Verbal Evidence

- Unusual Speech Patterns: extremely slow or extremely fast; word repetition; nonsensical speech;
- Extreme and Inappropriate Hostility or Excitement: talking loudly; unreasonably hostile, argumentative; threatening harm;
- Content and Quality of the thoughts: disorganized thought process (illogical, tangential, jumbled up words); disordered thought content (paranoid, delusions, obsessions).

2. Behavioral Evidence

- Physical Appearance: disheveled, poor hygiene; inappropriate to the environment, bizarre clothing or make up;
- Body Movements: strange posture or mannerisms; lethargic, pacing, agitated

⁷⁹ Steven Ciric, M.D. “Identifying Mental Illness in the Courtroom,” Presentation October 24, 2014.

- repetitious, ritualistic movements;
- The appearance of responding to voices;
- Confusion or lack of awareness of surroundings;
- Lack of emotional response;
- Causing injury to self;
- Environmental clues: odd decorations, personal waste, trash, hoarding;

Types of Mental Illness:⁸⁰

- **Psychosis** is an impairment that grossly interferes with the capacity to meet the ordinary demands of life. (DSM-5) Someone suffering from this makes an incorrect evaluation of the accuracy of perceptions and thoughts. That person makes incorrect inferences about reality, even in the face of contradictory evidence.
- **Delusions** has a firm, fixed, false belief that is experienced as a completely valid reality. In responding to delusions, the professional should not argue or endorse the belief but instead should seek to create an alliance with the client. Example: “That must be very hard. We have a problem here. Let’s think together how to solve it. What can we do?”
- **Hallucinations** are sensory perceptions “with the clarity and impact of a true perception” but that occurs without external stimulus. (DSM-5) These can be auditory (most common), visual, tactile, olfactory, and gustatory (taste). Because they are real to the person, the best response is to inquire what they are experiencing rather than if they are hearing something “that isn’t there.” A psychiatrist would ask if the voices are ordering the person to do something, such as harm to self or to others.
- **Schizophrenia** is a condition that interferes with the ability to think clearly, manage emotions, make decisions and relate to others. About 1% of the population suffers from this. Life expectancy is greatly reduced, as 10% of sufferers commit suicide. This can often appear in late adolescence or early adulthood.
- **Mood Disorders** are a pervasive and sustained emotion that colors the perception of the world. (DSM-5) They include:
 - Major depression: this is beyond sadness, loss or a passing mood status. It is persistent and it significantly interferes with thoughts, behavior, activity and physical health. It may occur at any age, although peak incidence is in the 20s.
 - Bipolar disorder: shifts in mood, energy, and functioning. It is characterized by episodes of mania and depression that can last from days to months. The age of onset is often late adolescence or early adulthood.
 - Anxiety: the apprehensive anticipation of future danger or misfortune accompanies by a feeling of unhappiness. The focus of the danger can be internal or external. (DSM-5)
 - Post-Traumatic Stress Disorder (PTSD): this can impact a person greater than 6 years old who is exposed to actual or threatened death, serious injury or sexual violence. This includes directly experiencing witnesses or learning

80 American Psychiatric Association. 2013. Diagnostic and statistical manual of mental disorders: DSM-5. Ar-lington, VA: American Psychiatric Association.

of it, or repeated exposure (such as first responders – police, firefighters, aid workers, etc.). Trauma is re-experienced through thoughts, nightmares, flashbacks. People can respond by both “fight” (combative behavior) or “flight” (avoidance). (DSM-5)

- **Personality Disorders** are enduring patterns or inner experiences and behaviors that deviate markedly from the expectations of an individual’s culture, affecting relationships, world-view, emotional expression, and impulse control.
 - Antisocial Personality Disorder: violates the rights of others through deceit, manipulation, otherwise charming behavior, rationalizing bad behavior, lack of genuine remorse.
 - Borderline Personality Disorder: unstable self-image, unstable emotional expression, unstable relationships, suicidal threats, inappropriate rage, impulsivity.
 - Paranoid Personality Disorder: suspects others are exploiting, harming or deceiving; reads hidden demeaning or threatening meaning into benign remarks or events; perceives attacks on character; recurrent suspicions, such as about fidelity of spouse.
- Substance Abuse Disorder

7.5.5 Interviewing a Mentally Ill Client

Defending and interviewing a mentally ill client poses additional considerations for the defense lawyer. If initial interviews with mentally ill defendants take place in a hospital or institutional setting, the defense lawyer should be careful to explain that he is an attorney and not a member of the hospital staff.

Practically:

- The defense lawyer should explain to the mentally ill defendant that their conversations are confidential and should not be discussed with the hospital staff;
- Evidence of a mental disability is of paramount importance to the formation of the defense lawyer’s strategy, as it can be used to prove that the defendant lacked the criminal intent to carry out the alleged crime.
- Whether the defendant is institutionalized or not, the defense lawyer should closely observe the defendant for signs that he possesses a mental illness.
- The defense lawyer should also seek information related to a possible mental illness through interviews with the defendant’s family members.

The defense lawyer will most likely want to seek an expert opinion to evaluate the defendant’s mental condition and aid in forming the most effective defense strategy.

CHAPTER 8

Trial Skills

8.1 Courtroom Etiquette and Protocol

The courtroom is a formal setting, and there are some specific etiquette rules to follow. Here are some useful guidelines:

- Always be truthful with the court – remember you are part of the justice process;
- Dress appropriately for a court appearance before entering the courtroom – this shows respect for the forum in which you are appearing;
- Treat all courtroom staff and other trial participants with respect – this includes interpreters, orderlies, the stenographer, police officers, clerks, judges, witnesses, prosecutors, victims;
- When facing the judge, counsel for the accused usually sits at the table to the right of the judge and counsel for the prosecution sits at the table to the left;
- When the judge enters, all counsel, and everyone else in the courtroom must stand-up; sit down when the clerk/registrar instructs everyone to do so;
- When you are getting ready to address the judge, either stand at your table or by the podium (if there is one);
- Wait until the judge looks at you or is ready to proceed. The judge may nod or may say that you can proceed. If you are not sure, ask the judge if you may proceed;
- Usually, the first counsel to address the court should introduce other counsel. For example one might say “The lawyer [name], my colleague [name]” or “my friends [name] and [name] appear for the accused”;
- Every other counsel should introduce themselves again before starting to address the court;
- If it is not your turn to address the judge sit down and pay attention to what is happening;
- Take notes that you can use during your submissions or closing statements;
- Try not to distract the judge - if you need to talk with your co-counsel, write a note;
- Stand every time you are addressing or being addressed by the judge – do not remain seated;
- Refer to your co-counsel as “my colleague” or “my co-counsel”. Defense counsel for other accused, if applicable, should be referred to as “counsel for [name of the client]”.
- Address the judge formally as “honorable judge” or simply as “judge”;
- Do not interrupt the judge;
- If you made an erroneous submission of fact or law and this is pointed out to you either by the judge or the prosecutor be humble and acknowledge it politely;
- When you address the court and wish to make a point, indicate it with the words “If the honorable court allows me, after your permission, the honorable judge”;
- If a judge interrupts you mid-argument or submission, stop immediately, and wait

until he/she is finished before continuing;

- If you wish to convey to the court of the prosecutor a particular fact or point that is important to your client, indicate it by stating “I would like to point out/clarify, your honor”;
- Never interrupt or object while an opposing counsel is addressing the judge;
- Wait until you are specifically asked by the judge to respond to a point argued by the prosecution;
- If the judge asks you a question, take your time to think about it before replying. If you do not hear the question or are confused by it, ask the judge to repeat or restate the question;
- If you do not know the answer to a question, say so, or say you will check and get back to the court with the answer.
- Once a question has been answered, pick up from where you were before the question;
- Never lose your temper in open court.

8.2 Trial Proceedings

8.2.1 General

After pre-trial matters have been completed, the prosecution reads the indictment and the summary of his/her case. Afterward the defense attorney can raise any points or issues with the indictment. Otherwise, the judge moves to question the accused, and all the witnesses starting with the complainant and prosecution witnesses.

8.2.2 Practical tips for delivering an effective intervention or a statement

- Begin in the prescribed formal way: “May it please the Court”;
- Be as brief as possible;
- Look at the head judge and/or each judge: Take them into your confidence and do not just speak blankly into courtroom space;
- Do not quarrel with your opponent or anyone else, especially the judge.

8.2.3 Testimony of the accused

In Syria, during criminal trials, the accused cannot choose if he/she will testify. Every accused is questioned by the head judge, in addition to the prosecutor and the counsel of the complainant, if they so wish. The defense counsel needs to, therefore, be aware of several strategic choices that can be made before the trial.

A crucial thing to remember is that the accused can be his/her biggest enemy when testifying. It is the responsibility of the defense counsel to make sure that their clients do not lie or deny facts in court that are indisputable. Lying can reflect very badly both on the client and even his/her defense counsel sometimes.

Before the testimony, the accused will be asked if he/she admits guilt or pleads innocence. It is important to consider what evidence there is in the case before deciding on one stance or the other. Generally, pleading innocence when the evidence overwhelmingly suggests guilt and conviction can aggravate the sentence. In contrast, pleading guilty can be considered as a mitigating circumstance by judges resulting in a lighter sentence.

During the testimony, it is a good idea for the client to admit the facts that are indisputable, although he/she should be careful and not admit something that is in question. For instance, if the client is asked whether he has ever seen person X or knows him, and they went to school together, he should not deny this as this is fairly easy to check and will reflect badly, or even worse if the client is caught not telling the truth. Being upfront with some facts of the case, on the other hand, can create a good image of the character and, in case of a guilty verdict, minimize the sentence or result in an alternative solution. It is important to rigorously look at the case and agree beforehand on the facts which the client should admit if asked about.

During the testimony, the accused should make sure he/she does not say more than is required. It is also important that the testimony does not contradict itself and is compelling. It is, therefore, a good idea to talk to the client beforehand and prepare him/her for the testimony. Sometimes the memory of the events can be foggy or confused, so it is crucial that the client is firm in his/her recollections and does not speculate about things that may have happened. It is better to admit that one may not remember or be completely sure of some facts, than guess.

It is equally important to consider the facts or testimonies that the defense counsel and the accused should dispute. But always remember, that disputing facts should not cross the line and be untruthful. It is never okay to say something you know is not true and perjure yourself.

8.2.4 Witness and co-accused questions

Defense counsel may direct their questions for witnesses to the judge after the judge and the prosecutor have finished questioning them. This could be a great opportunity to clarify a witness testimony or ask questions that would highlight inconsistencies or contradictions in a testimony benefiting the client's case. The attorney should not ask questions he might not want to hear answers to or that may implicate his/her client. The defense lawyer should think carefully and even plan potential questions before the trial, if possible. The aim must be to extract useful evidence in a clear and systematic fashion. The questions posed should be kept short and clearly and simply formulated so that they can be readily understood by the judge and the witnesses.

The defense counsel can also present their witnesses in the trial. However, it is important to find out from these witnesses what they actually know about the events in question. It is dangerous to rely upon what the accused or his relatives say that certain witnesses know and to ask or summon such persons to appear in the trial based upon what you have been told they will say. Possible defense witnesses should be interviewed before the trial to see what they know about salient matters. They can be then called to a trial if they can give testimony favorable to the defense case.

If there is a co-accused, a good strategy could be to ask questions that would create doubt in your client's culpability.

A problem may arise where the legal practitioner finds from interviewing a witness that the witness could provide valuable evidence for the defense, but the witness has indicated that he is unwilling or reluctant to give this testimony in court. If the testimony of the witness is vital to the defense, and the defense counsel fails to convince the witness to appear and testify during trial, he/she may ask the court to formally summon the witness. The attorney has to be prepared to explain the court why the witness is important to the case.

8.2.5 Further to the above, the counsel should:

- Consider how questioning witnesses is likely to generate helpful information for his/her arguments and the case;
- Think about how some questions could harm a case and should, therefore, be avoided;
- Anticipate the witnesses the prosecutor might call to testify as well as the evidence they are likely to give;
- Create a necessary question plan for each anticipated witness;
- Be alert to inconsistencies or possible variations in witness testimony and highlights these to the court in his/her closing arguments;
- Review prior statements of witnesses, or facts that he/she may have;
- Where appropriate, review relevant statutes and local police regulations for possible use if a misconduct argument could be made against the police.
- Be alert to issues relating to witness credibility, including bias and motive for testifying and highlight these issues in closing arguments or raise objections before testimonies are heard.

Remember that purposeless questioning is a waste of time and opportunity, so use your discretion.

8.2.6 Closing statements

8.2.6.1 General

A closing argument is the concluding statement of each party at trial. It usually reiterates the most important facts, evidence, and the law for the trier of fact - the judge(s).

A closing argument occurs at the end of a trial after the presentation of all evidence. The defense or the accused are usually permitted a final rebuttal and a statement. Defense counsel should use the closing summation to highlight weaknesses or discrepancies in the prosecution's argument or evidence that was presented. The attorney may also formulate legal arguments if those can be helpful to the case.

During the summation, all of the evidentiary pieces should be brought together and the case should be presented in a strong, fluid, and persuasive manner. All points that help prove the elements establishing the theory of the case must be fully explained. The closing should be performed in a simple, yet precise way.

8.2.6.2 Useful practical tips:

- It is important to anticipate the arguments that may be made by the other side: Prepare to rebut those arguments before they are made;

- Avoid attacking or insulting the prosecutor, other attorneys, witnesses or the victim: judges don't appreciate this type of argument. Under no circumstances engage in a personality battle with the opposing party or counsel – it is inappropriate and unprofessional;
- It is important not to cover all the evidence presented during the trial: If the entire case is presented during a closing statement, this becomes boring and one runs the risk of losing the attention of the judge. Instead, point out the highlights in given testimonies, discrepancies, contradictions, key evidence from the trial and the most important legal clauses;
- Do not present new evidence during the closing speech, it should only be about the evidence that was analyzed during the trial based on which the verdict will be reached.

In his/her closing statement, counsel should finish submissions by asking the judge to acquit the accused if there is not enough evidence or legal basis for guilt or ask for a reduced sentence if there were mitigating circumstances presented.

8.2.6.3 The test: Guilty beyond a reasonable doubt?

Under the law, the accused is presumed innocent until proven guilty. As such it is the responsibility of the prosecution to prove that the accused is guilty of all charges beyond a reasonable doubt. If reasonable doubt remains after the end of the trial, the judge has to rule in favor of the accused in accordance with the rule that when in doubt, the side of the accused is favored.

Guilty beyond a reasonable doubt means that after considering and comparing all the evidence, facts and arguments, every element of the charge(s) has been proven and no doubt of the accused's guilt remains.

To better understand what *beyond a reasonable doubt* means, it helps to look at two other standards that courts may apply: *A preponderance of the evidence or/and clear and convincing evidence*:

- **A preponderance of the evidence:** This means that after weighing all the evidence, the judge and the court can reasonably conclude that there is more than 50% chance an event, with which the accused is charged, occurred;
- **Clear and convincing evidence:** This bears a higher burden of proof than a preponderance of the evidence. Instead of 50%, at least 75% certainty is required;
- **Beyond a reasonable doubt:** The highest standard and is common to most criminal legal systems in the world. In a criminal case, because the stakes are so high, it is not enough to prove that the defendant is probably guilty - rather, the prosecution must prove each element of its case (and the charge) beyond a reasonable doubt.

If defense counsel believes that there is reasonable doubt of the client's guilt after all the evidence was presented, he/she should make this a central argument of the closing speech.

CHAPTER 9

Defense Case Theory and Theme

9.1 Introduction & Drafting the Outline of the Case

A critical legal skill and tool of a lawyer is to organize and prepare a case with the strongest defense arguments that could be made.

Every case contains a story and it is the duty of a lawyer to make sure this story is heard in court. This story is also called case theory. One's case theory must ultimately demonstrate that the client is entitled to relief: in a criminal case an acquittal, or a reduced sentence.

The case theory is the strategic plan for conducting a case and defense on behalf of a client as well as the tactical presentation thereof. Case theory usually involves legal theory, factual theory, and persuasive theory:

- **Legal theory:** The legal arguments explaining the reasons for why the defense and the defendant should prevail;
- **Factual theory:** An explanation of how a particular course of events happened or could have happened; and
- **Persuasive theory:** Argument as to why the accused should be acquitted as a matter of fairness and justice.

Following the initial consultation with the client, it is important to begin to formulate the theory of the case, which will lead you to form your defense arguments. In doing so a number of questions will need scrutiny:

- Was the Defendant illegally arrested?
- Was the client tortured or/and mistreated in any way?
- Were there sufficient statutory grounds to arrest the accused?
- If the accused is/was detained, was it lawful?
- If a search was completed, was it lawful?
- If necessary, was an interpreter provided to the accused?
- Does the accused have the mental capacity to commit the crimes?
- Has the accused signed any documents that include a confession?
- Does the accused want to plead guilty?
- Lay witness statements that need to be gathered?
- If the accused has an alibi, can this be substantiated?
- Has the statutory time limit for criminal prosecution expired?
- Can you prove the innocence of the accused?
- Can you justify the crime committed by the accused?
- Did the accused indeed commit the crime?
- Is there anyone who should take more responsibility than the client for the alleged offense?
- Is the client eligible for a lighter or mitigated punishment?

- Will the prosecution be able to bear its' burden of proof?

The above is a non-exhaustive list – keep in mind it is a flexible guideline that will alter with facts of every individual case. After gathering the initial information, review the statutes or codes listed within the charge as well as the elements of the crime. Review the criminal code for the potential penalties that the accused will face should there be a judgment of guilty as charged.

Remember, the lawyer and the accused have to be in agreement on how they will defend their case. The accused will be asked to testify at trial, and diverging stories and facts may harm the accused's case significantly. If the client does not agree with the attorney's strategy, it is an ethical obligation of the lawyer to follow his/her client's wishes, after giving advice and a legal opinion.

9.2 Determining The Case Theory

9.2.1 Whatever the facts of a matter may be, a good case theory is:

- Not based on assumptions about any aspects or facts of the case;
- Takes into account and explains or argues away unfavorable facts or aspects of the case, pokes the holes in the prosecution's case;
- Accepted by the presiding judge without having to stretch their imagination;
- Built on facts; and
- Consistent with incontestable facts (if any).

9.2.2 Why is it important to develop and have a case theory?

Having a good case theory is important as your case theory controls:

- Your case investigation;
- Your questions to your client;
- Your discovery and trial preparation;
- What you ask the witnesses during the trial;
- What is said during your closing argument; and
- What your case theme will be.

A thorough case theory thus provides a strategic roadmap of the case and ultimately how to present it tactically in court to a judge.

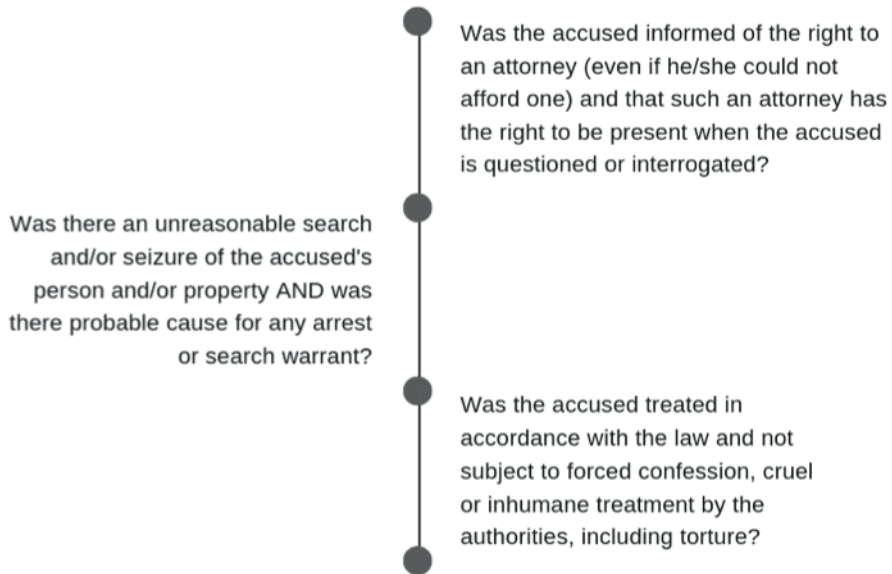
9.2.3 How do I go about creating and developing a theory of a case?

The **first** step in creating a case theory is to review the charge or indictment to determine precisely what the accused is being charged with. At this stage, it is critical to determine the essential elements of the crime and charge.

The **second** step is to thoroughly investigate the facts and background of the case. This is done through various actions:

- Interview the accused to obtain information, facts, and instructions;
- Inspect and examine fully all evidence, documents, exhibits and other materials made available by the prosecution;

- If possible, interview eyewitnesses to the alleged crime to obtain their version of the facts, and evaluate their credibility (e.g. an eyewitness might have poor eyesight and might not have correctly identified the accused, or has reasons to be untruthful);
- If possible, interview any other potential witnesses who may have information relevant to the case;
- If possible or applicable, examine the scene of the alleged crime, and take pictures;
- Control whether the accused's constitutional rights were violated, in particular:



The following are some additional actions that can be taken to help structure a defense theory and be prepared for trial:

- Talking with individuals familiar with the accused;
- Having facts about the accused's personal history;
- Having information about the accused's past (e.g. criminal history, criminal record);
- Having medical record documents, if necessary;
- Asking for a psychiatric or medical evaluation of a client, if applicable;
- Avoiding assumptions.

The **third** step in determining one's case theory is deciding how to conduct the accused's defense in the courtroom:

- Determine whether any initial objections or in limine points should be raised before the client pleads: For example jurisdictional issues, defective charge or indictment, etc;
- Identify the facts you will need to establish and prove in pursuit and presentation of the accused's defense;

- Identify how to prove those facts and what witnesses you need to call, or which information to present, to establish those facts;
- Determine whether the prosecution's witnesses have any (or significant) credibility issues;
- Determine the strongest points in your case as well as that of the prosecution; and
- Determine the weak points in the prosecution's case as well as your own.

A lawyer should, from the outset, build a general theory of the case centered on the client's best interests, the applicable law as well as the facts of the matter. This will not only help him/her evaluate what choices to make throughout the defense process but also guide his/her focus during the investigation of the matter and trial preparation.

In this sense, it remains the lawyer's duty to continuously emphasize and expand upon the facts and evidence supporting his/her client's version and theory of the case.

9.3 Types of Criminal Defenses

It is crucial to remember that each accused is presumed innocent until the court's final ruling. This is enshrined in Article 51 of the Syrian Constitution (2012). It means that the prosecution is responsible for proving the accused is guilty to absolute certainty. If there is uncertainty, even the slightest one, in accordance with the rule that gives the accused the benefit of the doubt, the court is obliged to acquit the accused. Moreover, the defense does not have the responsibility to prove innocence, it can merely show why the prosecution does not fully prove its case and why doubt remains, which is sufficient for acquittal. However, in constructing defense arguments, it could be useful to come up with a particular defense that may immediately crush the prosecution's case e.g. alibi, or that would significantly help your client get an acquittal or a reduced sentence.

When determining which defense arguments should be made, the attorney and the client need to first decide which facts they will be disputing, and which they will admit in court. Ultimately, a choice needs to also be made of whether it would be better to plead full innocence and acquittal or admit guilt and argue for mitigating factors and good character.

9.3.1 Mistake of Fact (Material Error)

If an individual's act is a mistake, he/she should not be punished.

- For example:
- Person A works at a library all day. After leaving, A realizes he/she took somebody else's computer. A did not commit theft.
- A, an officer of a Court, being ordered by that court to arrest B and, after due inquiry, believing C to be B, arrests C. A has committed no offense.

In addition, Article 223 of the Criminal Code stipulates that:

- “ - No person shall be punished as a perpetrator, instigator or an abettor of an intentional crime that is committed due to a material error inflicted on one of the elements that form a crime.
- If one of the aggravating factors is an error, then the offender is not responsible for

- this factor and, on the contrary, benefits from the excuse that he was not aware of.*
- *These provisions shall apply in cases of mistaken identity of the victim.”*

9.3.2 Mistake of Law

A mistake of law occurs when an individual is mistaken about what the law is. In general, ignorance is not a legitimate defense, but in rare circumstances, it could be.

Article 222 of the Criminal Code stipulates that:

- “ 1. No one can invoke ignorance or misinterpretation of the law as an excuse.
- 2. However, the following are not punishable:
 - a. Ignorance of a new law if the offense was committed within three days following the publication;
 - b. Ignorance of the foreigner who arrived in Syria and committed a crime within the first three days of his/her arrival when the crime committed is not punishable by the state he/she is a citizen or a resident of. “

For example:

- A person imports goods to the port, but suddenly a new law is enacted criminalizing the acquisition of such goods. This person had no criminal intent and therefore does not receive a criminal penalty.

9.3.3 Self-Defense

A person has a right to self-defense and should not be punished for exercising it. As such, if the life of the accused or someone else is in danger, he/she can be justified for using force. Nevertheless, the defense lawyer needs to demonstrate that the danger was reasonable and that the response was proportionate to the perceived threat.

Article 228 of the criminal procedure code stipulates:

“The perpetrator shall not be punished for the act that he resorted to by absolute necessity of protecting himself, another person, his property or the property of others from the grave and present danger, provided that he did not cause that danger and that act is commensurate with the danger.

It is not considered a necessity if the person is, under the law [in his profession], subject to danger.”

9.3.4 Misfortune/Accident

An individual who is coerced to commit a crime or commits it unintentionally, and could not have foreseen the consequences of his/her actions, can be excused from punishment or profit from a significantly reduced sentence. For example, A is at work with a hatchet; the head flies off and kills a man who is standing by. In this instance, there might have been a malfunction in the hatchet which was not A's fault, so his act is not punishable. However, if the act is an error A should have foreseen, or it resulted from A's actions that are contrary to usual behavior, the crime is considered unintentional and mitigating factors apply.

Article 226 of the criminal code stipulates:

1. *No one shall receive punishment for the act that is a result of physical or moral coercion that he was not able to push away.*
2. *A person who is found in that state [of committing a crime] as a result of his error will be punished, when necessary, as a perpetrator for an unintentional crime.*

9.3.5 Approval or Consent

An attorney can argue that a certain action was given consent, therefore there was no crime. For instance, if a person A agrees to lend person B his/her car, B is not committing theft. However, there can be difficulties determining whether consent was actually given and whether both parties were agreeing to the same thing. It is important to keep in mind that persons that are unconscious, asleep, are not of a sound mind, or minors cannot give consent, so this defense would not work in the mentioned cases.

9.3.6 Duress

If a person is coerced into committing a crime through the use of force or threat of force against him/her or the family, the act may be excused or the punishment reduced. For instance, a child is kidnapped by a gang member, who asks the mother to smuggle drugs, otherwise, the child will be killed. The attorney could argue that the crime was made under duress and that the mother should not be held liable for her offense.

9.3.7 Necessity

Sometimes an argument can be made that an unlawful act was necessary to avoid greater harm. For instance, there is a shooting, and a person decides to enter someone's property unlawfully to hide. Legally, that person would be liable for trespassing or breaking and entering, but if this was absolutely necessary to avoid danger, the accused should not face punishment.

9.3.8 Alibi

An alibi is a specific defense where an accused pleads that he/she was, at the time when the crime was committed, in a different place. An alibi defense can be used both by presenting a witness (someone that was with the accused, or saw the accused at the time of the crime) or documentary evidence (photos, GPS, videos etc.) that prove the accused was somewhere else at the time of the crime and could not have possibly committed it.

9.3.9 Degree of Culpability

Sometimes when a crime is committed or involves several people, an attorney can argue for a diminished degree of culpability and a sentence for his client. The circumstances surrounding the crime need to be examined carefully to do this. For instance, if a client is involved in a robbery, and his/her accomplice, when carrying out the robbery, wounds or kills a person, the client might not be fully responsible for the murder and could receive a lighter sentence if that murder was not premeditated or agreed upon by both parties.

If the client was involved in the organization of a crime, but before the crime took place, changed his/her mind and actively tried to stop or prevent the crime from happening, this may constitute a mitigating factor or relieve the client of criminal liability.

9.3.10 Incapacity (*Doli Incapax*)

Incapacity is a type of defense that rests on proving the accused lacked the capacity to distinguish between right and wrong or to foresee the consequences of his/her actions.

This defense can be used under three circumstances:

1. *When the accused is a minor*
2. *When the accused had diminished or no capacity for recognition.*
3. *When the accused is mentally insane*

9.3.10.1 Defense of Infancy

Children, as a rule, lack maturity and the capacity to think the same way adults do. For this reason, children are not tried the same way adults are.

Two important distinctions should be made henceforth:

- *Act of a child under ten years of age:* nothing is an offense when the act is done by a child under the age of ten because the child cannot bear the burden of criminal responsibility; thus, does not deserve any punishment. The child, therefore, shall not face criminal prosecution (Art. 2, Juvenile Offenders Act No. 18 of 1974 as amended by the Legislative Decree No. 52 of 2003);
- *Actions of children who are over 10 but under 18 years of age:* these children do not bear full responsibility since they do not have sufficient maturity. Therefore, they do not receive any punishment and only undergo corrective measures such as relinquishing the juvenile to parents, a family member, a legal guardian, or being admitted to the care center or a correctional institution (Section A, Art. 3, Juvenile Delinquents Act No. 18 of 1974 as amended by the Legislative Decree No. 52 of 2003). However, juveniles over 15 who have committed a felony, will benefit from mitigating circumstances due to their age and are subject to reduced sentences as per Art. 29 of the Juvenile Delinquents Act. Those sentenced to imprisonment can only be admitted to the special division of a juvenile correctional institution, as per Art. 30 of the Juvenile Offender Act.

It is the responsibility of the attorney to make sure children are never tried as adults, and that their interest is put first. If the juvenile client is tried, the emphasis should always be on how the court could help the juvenile rehabilitate, and not on the punishment.

9.3.10.2 Diminished Capacity

An attorney could argue that a person had a diminished capacity to understand his/her actions and should, therefore, profit from a reduced sentence or an exemption from punishment. This usually involves involuntary intoxication.

Involuntary intoxication

Involuntary intoxication occurs when someone becomes intoxicated against their knowledge or will. For instance, someone may have slipped a drug into the accused's drink and the accused consumed it without knowing that it contained the drug. If the accused

committed a crime under a strong influence and lacked the mens rea for the crime because of the effects of the drug, an argument should be made for an exemption from punishment, or reduced sentence in case the intoxication resulted from his [the defendant's] mistake.

Article 234 of the criminal code stipulates the following:

- “1. A person who committed the act due to a sudden and force majeure intoxication by alcohol or drugs shall be exempted from punishment by reason of loss of consciousness or free will.*
- 2. If intoxication was the fault of the perpetrator, he shall be liable for any unintended offenses he committed.*
- 3. He shall be liable for the offense in question if he could have foreseen that he might commit criminal offenses due to his error.”*

9.3.10.3 Insanity

Those that have committed a crime while in a state of insanity are exempt from punishment (CrC Art.230).

When pleading insanity and choosing insanity as a defense the critical elements are the following:

- The time when the act was committed;
- Unsoundness of mind of the accused;
- Incapable of knowing and understanding the nature of his act; and
- Whether it is wrong or contrary to the law.

The court, with the help of an expert, ultimately decides whether the person was mentally insane at the time of the crime. But it could be helpful to have documents, for instance, medical records, or witnesses that could testify about the mental state of the accused, to aid the defense during the trial.

9.4 Practical Skills for Presenting the Defense in Court

In court, the client and the lawyer tell their version of events. For this, they use a theory of the case infused with a coherent and logical theme. To defend the accused effectively, the lawyer and the client need to be in agreement over the facts of the case and the defense they will be using. A lawyer must further understand how to present his/her arguments in such a way that the judge, who ultimately decides the facts of the case, is persuaded of the defense's side. The judge will not be moved by emotion, but will coldheartedly consider the events and facts as an independent party to come to his/her own conclusion. Specialized judges usually have more experience in a particular field of crime, so the arguments need to be legally and factually strong.

Your client's defense starts with his/her testimony. It has to leave a positive impression on the judge. Make sure your client's testimony is coherent, flows logically and is convincing. If your client's testimony has logical gaps and inconsistencies this might be construed as lying or not telling the full truth of events. To ensure this does not happen, it is a good idea to rehearse the questions the judge or the prosecutor might ask before the trial. Your

client should behave respectfully during his testimony, as well as treat other witnesses with respect. The client should avoid raising voice and getting frustrated as this will make it harder for the judge(s) to thoroughly listen and understand the facts presented by the accused.

During the closing arguments, the defense attorney has to also be consistent, making sure he/she does not contradict the client, and that the arguments presented are compelling.

The following practical skills may help the judge understand and be persuaded of the arguments better:

- Articulate and clear speech;
- Varied tones and volume of voice;
- Body language and open hand gestures;
- Measured pauses and emphasis on the most important words or facts.

CHAPTER 10

Fundamental Principles of International Humanitarian Law and International Human Rights Law

10.1 Defining International Humanitarian Law (IHL) and International Human Rights Law (IHRL)

10.1.1 What is International Humanitarian Law (IHL)?

International humanitarian law (IHL), also known as the law of armed conflict, is a set of rules that are designed to mitigate and limit the effects of armed conflict for humanitarian reasons. IHL protects individuals that do not or that no longer participate in armed hostilities and imposes limits on warfare between belligerents.

IHL is part of the larger body of international law and is synonymous with *ius in bello* (law of armed conflict) which is separate and should not be confused with *ius ad bellum* (law regulating the resort to force). IHL applies irrespective of the reasons, justification or cause for which each side is fighting and universally protects all victims of conflict regardless of affiliation. IHL traditionally used to only regulate relationships between States. But since the wars have evolved and became increasingly more complex in their nature, IHL now recognizes obligations for both the States and non-state armed groups or other parties to an armed conflict.

The main body of IHL consists of the Geneva Conventions (discussed below), the Hague Conventions, and customary international law, as well as case law. Some examples of treaties prohibiting certain military tactics and weapons are the following:

- the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (plus the two protocols)
- the 1972 Biological Weapons Convention
- the 1980 Conventional Weapons Convention and its five protocols
- the 1993 Chemical Weapons Convention
- the 1997 Ottawa Convention on anti-personnel mines
- the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
- 2008 Convention on Cluster Munitions

10.1.2 History, Development, and Adoption of International Humanitarian Law

International humanitarian law has its roots in ancient religions and civilizations as war has always been regulated by existent customs and principles, to an extent. However, IHL was not codified until the 19th century, when following one of the bloodiest battles of the century in Solferino, the states agreed to come up with rules that would help protect non-combatants. Thus the foundation for the Geneva Conventions was laid down and on 22 August 1864 and the first twelve nations signed the first Geneva Convention - the

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Around the same time, in 1863, the International Red Cross was established to help the wounded in wartime.

The Hague Conventions were created to govern the conduct of the war in parallel to the Geneva Conventions. Emerging from the Hague Peace Conferences between 1899 and 1907, the Hague Conventions are a series of international treaties that impose limitations on armaments. A few examples include the prohibition of chemical or biological warfare.

Following the brutalities of World War II and exposure of war crimes during the Nuremberg trials, a series of conferences were held in 1949 affirming the support of the international community towards updating and expanding the prior Geneva and Hague Conventions. Thus, four Geneva Conventions, as we know them today, have been created in 1949 and universally adopted:

- The First Geneva Convention: for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- The Second Geneva Convention: for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea;
- The Third Geneva Convention: Relative to the Treatment of Prisoners of War;
- The Fourth Geneva Convention: Relative to the Protection of Civilian Persons in Time of War.

Due to the changing nature of modern warfare and armed conflicts, and especially with a surge of civil wars in the 20th century, additional protocols were adopted to the Geneva Conventions:

- Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts;
- Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts;
- Protocol III (2005) relating to the Adoption of an Additional Distinctive Emblem.

These protocols were designed to make IHL more complete, universal and to better protect non-combatants in times of armed conflict.

10.1.3 When and where does IHL Find Application?

As previously noted, IHL only applies in times of armed conflict and does not extend to any isolated cases of violence or internal tensions. Once an armed conflict has begun, all sides are subject to the rules of IHL, regardless of who started the war. Since the Geneva Conventions have been universally ratified, the bulk of this body of law applies globally.

IHL further distinguishes between international armed conflict (IAC) and non-international armed conflict (NIAC). An international armed conflict is such where at least two States are involved. This type of conflict is subject to a range of rules set out in the Geneva Conventions and Additional Protocols, as well as other international treaties. A non-international armed conflict is a protracted armed confrontation between armed

governmental forces and forces of one or more armed groups, or between such armed groups on the territory of a State. The parties involved must show a minimum level of organization and the confrontation needs to reach a minimum level of intensity. It is important to note, however, that the legal classification of a conflict can always change from one to another. In a NIAC, each party, as a bare minimum, is bound to apply the fundamental humanitarian provisions of international law as stipulated in the Article 3 common to all Geneva Conventions and from which no derogation is permitted.⁸¹

10.1.4 Who and what does IHL Protect?

International Humanitarian law covers two fundamental areas:

1. The protection of those who are not, or no longer, taking part in fighting;
2. Restrictions on the means of warfare – in particular weapons – and the methods of warfare, such as military tactics.

As such, IHL protects those who do not take an active part in the fighting, including civilians, medical, religious, military personnel, as well as combatants that no longer engage in active combat. The latter includes wounded soldiers, sick combatants, shipwrecked, and prisoners of war (POWs).⁸² This protection also extends to civilian objects, such as medical units (hospitals, blood transfusion centers etc.) and medical transport (ambulances, medical aircraft, hospital ships, etc.).

10.1.5 How does IHL protect?

The mentioned categories of people are entitled to respect for their right to life, as well as their physical and mental integrity. They enjoy certain legal guarantees and must be treated humanely no matter the circumstances.

A few specific examples of the rules governing their protection include: prohibition to kill or wound an enemy who has surrendered or is unable to fight; responsibility to collect and care for the wounded and sick by those in whose power the vulnerable find themselves; prohibition to interfere with medical personnel and supplies, work of hospitals and ambulances, which must be protected at all times.

There are additional rules that detail the rights of prisoners of war (POWs) and impose certain responsibilities to the authority under whose control the prisoners of war are. The provisions, that are outlined in the Third Geneva Convention of 1949 and the Additional Protocol I of 1977, include adequate food, shelter, clothing, hygiene, and medical care, as well as the rights to exchange messages with their families. In noninternational armed conflicts, under the common Article 3 and Additional Protocol II of 1977, any persons deprived of liberty related to conflict must be protected against murder, torture and cruel, inhumane and humiliating treatment.⁸³

81 International Committee of the Red Cross, 'The Law Of Armed Conflict: Non-international armed conflict', June 2002, available at: https://www.icrc.org/en/doc/assets/files/other/law10_final.pdf

82 ICRC, Advisory Service on International Humanitarian Law, 'What is international humanitarian law?', December 2014.

83 *Ibid.*

IHL further sets out a number of recognizable symbols that can be used to identify protected persons, objects and places. The main emblems are the red cross, the red crescent and the red diamond (discussed further below), as well as symbols that identify the cultural property or civil defense facilities.⁸⁴

10.1.6 Why is IHL important?

Since its inception, IHL has contributed to protecting civilians, prisoners, sick and wounded, and restricted the use of inhumane weapons. Without this, many more lives could have been lost and people exposed to scores of heinous crimes. Unfortunately, violations of IHL persist until this day and civilian deaths are often collateral damage with civilians sometimes finding themselves as a target. Nevertheless, it is always important to ensure respect and compliance with IHL and its treaties to safeguard wellbeing and safety of non-combatants.

10.1.7 What is International Human Rights Law?

Similarly to IHL, International Human Rights Law (IHRL) is a body of different treaties, customary laws, and fundamental principles. The main purpose of IHRL is to protect people's inherent rights. But unlike IHL, IHRL finds its application both in times of peace and armed conflict as confirmed by the bodies such as United Nations Security Council, United National General Assembly, and the International Court of Justice. This is so since the international community agrees that human beings are born with innate rights, hence they continue to exist regardless if there is war or peace. Some derogation is possible in light of the state of emergency, however, there are some provisions to which no derogation is permitted. These include:

- Prohibition of discrimination on the basis of race, color, sex, language, religion or social origin.
- (ICCPR) the right to be free from arbitrary deprivation of life; the prohibition of torture and other ill-treatment; the prohibition of slavery, imprisonment for debt and retroactive penalty; recognition as a person before the law; freedom of thought, conscience, and religion.⁸⁵
- (non-derogable rights recognized by Human Rights Committee jurisprudence) the right of all persons deprived of liberty to be treated with humanity; the prohibition against taking of hostages, abductions or unacknowledged detentions; the prohibition of genocide; non-discrimination; the prohibition of deportation or forcible transfer of a population; the prohibition of propaganda for war, or advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence; the right to a remedy; procedural and judicial guarantees necessary to protect non-derogable rights; and the fundamental principles of fair trial, including the presumption of innocence.⁸⁶

⁸⁴ *Ibid.*

⁸⁵ International Covenant on Civil and Political Rights Article 4 paragraphs 1 and 2.

⁸⁶ UN OHCHR, 'Manual on Human Rights Monitoring', Ch.5, p.16, Available at: <https://www.ohchr.org/Documents/Publications/Chapter05-MHRM.pdf>

Derogation from certain rights may be allowed only to the extent that is strictly required by the situation, and only if the derogation is not inconsistent with other requirements and principles of international law.

10.1.8 History, Development and Adoption of International Human Rights Law

Like IHL, principles underlying IHRL can be traced back centuries ago and can be found in different religions and customs. Various human rights were recognized on a country level, notably in a 1789 French *Declaration des droits de l'Homme et de du citoyen* (Declaration of the Rights of Man and Citizen) or the 1776 American Declaration of Independence. However, it was not until the 20th century that the first steps were taken to build human rights law framework applicable on an international level.

A historical event that set the world on a path to creation and implementation of international human rights treaties, was the adoption of the Universal Declaration of Human Rights (UDHR) by the UN General Assembly in 1948. The declaration itself is not legally binding since it is not a treaty. However, some legal scholars have argued that due to the fact that nations have consistently invoked the UDHR since its adoption, it has become part of customary international law, and hence it is, in fact, binding.

UDHR has also paved the way for numerous international treaties to be drafted and adopted around the world using the principles enshrined in UDHR, for instance: International Covenant on Economic, Social and Cultural Rights which was signed in 1966 and entered into force in 1976; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985); the Convention on the Rights of the Child (1989) and many more.

It is worth mentioning, that regional human rights treaties have also been created and adopted. For instance American Convention on Human Rights (1969), African Charter on Human and Peoples' Rights (1981), European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the Arab Charter on Human Rights (2004).

The International human rights law today looks remarkably different from the time when the UDHR was adopted. Courts across the world have been established to protect human rights and treaties have increasingly expanded to include more rights to different social groups. At the same time, greater emphasis has been put on individual liability as well as gross violations of human rights, such as torture, genocide, and crimes against humanity.

10.1.9 Who and how International Human Rights Law Protects

As mentioned, IHRL consists of customary law and various treaties that when signed and adopted by the States become binding and must be respected. This means the States cannot interfere with or curtail the enjoyment of human rights of every individual and are required to protect them against human rights abuses. Through ratification, States also become obliged to change or adjust existing domestic laws to be in conformity with the adopted treaty.⁸⁷

87 UN OHCHR, 'International Human Rights Law', Available at: <https://www.ohchr.org/EN/Profes->

If domestic justice mechanisms fail to ensure respect for human rights or address their violations, regional and international procedures exist for individual or group complaints. For instance, citizens of 47 member states of the Council of Europe can sue their countries before the European Court of Human Rights. International Court of Justice has also had important contributions to human rights. Following a UNGA resolution ES-10/14 in 2003, ICJ issued an advisory opinion titled “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory” (2004). In its opinion, ICJ concluded that Israel violated several provisions of the Fourth Geneva Convention (1949) as well as International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Rights of the Child.⁸⁸ Although no similar mechanism exists so far to address violations of the Arab Charter of Human Rights (2004), an Arab Court of Human Rights is envisioned in accordance with the Statute of the Arab Court of Human Rights, but it does not provide for a possibility of individual claims being brought before the court so far.⁸⁹

10.1.10 Customary International Law and *Ius Cogens*

Customary International Law is a component of International Law and refers to international obligations that arise from widespread international State practice as opposed to written treaties. Customary international law can be established by, firstly, showing general state practice, and secondly, through *opinion juris* (states obedience to the rule because they consider themselves legally bound as opposed to politeness, convenience, or tradition).

Customary international humanitarian law, for example, complements protection of the IHL treaty law. While all states have ratified the Geneva Conventions, other treaties under the body of IHL have not been adopted by all countries. Yet some have been deemed to constitute Customary International Law, and thus be binding for states that have not ratified them unless the State in question has persistently objected to that custom.⁹⁰

Ius Cogens or ‘peremptory norms’ are rules considered by the international community as so fundamental, that they cannot ever be derogated from, violated or included in any treaties. States consent, at this point, is not required to make respect for these principles legally binding. Examples of *ius cogens* include the prohibition of slavery, genocide, torture, racial discrimination and illegal use of force. Vienna Convention on the Law of Treaties, Art. 53 further stipulates that any treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm.

[sionalInterest/Pages/InternationalLaw.aspx](#)

88 International Court of Justice, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion) Summary of the Advisory Opinion of 9 July 2004’, Available at: <https://www.icj-cij.org/files/case-related/131/1677.pdf>

89 Human Rights Watch, ‘New Arab Human Rights Court is Doomed from the Start’, November 2014, Available at: <https://www.hrw.org/news/2014/11/26/new-arab-human-rights-court-doomed-start>

90 ICRC ‘International Humanitarian Law Answers to your questions’ February 2016, p. 17

10.2 The Geneva Conventions

10.2.1. Summary of the Four Geneva Conventions

Geneva Convention I: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)

The First Geneva Convention has improved and replaced the same Conventions adopted in 1864, 1906 and 1929. The new Convention protects the wounded and infirm soldiers on land during the war (Art. 12, 13), as well as medical and religious personnel, medical transport and units (Chapters 3-6). It also establishes and recognizes distinctive emblems (Chapter 7) and consists of a total of 64 articles.⁹¹

Geneva Convention II: For the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea (1949)

The Second Geneva Convention protects wounded and sick, and shipwrecked military personnel at sea during the war. The Convention originally replaced the Hague Convention of 1907 and follows closely the structure and content of the First Geneva Convention. It is comprised of 63 articles that are specific to the war at sea. It, therefore, protects any of the protected establishments under Geneva Convention I from bombardment or attack at sea, as well as hospital ships, or ships utilized by the Red Cross Societies (Chapters 3-5), officially recognized relief societies or private persons of neutral states.⁹²

Geneva Convention III: Relative to the Treatment of Prisoners of War (1949)

The Third Geneva Convention outlines the rights possessed by the Prisoners of War and obligations of those under whose control POWs are. It replaced a previously existed Prisoners of War Convention of 1929 and contains a total of 143 articles. More broadly, the Third Geneva Convention precisely defines the places and conditions of captivity (Section IV, Chapter 1), the relief received by POWs and the judicial proceedings against them (Art. 104). In addition, it establishes principles such as release and repatriation without delay after the cessation of active hostilities (Art. 118, 119).⁹³

Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War (1949)

The Fourth Geneva Convention affords protection to civilians, including those in occupied territories. It is comprised of 159 articles and contains a short general section regarding the protection of populations from consequences of war (Art. 13-26). It further details the obligations of the occupying power to the civilian population (Part III) and contains provisions on humanitarian relief for populations in occupied territories and treatment of the civilian internees (Section IV).⁹⁴

91 UN Documents, 'Geneva Convention I: for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' Available at: <http://www.un-documents.net/gc-1.htm>

92 UN Documents, 'Geneva Convention II: for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea', Available at: <http://www.un-documents.net/gc-2.htm>

93 UN Documents, 'Geneva Convention III: relative to the Treatment of Prisoners of War', Available at: <http://www.un-documents.net/gc-3.htm>

94 UN Documents, 'Geneva Convention IV: relative to the Protection of Civilian Persons in Time of

10.2.2. Common Article 3

Article 3 is common to all four Geneva Conventions and outlines fundamental rules that apply to all parties of armed hostilities of non-international nature. It establishes a bare minimum that needs to be respected and cannot be derogated from. Article 3 has been deemed a great achievement since it ensures that no matter the legal classification of the armed conflict, minimum protections apply at all times.

Article 3:

1. *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*
 - A. *violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
 - B. *taking of hostages;*
 - C. *outrages upon personal dignity, in particular humiliating and degrading treatment;*
 - D. *the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*
2. *The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.*⁹⁵

10.2.3. Summary of the Additional Protocols

In response to the changing landscape of war and, in particular, an increase in non-international armed conflict and civil wars, two Additional Protocols were adopted in 1977. A third Additional Protocol was adopted in 2005 broadening the body of recognized international emblems.

Additional Protocol I

This protocol strengthens the protection of victims in times of international armed conflict and places further limits on the way wars are fought. The main innovations that this protocol brings are that armed conflicts in which people fight against colonial, occupation or racist regimes are considered international conflicts (Art. 1(4)) (as long as more than two States are involved); further extends the protection granted to civilian medical personnel, as well as equipment, supplies, civilians units and transports, and contains detailed provisions on medical transportation (Art. 8-34); Articles 43 and 44 establish a new definition of armed forces and combatants; military objectives are defined and attacks on civilians population

War; Avail-able at: <http://www.un-documents.net/gc-4.htm>

95 UN Documents 'Geneva Conventions of 12 August, 1949 and Protocols Additional to the Conventions', Available at: <http://www.un-documents.net/gc.htm>

and objects are prohibited; further articles also deal with protection of relief actions, civil defense organizations, and treatment of persons in the power of a party to a conflict (Art. 61-79).⁹⁶

Additional Protocol II

Before this protocol, non-international armed conflicts were guarded only by Article 3 of the Geneva Conventions of 1949. This proved to be increasingly inadequate in light of more and more armed conflicts being of non-international nature.⁹⁷ The second Protocol addressed this discrepancy and was created solely with the purpose of extending the essential rules of the law of armed conflict to non-international armed conflicts (NIACs). The Conference officially adopted 28 provisions. Among them are the prohibition to order that there shall be no survivors (Art. 4), provisions on protection of civilian populations (Art. 13-18) including objects indispensable to the survival of the civilian population (food, water etc.) (Art.14), cultural objects and objects of worship (Art. 16) and relief actions (Art. 18).⁹⁸

Additional Protocol III

Since the adoption of the Geneva Conventions, the emblems belonging to the Red Cross and Red Crescent Movement have been in certain times and contexts perceived as having a religious or political connotation. This has resulted in difficulties for the organization as the emblems are sometimes not given the respect they are due that can, in turn, diminish the protection that is afforded to those displaying them. To rectify this problem, the third Additional Protocol was adopted recognizing an additional emblem that is composed of a red frame on a white background in a shape of a square on the edge, that is commonly referred to as the Red Crystal.⁹⁹

The third Additional Protocol consists of 17 articles and established the particularities of the use of the Red Crystal as a protective device and/or as an indicative device.

10.2.4. The Geneva Conventions, the ICRC, the Movement and Protection of the Emblems

Established in 1863, the ICRC (International Committee of the Red Cross) is an impartial, neutral and independent organization, that has one exclusive humanitarian mission – to protect lives and dignity of victims of armed conflict and other situations of violence, as well as provide these victims with assistance.¹⁰⁰ It also directs and coordinates activities carried out by the International Red Cross and Red Crescent Movement around the world.

⁹⁶ ICRC, ‘Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977’, Available at: <https://ihl-databases.icrc.org/ihl/INTRO/470>

⁹⁷ *Ibid.*

⁹⁸ UN Documents, ‘Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts’, Available at: <http://www.un-documents.net/gc-p2.htm#article-14>

⁹⁹ ICRC, ‘Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005’, Available at: <https://ihl-databases.icrc.org/ihl/INTRO/615?OpenDocument>

¹⁰⁰ ICRC, Mandate and Mission, Available at: <https://www.icrc.org/en/mandate-and-mission>

The work of ICRC is based on the four Geneva Conventions of 1949, their additional protocols, as well as statutes and resolutions of the International Conferences of the Red Cross and Red Crescent. The four Geneva Conventions and the Additional Protocol I give the ICRC an exclusive mandate to act in the event of international armed conflict and provide relief and visit prisoners of war and civilian internees (GC III Section 5, Art. 125, Annex 3 Art. 9). In non-international armed conflicts, under common Article 3, the ICRC has a right of humanitarian initiative. Aside from IHL, the International Red Cross and Red Crescent Movement has statutes that give the movement the right of initiative in cases of internal disturbances and tensions that warrant humanitarian action. ICRC also has an official mission of promoting and strengthening respect for humanitarian law and universal humanitarian principles.¹⁰¹

Two emblems officially recognized as the ICRC emblems existed. Additional Protocol III of 2005 expanded these emblems to include an additional one – the Red Crystal, that can be used by the national societies within the Movement (see all three emblems below). These emblems are particularly important since people, transport, and units containing them enjoy protection under the Geneva Conventions from a military attack on the battlefield and many other rights.



10.3 IHL and IHRL in Syria: Application and Challenges

10.3.1 International treaty obligations in Syria

Like many other States, Syria has been a party to many International Human Rights and International Humanitarian treaties. The current armed conflict does not in any way remove Syria's obligations under these treaties.

The following IHRL treaties have been adopted and are binding:¹⁰²

1. *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)* (Ratified 21 April 1969; in force 21 May 1969; reservations – Art. 22)
2. *International Covenant on Economic, Social and Cultural Rights (ICESCR)* (Ratified 21 April 1969; in force 1 March 1976; reservations – Art. 26(1))
3. *International Covenant on Civil and Political Rights (ICCPR)* (Ratified 21 April 1969; in force 23 March 1976; reservations – Art. 48(1))
4. *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* (Ratified 28 March 2003; in force 27 April 2003, reservations – Art. 2, 9(2), 15(4), Art. 16(1)(c), (d), (f), (g), (2), 29(1).)
5. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*

¹⁰¹ *Ibid.*

¹⁰² UN OHCHR, Ratification status by country, 'Ratification Status for Syrian Arab Republic', Available at: https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Country-ID=170&Lang=en

- or Punishment (CAT) (Ratified 19 August 2004, in force 18 September 2004, reservations – Art. 20)*
6. *Convention on the Rights of the Child (CRC) (Ratified 15 July 1993, in force 14 August 1993, reservations – Art. 14, 20, 21)*
 7. *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Ratified 17 October 2003, in force 17 November 2003)*
 8. *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Ratified 15 May 2003, in force 15 June 2003, reservations – Art. 3(1) (a) (ii), (5).*
 9. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Ratified 6 February 2005, in force 1 October 2005)*
 10. *Convention on the Rights of Persons with Disabilities (CRPD) (Ratification 10 July 2009)*
 11. *The Arab Charter on Human Rights (2004) (Ratified 6 February 2007)¹⁰³*

The following IHL treaties have been adopted and are binding:¹⁰⁴

1. *The Geneva Conventions, 1949 (Ratified 2 November 1953)*
2. *Additional Protocol (I) to the Geneva Conventions, 1977 (Ratified 14 November 1983)*
3. *Geneva Protocol on Asphyxiating or Poisonous Gases, and of Bacteriological Methods, 1925 (Ratified 17 December 1968)*
4. *Convention prohibiting Chemical Weapons, 1993 (Ratified 14 September 2013)*
5. *Hague Convention for the Protection of Cultural Property, 1954 (Ratified 6 March 1958)*
6. *Hague Protocol for the Protection of Cultural Property, 1954 (Ratified 5 March 1958)*
7. *Convention on the Prevention and Punishment of Genocide, 1948 (Ratified 25 June 1955)*
8. *Convention on Mercenaries, 1989 (Ratified 23 October 2008, reservation – Art. 17(1))*

Various other treaties have been signed but not yet ratified, for instance, the Convention on the Prohibition of Biological Weapons (1972) and the Rome Statute of ICC (1998).

10.3.2. Armed conflict and humanitarian crisis in Syria

Even though initial fighting between the regime forces and the opposition amounted to a non-international armed conflict, a series of armed conflicts now exist, with some arguably constituting an international armed conflict. The latter can be illustrated by a conflict between the Syrian regime and the US-led international coalition as well as Turkey which has ground troop presence in northern parts of Syria. In addition, part of another Syrian territory, the Golan Heights, is occupied by Israel.¹⁰⁵ As such, different parts of the Geneva Conventions apply depending on the context.

¹⁰³ Note : the 2004 Arab Charter of Human Rights is a regional human rights treaty.

¹⁰⁴ ICRC, Treaties, State Parties and Commentaries, 'Syrian Arab Republic', Available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY

¹⁰⁵ RULAC, Geneva Academy, 'Syria', February 2018, Available at: <http://www.rulac.org/browse/countries/syria>

Since the start of the conflict in 2011, the number of civilian casualties has been incredibly high with an estimate of more than 400,000 people.¹⁰⁶ Even though the civilians and other non-combatants enjoy unequivocal protection under the IHL and IHRL, including the prohibition of launching attacks against civilians that would violate principles of proportionality and precaution, violations continue to occur. The Syrian Monitoring and Reporting Mechanism (MRM4Syria) has reported grave violations against children verifying 26 attacks on education facilities and 107 attacks on health workers and facilities in the first half of 2017 alone.¹⁰⁷ Child recruitment was also a pattern with 18 percent of 300 verified cases being children under the age of 15, and some as young as 12 engaging in active combat roles. These amount to a violation of international law.

10.3.3. Status of Internally Displaced Persons in Syria

Internally Displaced Persons (IDPs) are people who have been forced or obliged to leave their homes behind for reasons of armed conflict or other violence, who remain within the borders of their country. IDPs enjoy particular protection under the IHRL and IHL. IHL seeks to prevent displacement of civilians in the first place and more importantly, prohibits forced displacement unless it is an absolute imperative for military reasons and for the safety of civilians themselves. If such a justification does not exist, then under IHL forced displacement amounts to a crime against humanity. Other human rights treaties, such as International Covenant on Civil and Political Rights, provides safeguards against displacement, in particular, by prohibiting arbitrary or unlawful interference with privacy, family, and home (Art. 17(1)).

The UN Guiding Principles on Internal Displacement have been issued in 2004 and since incorporated by many states into their domestic law. Some of the rights include the State's duty to provide the IDPs with lasting return, resettlement and reintegration solutions, as well as involving IDPs in planning and managing measures that would concern them.¹⁰⁸

The protection of IDPs and prevention of further displacement is particularly important for the Syrian context since there are more than 6.1 million IDPs and the number continues to rise.¹⁰⁹

106 HRW, 'Syria: Events of 2017', Available at: <https://www.hrw.org/world-report/2018/country-chapters/syria>

107 World Food Program, '2018 Humanitarian Needs Overview' Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/hno_2018_summary_171120_0.pdf (Hereinafter WFP 2018)

108 UN OCHA, 'Guiding Principles on Internal Displacement', September 2004, Available at: <https://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>

109 WFP 2018 *supra* 27

CONCLUSION

Due to the ongoing conflict and the unstable nature of areas of control and influence, defining laws and rules that apply to different territories and actors is complex. The laws used in this manual are hence largely those that have been in force before 2011. There are many issues with that, one of which is some actors within Syria choose not to apply these laws, or have come up with alternative laws to self-govern. Tracking these laws is even more complicated since they are a mix of earlier laws, some international codes, sharia law and self-made rules.

Nevertheless, this manual seeks to work with a strong base of national and international laws that have existed for several decades and advise lawyers and legal practitioners on how to use these laws in protecting human rights, including the rights of the accused, and upholding the rule of law to the best of their ability through their work.

Moreover, it should be said, that this manual is a non-exhaustive resource. Any legal practitioner who reads the manual should, of their own initiative, inquire more about specific laws and articles mentioned in this manual. That is because this handbook is designed to introduce the Syrian justice system and good practices in criminal law, rather than to cover every aspect of it.

Lastly, the Syria Criminal Defender Manual seeks to reinforce a positive image of due process rights and inspire legal practitioners to seek a change in the criminal justice system that would further solidify and protect human rights of all people.

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