International Bridges to Justice

Criminal Defender Manual - DRC

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Criminal Defender Manual DRC

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Canada

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About International Bridges to Justice

Who are we?

International Bridges to Justice (IBJ) is a non-profit, non-governmental organization (NGO) founded in 2000 with the goal of securing the basic legal rights of ordinary people. Specifically, IBJ aims to ensure that every individual has the right to competent legal representation, the right to be protected from any form of abuse or torture, and the right to a fair trial.

IBJ has established Legal Resource Centers in Rwanda, Cambodia, China, Democratic Republic of Congo, India, Burundi, Zimbabwe, and Myanmar. Through its eight country programs, IBJ provides direct legal assistance to those in need, trains lawyers, organizes roundtables for justice sector officials, and conducts legal rights education campaigns. In addition, through innovative international programs such as JusticeMakers, the eLearning platform, and the Criminal Defense Wiki, IBJ uses technology to increase its impact in promoting access to justice. IBJ's experience has shown that legal advice in the initial stages of criminal defense can reduce torture cases by up to 80%. Thus, IBJ works in conjunction with trial lawyers or public defenders to enhance the protection and human dignity of individuals who are unjustly prosecuted.

Since its inception in 2000, IBJ has established itself as a leader in a pragmatic approach to human rights and now has the authority to catalyze legal transformation around the world.

IBJ in DR Congo : D.R. Congo Bridges to Justice

Since 2016, D.R. Congo has been providing free legal assistance to ordinary, indigent, vulnerable, and/or victimized defendants. This is accompanied by related activities such as monitoring dungeons and amigos, participating in MONUSCO Taskforce meetings, and supporting military justice.
We also organize roundtables on rights issues, providing a forum for exchange between actors in the criminal justice system.
Finally, we organize training for lawyers and raise awareness among the population about basic and fundamental rights.
In this way, IBJ contributes to the promotion of access to justice and the building of a penal system that respects human rights.

IBJ's activities in the D.R. Congo are currently carried out by the local affiliate of IBJ called R.D. Congo Bridges to Justice (RBJ). Between its establishment in Bukavu in August

2016, and August 2017, the Legal Resource and Criminal Defense Center (LRDC) has provided legal assistance to 322 individuals. RD Congo Bridges to justice also organized 4 roundtables that brought together a total of 92 justice system actors and conducted several rights information campaigns (within communities and on the radio), reaching over 100,000 people directly and 310,000 people indirectly.

What do we do?

Our programs are divided into 6 types of activities:

1. Legal assistance in the criminal justice system

IBJ's trained lawyers handle hundreds of cases annually, improving access to justice for indigent and vulnerable defendants and strengthening the pro bono culture in the country. IBJ intervenes as early as possible in the criminal justice process to ensure that the poorest people have a greater level of protection of their rights. This systematic legal assistance from the very beginning of the proceedings provides a basis for ensuring that the human rights of all are respected.
IBJ's lawyers, specially trained in criminal defense techniques, thus contribute to improving the effective implementation of the provisions of the Congolese Code of Criminal Procedure relating to the guarantees of a fair trial.

2. Capacity building for lawyers

A fair judicial system must include the existence of a professional body of competent lawyers whose services are accessible to the poorest through a system of public legal aid. To achieve this goal, professional training is a crucial element: we offer our legal expertise to Congolese lawyers and provide them with legal training programs as well as a wide range of professional, technical and material resources to enable them to do their work as effectively as possible. The training of lawyers takes place through thematic sessions, systematically sanctioned by professional certificates.

3. Roundtables: Criminal Justice Reform

Recognition of basic human rights in written laws is insufficient if it is not followed up in practice by their respect. Putting these laws into practice requires the cooperation of all actors in the justice system, not just lawyers. Our programs therefore include "judicial roundtables," which bring together lawyers, judges, police and local government officials, as well as prison staff and academics. These roundtables serve to promote communication among the various actors in the system, encourage a spirit of collegiality and mutual respect, and allow for the dissemination of more equitable and law-abiding practices. They generally lead to recommendations and proposals for action to reform and modernize the existing penal system.

4. Information and rights awareness campaigns

For the vast majority of citizens in developing countries, the lack of information and ignorance of their rights is one of the factors at the source of daily judicial injustices and abuses. The promotion of judicial information and rights awareness is therefore an integral part of our programs. Our campaigns rely on a variety of communication tools (posters, brochures, public councils, street demonstrations, etc.) and allow us to reach a large number of citizens, regardless of their age, gender, level of life or education. In particular, we strive to disseminate information in all local/minority languages, and we use orality and images as much as possible to reach illiterate individuals as well.

5. eLearning and Criminal Defense Wiki

Our eLearning and Criminal Defense Wiki platforms provide vital assistance to human rights defenders around the world, sharing legal knowledge and best practices. No matter where they are, lawyers can access these resources and find essential information, such as court procedures, the impact of new criminal codes, or how best to intervene and avoid torture in prison. By making these resources available on a global scale, IBJ is taking another step toward institutionalizing defense standards around the world. These can be accessed on www.elearning.ibj.org and www.defensewiki.ibj.org.

6. JusticeMakers Program

The JusticeMakers program was initiated in 2008. It is a key component of IBJ's strategy to improve access to justice. By connecting, training, and financially supporting these social innovators, the JusticeMakers program empowers local lawyers and human rights advocates to improve justice in their communities. These projects for strengthening the implementation of procedural rights are an effective method for reaching and supporting people in need. The program has allowed IBJ to significantly expand its international reach, while maintaining its commitment to protecting legal rights at the local level. Today, 69 JusticeMakers Laureates are on the front lines of advocacy against abuse in 42 different countries. In June 2017, 10 new Laureates joined the JusticeMakers community to implement their projects to fight torture and improve access to justice in Francophone Africa.

Support our actions

There are several ways to support us:

1. Donate on our website www.ibj.org

2- You are a lawyer, a jurist, or a professional from another sector (finance, marketing, communications/PR)? You can *support our actions by bringing us*, on a one-time or long-term basis, *your expertise and your professional resources*. To learn more, contact us by email at *internationalbridges@ibj.org*.

- II -

Fundamental Principles

Certain fundamental principles must always be kept in mind by the lawyer or judicial defender. They guarantee that they will be able to carry out their functions in a complete, professional and efficient manner.

The main principles derived from the Constitution and International Treaties refer to fundamental rights. They also, and above all, have direct repercussions applicable to daily life.

A) The right to be informed of one's rights and the reasons for one's arrest

In the DRC, this right is constitutionally guaranteed. Indeed, **Article 18** of the **2006 Constitution** as revised in **2011** provides that "any person arrested must be immediately informed of the reasons for his arrest and of any charges brought against him, in the language he understands. He or she shall be immediately informed of his or her rights. The person in custody shall have the right to immediate contact with his family or his counsel. Police custody may not exceed 48 hours. At the end of this period, the person in custody must be released or placed at the disposal of the competent judicial authority. All detainees must be treated in a way that preserves their life, physical and mental health and dignity.

In addition, when an arrest is made, an arrest report must be signed by the police officer and the arrested person, after being read or translated into the language of the latter's choice. This document must mention the reason for the arrest.

This right must also be observed before the investigating magistrate and the courts.

B) The presumption of innocence

The principle of presumption of innocence is the basis for the protection of individual freedom.

The presumption of innocence as a constitutional principle implies the prohibition of the assertion of guilt before any judgment and places the burden of proof on the Public Ministry. The latter is responsible for investigating the case both for the prosecution and the defence. If necessary, it must present evidence to support its accusation before the criminal court, which alone can decide on the guilt or innocence of the accused[1].

The presumption of innocence is clearly affirmed by **Article 17**, **paragraph** 9 of the **constitution**, which states: *"Every person accused of a crime is presumed innocent until proven guilty by a final judgment. Every detainee shall be provided with treatment that preserves his life, physical and mental health and dignity."*

The Rome Statute, in **Article 66**, uses the same wording. **Article 11**, **paragraph 1**, of the Universal Declaration of Human Rights states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law in a public trial at which he shall have had all the guarantees necessary for his defence. **Article 14**, **paragraph 2**, of the **International Covenant on Civil and Political Rights (ICCPR)** goes on to state that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

[1] Richard LONGENDJA ELAMBO, Administration de la preuve pénale théorie générale et évolutions juridiques, Bukavu, Ed. CRUKI, 2017, p 5

This fundamental principle of criminal law has three major consequences that must be made a leitmotiv of defence:

- It is necessarily opposed to the idea of pre-trial detention: from the Universal Declaration of Human Rights of 1789 to the Universal Declaration of Human Rights of 1948, the presumption of innocence is attached not only to individual freedom, but also to the need to guarantee it. Individual freedom is seen as one of the forms of the faculty that consists precisely in going and coming back where one wants and when one wants. It is the golden rule on which human rights are fully priced in their legal humanity and especially in their promotion. In many cases where the accused have no or few guarantees of representation for a judicial review, it is necessary to remind this principle to the Officers of the Public Prosecutor's Office (Magistrates of the Public Prosecutor's Office) who use pre-trial detention as a harmless measure.
- It places the burden of proof (of all[2] evidence) on the prosecution and therefore considerably influences the methodology of the defense (see Defense Strategies).
- The trial must respect the adversarial process: it must be oral and public. The criminal case file must be accessible to the defense, which must be able to submit exhibits to the file.

C) The right to a fair trial

Articles 17, 18 and **19** of the Constitution of the Democratic Republic of Congo guarantees in principle that everyone shall be tried:

- Fairly
- Within a reasonable period of time
- Publicly
- With all the guarantees necessary for his free defense.

In criminal matters, all lawyers or judicial defenders work on a daily basis with a Penal Code and a Code of Criminal Procedure and other legal texts that complete or modify the Penal Code and the Code of Criminal Procedure. These legal instruments reflect the Constitution and must therefore include these fundamental elements. In practice, the codes are sometimes silent on certain points; this is the case in the DRC, as it is everywhere else.

It should therefore be remembered that the judge is subject to the law and the constitution, and that the articles enshrining the fundamental principles of law allow all these rules to be invoked before him. Therefore, even if the Code of Criminal Procedure is silent on this point, the Lawyers or the judicial defenders have the duty to demand:

1) The right to be tried within a reasonable time

Article 19 of the **Constitution** of 2006 as revised in 2011 provides: *"every person has the right to have his case heard within a reasonable time by the competent judge"*. Reasonable time is problematic in that the law generally does not specify the time limit.

[2] Except where the law provides otherwise. For example, where a car was used by persons other than the owner to facilitate the commission of an offence, the onus will be on the owner to show that he or she had no part in it.

However, **law n°06/01** of **July 20, 2006**, modifying and completing the **decree** of **January 30, 1959**, establishing the Congolese code of criminal procedure, stipulates in **article 7 bis** that, without prejudice to the provisions relating to flagrante delicto proceedings, the preliminary investigation in matters of sexual violence shall be carried out within a maximum of one month from the date of referral to the judicial authority. The investigation and the pronouncement of the judgment are made within a maximum of three months from the date of referral to the judicial authority.
However, this law does not provide for any sanction in case of non-compliance with the time limits. In the practice of the jurisdictions of South Kivu province, IBJ's experience shows that this legal time limit is rarely observed.

2) The right to be tried publicly

This is laid down in **Article 20** of the **Constitution** of the DR Congo, which states that "The hearings of the courts and tribunals are public, unless such publicity is deemed dangerous for public order or morality. In this case, the court shall order the hearing to be held in camera. The public nature of the proceedings promotes fairness. The free defense requires that lawyers or legal defenders not be sued for any remarks they may make during their pleading (immunity of the pleading). The latter must remain entirely free of any censorship. A double reservation applies to this principle: on the one hand, contempt and insults remain criminally and ethically condemnable; on the other hand, the freedom of speech of the lawyer or the legal defender is no longer the same when leaving the courtroom and before the press. Moreover, the immunity of the plea does not exonerate the lawyer or the judicial defender from the respect of his oath and of the principle of professional deontology.

3) The right to be judged fairly and with all the guarantees necessary for one's free defense: equality of arms

There is no difference in judgment between the Congolese who appear before the court. As seen above, **Article 18** of the **Constitution** provides that every Congolese has the right to access all the necessary guarantees for the proper conduct of legal proceedings. The DRC Constitution thus specifies that any person arrested, without distinction, has the same rights.
Each person, regardless of sex, age or religion, has the right to equal treatment and will be able, for example, in the same way as another detainee in police custody, arrested or detained, to contact his family or his counsel. And by this article, it is possible to understand that each person is in the same way as another person informed of his rights and the reasons for his arrest. This is a common right.

D) The principle of individual criminal responsibility

Article 17 of the **Constitution** protects every person against any form of collective or vicarious criminal responsibility. Indeed, it clearly states that "*criminal responsibility is individual. No one may be prosecuted, arrested, detained or convicted for the acts of others."*

Thus, the fact of arresting a person for the act of others constitutes the offence of arbitrary arrest provided for and punished by article 67 of the Criminal Code, which states that *"anyone who, by violence, deception or threats, has abducted or caused to be abducted, arbitrarily arrested or caused to be arrested, detained or caused to be detained any person whatsoever, shall be punished by penal servitude for a period of between one and five years".* When the abducted, arrested or detained person has been subjected to bodily torture, the culprit shall be punished with penal servitude from five to twenty years. If the torture has caused death, the guilty party is sentenced to penal servitude

for life, in accordance with Law No. 11/008 of July 9, 2011 criminalizing torture.

E) The principle of legality and non-retroactivity

This principle is enshrined in the adage *"nullum crimen, nulla poena sine lege".*

Article 17 of the **Constitution** of 2006 as revised in 2011 enshrines the principle of the legality of criminal law and non-retroactivity. It provides that *"no one may be prosecuted, arrested, detained or convicted except by virtue of the law and in the manner prescribed by it. No one may be prosecuted for an act or omission that does not constitute an offence at the time it is committed and at the time of prosecution. No person shall be convicted of any act or omission that is not an offence both at the time it is committed and at the time of conviction. No greater penalty shall be imposed than that applicable at the time the offence is committed."*

Article 11 para 2 of the Universal Declaration of Human Rights: *"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 that which was applicable at the time the criminal act was committed."*

F) The right to be assisted by a lawyer

The right to a lawyer or legal counsel is a right central to the fairness of justice. It is based on the idea that the complexity of the proceedings and the important powers of the prosecution require a qualified defense that balances the proceedings and gives the parties an equal chance to present their claims.

Article 19 of the DRC **Constitution** of 2006 as revised in 2011 provides that "*The right of defense is organized and guaranteed. Every person has the right to defend himself or herself or to be assisted by a defender of his or her choice at all levels of criminal proceedings, including the police investigation and the pre-trial investigation. He may also be assisted before the security services*".

Article 14, paragraph 3, of the **International Covenant on Civil and Political Rights** states that "*Everyone charged with a criminal offence shall be entitled to the following minimum guarantees, in full equality [...] if he does not have legal assistance, to be informed of his right to legal assistance and, whenever the interests of justice so require, to have legal assistance assigned to him without payment by him in any case where he does not have sufficient means to pay for it.*"

Article 73 of the **decree** of **6 August 1959** on the code of criminal procedure provides that each of the parties may be assisted by a person specially approved in each case by the court to speak on his behalf*: "Unless the defendant objects, the Judge may appoint a defender for him, whom he chooses from among the notable persons of the locality where he is sitting. If the defender thus appointed is an agent of the Belgian Congo, he may not refuse this mission, under penalty of such disciplinary sanctions as may be appropriate*.
Note: Since 1968 and the ordinance law n° 79/028 of 28.09.1979 on the organization of the Bar, the monopoly of legal representation is recognized to the lawyers and judicial defenders. Article 73 of the decree of August 6, 1959 should be read with this later text.

Article 237 of law n°023/2002 of 18 November 2002 on the military judicial code states: The president shall summon the accused; he shall appear freely before the bar and only accompanied by guards. He is assisted by his counsel.

Organization of free legal and judicial assistance:

Article 74 of **ORDINANCE-LOI 79-028** of **September 28, 1979,** on the organization of the bar, the body of judicial defenders and the body of state agents, provides that the lawyer (judicial defender) is prohibited from refusing or neglecting the defense of the accused and the assistance to the parties, in case he is appointed.
In practice, the "pro deo" assistance is conditioned by the request of any person (accused, accused, defendant) in need of legal aid, who proves his or her indigence by means of a certificate issued by the Civil Registrar or his or her representative of the place of residence; this request is addressed either to the Bar Association or to the Corps of Judicial Defenders of the Court in which the case is pending, in order to designate a Counsel.

However, during the hearing, the Judge may find that a defendant or a child in conflict with the law is indigent and, either because of the balance of the defense or because the sentence is greater than 5 years of imprisonment, he or she will appoint a judicial defender present at the hearing to assist pro deo, or will request the Syndic (head of the Corps of Judicial Defenders) or the President of the Bar to appoint a pro deo counsel

Article 63 of law n°023/2002 of November 18, 2002 on the military judicial code states: The military judge shall appoint a defense counsel for the benefit of a defendant in case the latter has not chosen one.
Article 73 al. 3 of the code of criminal procedure already cited provides that unless the defendant objects, the judge may designate a defender from among the notables of the locality where the judge sits. If the defender thus appointed is an agent of the Congo-Belgium, he may not refuse this mission under penalty of such disciplinary sanctions as may be appropriate.
Finally, **Article 14(3)** of the **International Covenant on Civil and Political Rights** states more clearly that *"Everyone charged with a criminal offence has the right to the following minimum guarantees, in full equality [...] if he does not have legal assistance, to be informed of his right to legal assistance and, whenever the interests of justice so require, to have legal assistance assigned to him without payment by him in any case where he does not have sufficient means to pay for it.*"

- III -

Rights and responsibilities of the lawyer or legal advocate

The 4 fundamental principles:

- **Independence:** defends the client without taking into account his personal interest
- **Loyalty:** no conflict of interest and adversarial principle
- **Confidentiality:** all information concerning the client, third parties and correspondence must be unlimited, general and absolute
- **Duties of information, advice and diligence**: prudence in the treatment of the file, obligation to advise and inform, information on the chances of success, means of recourse...

A) Lawyers' rights

1) Absolute respect for the adversarial process and therefore permanent and unlimited access to the file.

Logic even dictates that they should have the right to a copy of the proceedings, which should be free of charge to guarantee the equality of citizens before the law. This is the practical translation of the right to a fair trial imposed by **article 19** of the **Constitution** of the DR Congo. It is also the application of the rights of the defense, resulting from this same article. As a reminder, the respect of the adversarial process is also imposed on the defense, which cannot produce any document or element to the Tribunal without having previously communicated it to all the other parties[3]. In addition to the file, the lawyer must, by virtue of these principles, have permanent and unrestricted confidential access to the person he is defending. These rules are partially ensured by **Article 15** of the Congolese **Code of Civil Procedure**, which provides that: the parties shall be heard in adversarial proceedings. They may make written submissions.

*2) The right to challenge the detention is a consequence of the reasonable time limit implicit in **article 19**, **paragraph 2**, of the **Constitution** of the DR Congo.*

In this area, the Code of Criminal Procedure provides for mechanisms to renew pre-trial detention. However, it should be borne in mind that the concept of reasonable time (which is found in international texts) is quantifiable. Therefore, after a certain number of renewals of detention without trial, there is a case for invoking the Constitution to obtain the release without delay of the person who is not tried.

3) The right of correspondence

Lawyers or court defenders may correspond with their detained clients and see them without witnesses at the place where they are incarcerated; they may examine at the registry, without having to travel, all the files of the cases in which they represent or defend a party.

[3] In Congolese law, this obligation applies much more in civil matters; in criminal matters, the documents and other elements of the trial are communicated to the parties during the investigation at the hearing. It should be noted, moreover, that these documents and elements may be communicated to the Public Prosecutor's Office or to the Judicial Police Officer during the pre-judicial phase. Here, they can only be accessible to the other party with the authorization of the Public Prosecutor, responding to a request for the removal of a copy sent to him by the latter.

Please note: Except in cases where the law requires a special mandate, lawyers are presumed to represent the parties as soon as they carry the documents of the proceedings. They have the right to be present in camera; the right to advice and consultation; the right to fees.

B) The lawyer's responsibilities

The main professional responsibilities of the lawyer can be summarized here:
- **defense obligation**.
- **duty of care**: care in the performance of a task, also referred to *as "promptness and accuracy in the performance of a task"* [4].
- **the duty of competence**: the lawyer or legal advocate should not accept a case if he or she knows that he or she does not have the necessary and adequate competence to handle it.
- **the duty of continuous training**: the lawyer or the judicial defender carries out his continuous training through individual study and active participation in cultural initiatives in legal matters and the legal profession.
- **The duty of loyalty** implies correctness of behavior. The duty of truth.
- **the duty of delicacy**: it relates to the high sense of judgment of the lawyer or legal defender which consists in deciding the best conduct to adopt in the face of determined facts or circumstances. "*It pushes probity to the point of scrupulousness, even if it is exaggerated, and of wanting, in the practice of good, to observe even the slightest nuances*" [5]. It is a matter of abstaining from any personal attack or any hurtful allusion that could affect one's colleague, from any search for personal publicity.
- **the duty of probity** is a concept that can be defined as uprightness, honesty or integrity.
- **the duty of dignity**: *"this is the set of rules dictated by the honour attached to the public function exercised by the lawyer or the legal defender"* [6].
- **the duty of honour**: *"a strong sense of one's own dignity which motivates an individual and drives him to maintain the esteem of others as well as the moral principles which are at the basis of this feeling"* [7].
- **the obligation to replace magistrates**
- **respect for laws and institutions**
- **payment of contributions**
- **maintaining professional secrecy**
- **the duty of courtesy and fair consideration and confraternity**
- **the relationship of lawyers with the judiciary shall be marked by dignity and respect, deference and mutual consideration**
- **the lawyer or the legal defender cannot receive the opposing party without his lawyer.** If the party does not have a lawyer, the lawyer or court defender may only receive the party in the presence of the client or with the client's prior consent.

1) For the hearing

Preparation: find and question information about:

- The circumstances of place and time
- All those present (whether or not they participated)
- The exact role of each person, including the nature and number of moves
- All pressures and threats constituting moral torture
- Any marks you have personally seen on potential witnesses (bystanders,

[4] J.M MUBALAMA ZIBONA, Vade-mecum of the Lawyer, p21
[5] Ibid
[6] Ibid
[7] Ibid

co-prisoners)

Dress: Lawyers wear a black robe with leopard fur trim and a white flap; they may not wear any insignia or jewelry indicating their membership of a national or foreign Order or an institution of public or private law. They are called "*Masters*". They plead standing and uncovered.

2) Moral obligation in Congolese law

Section 2 of **ORDINANCE-LOI 79-028** of **September 28, 1979,** on the organization of the bar, the corps of legal defenders and the corps of state agents:

- Lawyers must complete the cases they handle (exception - client discharges them/foresees them quickly enough)
- The lawyer must conduct each case promptly and competently
- Liability actions against lawyers are carried out in accordance with common law
- The lawyer is obliged to return, without delay, the documents or sums of money of which he is the depositary, as soon as they are no longer necessary for the defense of the case (right of retention)
- A lawyer called to plead before a court outside the jurisdiction of his bar is required to present himself to the president of the hearing, to the officer of the Public Prosecutor's Office, to the President of the Bar and to the colleague in charge of the opposing party's interests
- The lawyer gives his consultation in his office or in the office of a colleague - Cannot go to the client's home except in case of emergency or necessity

C) Prohibitions on lawyers

The prohibitions of lawyers are set forth in article 74 of **Ordinance-Law 79-028** of **September 28, 1979.** They are prohibited from:

- To become the assignee of inheritance or litigation rights.
- To make random agreements with the parties for compensation that are contingent on the outcome of the case.
- To engage in name-calling of parties or personalities towards their advocates.
- Not to bring forward any serious facts against the honor or reputation of the parties, unless the necessities of the case require it.
- To refuse or neglect the defense of the accused and the assistance to the parties in case they are appointed.
- To solicit customers or to pay an intermediary for this purpose.
- To use all advertising means, except what is strictly necessary for the information of the public.
- To accept from an intermediary the cause of a third party without directly contacting the latter.
- To accept to defend in turn opposite interests in the same cause.

- To reveal secrets entrusted to them by reason of their profession or to take advantage of them themselves.
- To bring up at the hearing an exhibit that has not been communicated to the opponent.
- To take any action or engage in any conduct that may compromise their independence or character.

Mutatis mutandis, this **Ordinance-Law 79-028** of **September 28, 1979 provides in its articles: 136. - Within the** limits of their competence, legal defenders shall enjoy all the prerogatives accorded to lawyers. **137. -** Judicial defenders shall wear a black robe without shoes, but with a white flap. **138. - 138.** All the prohibitions imposed on lawyers shall apply to judicial defenders.

- III -

Client Interviews (Abuse)

Whether it is a matter of preparing one's client's defence on the merits or of raising (and thus proving) a procedural irregularity, certain fundamental questions must be asked. If we all do it, it is obvious that with time and experience, the multiplication of cases and visits in detention, we sometimes end up forgetting some of them. Hence the usefulness of a small memo in which we note:

- Specific dates and times of arrest.
- The conditions of the arrest: number of people, role of each, possibly names and quality.
- Words exchanged, rights invoked, placement in custody, knowledge of the offense.
- The language used, its understanding and visits.
- Conditions of treatment after arrest / Conditions of custody: doctor, lawyer, interpreter, interrogations, rest, food, family.
- Judicial follow-up: transfers to the palace, appearances, notifications, right to counsel.

This memo is used for any type of defense. However, one of the particular consequences of this type of interview is going to be confronting a person who is a victim of torture or abuse.

A) Torture and abuse in law

Many laws and articles in the constitution and the penal code prohibit the use of torture. Despite their existence and the ratification by the DRC in 1996 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), torture is still practiced.

For the record:

Torture, as stipulated in **Article 151** of **Law No. 09/001** of **January 10, 2009** on the protection of the child, is "*any act by which severe pain or suffering, physical or mental, is intentionally inflicted on a person for the purpose of:*
1) obtain information or confessions from the person or a third party.

2) punish her for an act she or a third party has committed or is suspected of having committed.

3) intimidate or coerce, intimidate, coerce a third person, or for any other reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the express or implied consent of a public official or other person acting in an official capacity.

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture in Article 1, § 1: *"For the purposes of this Convention, torture means any act by which severe physical or mental pain or suffering 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, to intimidate or coerce a third person, or for any other purpose based on discrimination of any kind,*

where 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."

The main Congolese laws prohibiting torture are the following:

Article 18, **paragraph 5** of the **Constitution** tells us that "*every detainee must benefit from a treatment that preserves his life, his physical and mental health and his dignity*". Thus, ill-treatment of persons in detention is indeed prohibited.

Article 16 of the same **Constitution** also states that "*the human person is sacred. The State has the obligation to respect and protect it. Every person has the right to life, to physical integrity as well as to the free development of his or her personality in accordance with the law, public order, the rights of others and good morals. No one may be held in slavery or in an analogous condition. No one may be subjected to cruel, inhuman or degrading treatment. No one shall be required to perform forced or compulsory labor*.

The **Constitution** thus advocates the sacredness and respect of the human person.

Article 61 of the same Constitution provides that in no case, and even when a state of siege or a state of emergency has been proclaimed in accordance with articles 85 and 86 of the present Constitution, may there be any derogation from the fundamental rights and principles listed below: **2.** the prohibition of torture and cruel, inhuman or degrading treatment or punishment.

Law No. 11/008 criminalizing torture, adopted on **July 9, 2011**, added **articles 48 bis**, **48 ter** and **48 quater** to the **Congolese Criminal Code**.

According to **article 48 bis**: *"Any public official or officer, any person in charge of a public service or any person acting on his order or instigation, or with his express or tacit consent, who shall have intentionally inflicted on a person severe pain or suffering, physical or mental, for the purpose of obtaining from him or from a third person information or a confession to punish him or her for an act that he or she or a third person has committed or is suspected of having committed, to intimidate or put pressure on him or her or to intimidate or put pressure on a third person or for any other reason based on any form of discrimination, shall be punished by five to ten years of rigorous imprisonment and a fine of fifty thousand Congolese francs to one hundred thousand Congolese francs*.

And according to **article 48 ter**, "*the guilty party will be punished by ten to twenty years of penal servitude and a fine of one hundred thousand Congolese francs to two hundred thousand Congolese francs when the acts provided for in article 48 bis above have caused the victim serious trauma, illness, permanent work incapacity, physical or psychological impairment, or when the victim is a pregnant woman, a minor or a person of advanced age or living with a disability. It will be punished with penal servitude for life when the same acts cause the death of the victim*".

The explicit prohibition of torture is also found in several other Congolese legal texts, such as **Law No. 09/001 of January 10, 2009** on the protection of children, **Articles 9** (**paragraph 1**), **151** and **152 of** which prohibit and punish torture against children; or the **Military Penal Code, Articles 103**, **166**, **169**, **173**, **192**, **194 of** which establish torture and other PTCID as an aggravating circumstance punishable by "death", as crimes against humanity or war crimes. The same is true of the **ordinary criminal code, articles 57** and **67.2 of** which make corporal torture an aggravating circumstance, and of **organic law n°06/020** of **October 10, 2006** on the status of magistrates, which makes torture a disciplinary offence.

There is an exception. Indeed, despite the fact that **Article 61** of the **Constitution** specifies that no derogation is permitted from the prohibition of torture, even in situations of war, emergency or siege, the force strictly necessary to arrest a person or to keep him at the disposal of the police is legitimate.

Any other attack on the person, physical (slapping, various blows, pulling, deprivation, abuse, detention without title or basis, etc.) or moral (threats, direct pressure or on the entourage, deprivation of contact) remains an illegal act, whatever the definition given to it, which the lawyer or the legal defender must denounce and have prohibited

In addition to the fact that torture is an offense in the DRC, confessions and evidence obtained under torture cannot be used in court. In other words, if someone has admitted to committing a crime under torture, this confession does not constitute evidence and a judge should not accept it as such. This is clearly stated in **Circular No. 04/008/In/PGR/70** of **May 16, 1970** of the Attorney General of the Republic addressed to the Officers of the Public Prosecutor's Office (Magistrats du Parquet).

It is worth recalling that although the human person is sacred, in the Democratic Republic of Congo, the death penalty is still provided for in Congolese national law, notably by **Article 5 of the Penal Code**, in the list of penalties applicable to the offences provided for.

However, the DRC has had a moratorium on the execution of the death penalty since 2002. As a result, when the death penalty is imposed by Congolese courts, the execution is suspended or automatically commuted to life imprisonment.
The Public Prosecutor's Office must in all cases initiate the appeal procedure, when the accused is sentenced to death. In addition, when all judicial remedies have been exhausted, including cassation, a death sentence may be appealed for clemency.

Finally, by virtue of the theory of the primacy of treaties and agreements over domestic laws, which is enshrined in the Constitution of the DRC in the following terms *"international treaties and agreements duly concluded have, upon their publication, an authority superior to that of laws, subject for each treaty or agreement, its application by the other party"* (**Article 215), the DRC having ratified treaties and agreements enshrining the sacredness of the human person, life, and the prohibition of cruel, inhuman or degrading treatment and punishment, Article 5 of the Penal Code Book One is tacitly repealed in its provision of the death penalty.**

B) Facing the victim, preparing for the hearing

Faced with this, experience has shown, particularly in the Middle East in the many small Guantanamos set up by the Americans on the territory of their allies (Pakistan, Jordan, Saudi Arabia, Iraq) where torture is almost systematic in the case of the fight against terrorism, that there are two marked attitudes on the part of the victims: either they are walled up in a silence that alone expresses the depth of the trauma, or they are extremely voluble about what happened to them. These two categories are somewhat schematic in that we also find behaviors that borrow from both attitudes.

In any case, the approach of the lawyer or legal defender must be totally methodical and never lose sight of the purpose of the interviews. The case must be investigated and the person questioned in order to build an effective defense. This implies putting aside any personal feelings, which is delicate. We must not fall into curiosity either, as this is detrimental to efficiency. We will therefore proceed in order:

Faced with a silent person who has obviously been mistreated:

1. Keep in mind that you must get them to talk and resist the temptation to speak for them;
2. A good method is to have him tell the story of his arrest from the

At first, asking for many details (color and make of the police car, weather of the day, people's clothing, etc.) that seem insignificant. Often, once the habit of giving details is established, the violence is more easily discussed.

3. Never finish or complete the person's sentences. Silences, even if they are prolonged, can be used to help the person take the next step.
4. Remember that our scale of gravity is not necessarily his and therefore be constantly listening[8].
5. Once it has started, do not interrupt it, wait for it to stop by itself.
6. Whenever possible, try to have the physical abuse recounted (purged) before moving on to pressure and mental torture.
7. Make an inventory with the person of the marks that he or she is wearing and that you can see. Ask him/her if there were any witnesses (during the arrest, especially the family or in other cells), the description and possible names of the perpetrators (they often call each other by their first names or nicknames during harsh interrogations).

Faced with a voluble person who wears traces and is revolted:

1. It is essential to leave an initial phase of purging where she needs to "empty *her bag*". Take advantage of this time to capture elements that will guide the more precise conversation that you will have.
2. She sometimes tends to exaggerate but not always.
3. Explain how you intend to use the details in his defense (nullity, defense on the merits, prosecution of the perpetrators...).
4. Have her make specific lists of people, moves, outfits to regulate the flow.
5. It is often better to have them talk about moral torture first.
6. Pause in the story by speaking up to explain, for example, the texts that punish torture.
7. If the flow is uninterrupted, change the subject for a while and talk to them about their loved ones, this is usually effective in bringing them back to reality; you will then return to the violence.
8. Go around his wounds only at the end.
9. Take inventory of locations, names and witnesses as above.

In both of the above cases, at the end of the interrogation you must have elements:

1. On the circumstances of place and time
2. On all those present (whether or not they participated)
3. On the exact role of each person and in particular the nature and number of strokes
4. On all pressures and threats constituting moral torture
5. Of all the brands you have personally seen[9]

6. On possible witnesses (bystanders, fellow inmates)

It then remains to request a doctor (expertise but also sometimes necessary care), to find the possible witnesses to make them hear or quote, and to prepare the response. This can take three forms:

- Either an action for nullity of the procedure or part of it (interpellation,

[8] Many people explain that they were beaten reasonably, that they were subjected to the "normal" violence during an arrest.
[9] The lawyer or the legal defender is *never* a witness but can nevertheless inform

interrogations, police custody, etc.), nullity of the minutes of hearings, interrogations and depositions. See Part V.

- Either a defense on the merits of rejecting the statements or findings in light of the conditions of abuse and mistreatment.

- Either an action against the perpetrators, which can be disciplinary (by referring the matter to the hierarchical superiors, for example) or criminal and civil through a complaint or a direct summons. All three actions are possible simultaneously, as well as in addition to the above-mentioned defenses.

In any case, it is necessary to have a CONCRETE case before taking action. The burden of proof here is on the defense and is, by hypothesis, delicate.

- IV -

Hearing strategies

A) Vis-à-vis the accused

It is fundamental to show the courts that one has some distance to his client. It is even a golden rule of criminal defense to avoid a quasi-systematic and instinctive confusion on the part of the magistrates of the court as well as of the public prosecutor's office between the lawyer or the legal defender and the person he defends.

Displaying its distance means:

- Even if he lies, I don't lie.
- If he has committed a criminal act, I assume the noble task of defending him - his act is not mine.
- If he locks himself in a stupid defense, I follow him only with reservation and I advised him the opposite.
- I don't hesitate to contradict the defendant when it serves him or her and even to be dry with him or her.

But also, and above all:

- I am a bulwark between you and him.
- I fight prejudice for him.
- I fundamentally believe in what I am telling you.
- The system weighs more than the defendant: I am here to restore the balance.
- Practicing criminal defense means leaving nothing to chance from a technical point of view.
- Being a legal technician justifies defending any act, any cause.

Finally, and this is true in all circumstances, you must ALWAYS keep in mind that often: *THE FIRST OPPONENT IS THE CUSTOMER*.

With this in mind, we can then consider asking questions of the person we are defending. However, even if there is no miracle recipe, experience shows that some basic rules avoid disasters:

1. Never ask a question you don't already know the answer to.
2. Don't ask too many questions not previously discussed.
3. Explain to the defendant in advance that there is no trick question from us and that he must always answer what seems most obvious to him.
4. Ask short questions and do not hesitate to rephrase or explain them if the client gets lost.

5. Do not forget that the answer is intended for the Court and remind the defendant regularly.
6. It is always better to leave a doubt (which can be argued) than to have a catastrophic answer (which cannot be made up).

Similarly, it is fundamental to remind the accused that he or she must always answer the Public Prosecutor, the lawyer or legal defender of the civil party and the President in the shortest and most concise way possible. This avoids slippage.

B) Vis-à-vis co-prisoners

The golden rule is that nothing is gained by "beating up" on others. The mitigation of the rule is that there should be no sharing of responsibility by confraternity.

The result is that one must be direct and frank when asking questions to the co-defendant: it should not be a question of doing the work of the Public Prosecutor's Office, one does not seek to "push" him, but to clear or mitigate the responsibility of his client.
The line between questioning and accusation is quickly crossed. Moreover, the questioning of the co-accused must never turn into a confrontation with our colleague who is defending him. This is a waste of energy and has a disastrous effect.

Last but not least, one must remember the rules regarding one's own client: a doubt is pleaded, a certainty that comes from a catastrophic answer to a question is not made up for. Therefore, it is useless to insist beyond what the Tribunal can inform.

C) Vis-à-vis victims and civil parties

Another golden rule is that the last person to be attacked is the victim. Always address the victim courteously, gently and calmly. Give the Court the feeling that you understand their position, even if you do not share it.
This means that when confronted with a victim who lies, we must succeed in making her admit it or get her to contradict herself while showing that as a lawyer or legal defender we understand why she may have lied.

One must also remind one's client of this principle of precaution with regard to the victim. It is therefore not up to the lawyer or legal defender to be aggressive with the victim, except after it has become clear that the victim is lying, inventing, distorting, arranging, etc. In the latter case, it is necessary to be firm, even unpleasant in the questions, not forgetting that others can defend the victim or take over the floor. It is therefore necessary to keep most of her aggressiveness for her plea, to which no one will be able to respond.
In short, it is always better to be conciliatory with the victims, it does not prevent you from contradicting them and it avoids turning all the actors of the trial against you.

In two points, and to be concrete:

a. It is all too common to see lawyers or legal defenders of defendants attacking civil parties, thus accentuating their victim status and complicating the task of the defense.

b. On the other hand, we also see too many defenders who are totally silent in front of the victims and who forget to ensure the minimum of their role as adversary at the hearing.

The balance is delicate to find, it is in the middle and depends a lot on the attitude of the victim.

There is nothing wrong with going after a shameless liar, given what is at stake for the person you are defending, but you have to be sure that the liar is lying…

- V -

Defense strategies

They differ from the above hearing strategies in that they are principles established before the hearing between the lawyer or legal defender and the person he or she is defending and which will remain unchanged until the hearing is over.

It is fundamental that these strategies be common to both the defendant and the lawyer or legal defender, since one cannot apply them without the other. To be a good lawyer or judicial defender is also to have the pedagogy to make the defendant admit what is the best defense and to make sure (in his interest) that he sticks to it throughout the trial.

In a particular case, of a clearly political nature, it is the position of the defendant that imposes a very limited defense on the lawyer or judicial defender: the rupture.

A) Defense of rupture and defense of connivance

The defence of rupture is one that is based on the principle of challenging the legitimacy of the Tribunal. It therefore means challenging the authority of the state and its judicial power.

This defense strategy appeared in the 1960s during the wars of liberation (particularly the Algerian conflict) and it is difficult to know whether lawyers or legal defenders chose it or whether it was imposed on them by the intangible position of the people they were defending. Everyone may be called upon to defend a person who is a member of a political or ethnic rebel movement, fighting for independence, autonomy or revolution.

These people will explain to their counsel that they do not recognize the legitimacy of the Tribunal that wants to judge their acts (often serious: terrorism, assassination, armed rebellion, etc.), or even worse, arising from war crimes or crimes against humanity. This raises a question of conscience for the lawyer or judicial defender who, by hypothesis, is one of the cogs in this judicial machine that is being challenged by the accused or the defendant.

The daily defense strategy of the lawyer or the judicial defender in a democracy is a defense called "*connivance*", that is to say, he admits the legitimacy of the system to which he belongs and participates. It seems obvious to us that this membership should never be questioned or that there is reason to leave the Bar or the body of judicial defenders.

It is thus necessary to manage a client who contests (in a revolutionary way) this connivance but at the same time to exercise a real defense. However, the deontology of the lawyer or the judicial defender formally forbids him to plead against the interests of the defendant but also against his wishes.
The result is often the same: the defendant, if he is coherent, must ask his lawyer or his legal defender not to plead for him since this would be tantamount to admitting the judicial system.

He must remain seated and silent even though he is present. He must either renounce, during the

hearing, to the defense of the accused (but it often happens that he is appointed by the President of the Court), or explain, beforehand, this contesting position of the accused and thus justify his absence from the pleading and defense. It should be noted that the client can forbid him to speak on his behalf, which poses a real problem.

In all cases, extreme caution must be exercised. The client's position and his wishes in terms of defense must be explained very precisely. It is also essential to inform the client of the consequences of such a defense in terms of sentence (in this case, often the maximum). In addition, it will be necessary to explain to the court the situation in which one finds oneself as a lawyer or judicial defender, bound by one's ethical and professional obligations both to the defendant and to the court.

One can never recommend caution enough before accepting a breakaway defense, which, in principle, is a problematic non-defense. We remind you that the lawyer or the judicial defender can only be a stranger to the cause of the person he defends, under penalty of losing his independence and his conscience, which are the very essence of his function. At the same time, it is the very essence of his function to ensure all the defenses...

Note: The contested position of the accused may also be reflected in the use of recusal and legitimate suspicion.
Congolese doctrine defines recusal as a procedure whereby the litigant requests that a judge refrain from sitting because he has reason to suspect that the judge is biased against him. Thus defined, recusal has the effect of removing a judge from the investigation or trial of a given case.[10]
Legitimate suspicion exists when a party to the proceedings has serious reasons to fear that a court will not be able to render its decision impartially.
This defense is constitutionally guaranteed by ***Article 19 of the 2006 constitution as revised in 2011, which states:*** *"No one shall be removed or diverted against his will from the judge assigned to him by law. Every person has the right to have his case heard within a reasonable time by the competent judge. The right of defense is organized and guaranteed."*
The organic law N° 13/011-B of April 11, 2013 on the organization, functioning and competence of the jurisdictions of the judicial order, in its articles 49 to 62 provides for the procedure to be followed.

B) Admitted or disputed guilt

We must be very clear about this in order to produce an effective defence. Our civil systems do not, in principle, know the practice of *guilty pleas, which is* common in Anglo-Saxon law.

One could therefore deduce that it is inoperative to take a position on this point in our trials. Namely, should the client admit the facts or not? In everyday life, however, we notice that this is generally the first question that is asked of the defendant or the accused. And this seems logical.

Indeed, on the one hand, the Congolese Penal Code - like many others - allows for mitigating circumstances. These are not automatically acquired when a defendant recognizes the facts, of course. However, to dispute the evidence is to deny it.

[10] Achille BETU NZUJI, la récusation et la suspicion légitime en droit congolais, p.9

On the other hand, the unconscious of the Tribunal, like the collective unconscious, is sensitive to the recognition of the facts and this, for various reasons that vary from one person to another.
Many magistrates of the court and of the public prosecutor's office have told us in private that they have a benevolent approach to recognized cases. The main reasons for this are the enormous loss of time during hearings with a heavy docket and the irritation of judges faced with challenges against all and sundry.

In this sense, the lawyer or the judicial defender must respect a golden rule if he wants to usefully plead the extenuating circumstances or the personality of the accused: never dwell unnecessarily on the details of the facts that are recognized. It is in fact in the interest of the court to save time, or rather not to waste it unnecessarily.

Be careful, however:

1. Justice is not a matter of court time balance.
2. If it is necessary to go back on certain facts (partially recognized or to minimize them), it is the duty of the lawyer or the legal defender to do so.

This subject, which may sometimes seem like a detail, has immediate and long-term repercussions. Immediate, because the Court will often be more severe; long term, because the lawyer or the judicial defender who pleads commits the credibility of his own word. Denying the evidence (of a fingerprint, for example, as is too often the case) is a radical way of damaging one's credibility in the eyes of the Court. However, the career of a lawyer or a judicial defender is not limited to one case but in hundreds of others that you will plead over time, often before the same magistrates. Arriving in front of a Court that does not consider you credible is an often insurmountable obstacle.

Therefore, it is often better, if one cannot get a person who denies the obvious to admit that his or her mode of defense is suicidal, to give up assisting him or her rather than pleading aberrations by betraying one's oath and undermining one's own credibility in front of the judges.

In short, it is essential to establish one's position at the beginning of the hearing and, if one is convinced that it will help the defendant, to invite him to admit what is not in dispute (be careful never to lead him to admit to facts that he did not commit).
From then on, the defense can focus on the mitigating circumstances and the personality of the defendant to reduce the sentence as much as possible or propose alternative solutions to the Court.

This mode of defense, when the facts are recognized, is prepared with the same rigor as a contestation of the facts or a confession.

You must:

1. Targeting the defendant's entourage.
2. Have elements of personal history.
3. Have social opinions about his past (possibly in prison).
4. Have medical documentation if needed.
5. Seek the appointment of medical or psychiatric experts as needed.
6. Avoiding commonplaces.

The future of individuals can be read in part in their past, which influences them. It is still necessary to know this past.

In the event that the facts are contested, it is still necessary to establish a defence position and to focus on it.

There are two major axes[11]:

1) ***The pure and simple challenge***: there is no need to dwell on this line of defense except to remind you that the lawyer or the legal defender does not have the ethical right to plead against the statements of the person he defends. There must therefore be a synergy between the two and consistency in the challenge and demonstration.

   It is necessary, and this is a paradox in view of the developments below, to build the challenge on concrete facts (by summoning witnesses, providing material elements, etc.) to go against the accusation. It is a choice of defense that imposes this demonstrative path and not the challenge of the charges of the prosecution in which case, it is necessary to be precise about their insufficiency. It may be useful, in the case of complex cases or if one wishes to force the Tribunal to respond on specific points with a view to the appeal, to file submissions for the purpose of acquittal[12]. The principle of adversarial proceedings requires that they be transmitted to the Public Prosecutor's Office. However, it is advisable not to transmit them too soon, at the risk of the Public Prosecutor's Office taking steps to remedy the shortcomings that the submissions have highlighted. Once again, it is all a question of balance in the strategy.

2) ***The absence of sufficient charges***: to find a person guilty, the judge must be convinced beyond a reasonable doubt of the guilt of the accused. If there is any doubt as to the guilt of the accused, this doubt must be resolved in favour of the accused[13], i.e., he or she must be acquitted or released "*for the benefit of the doubt*". The absence of sufficient charges against the alleged offender discharges him. Doubt benefits the accused, or *"in dubio pro reo*", is a general principle of law.

   It must be admitted, however, that the term "*benefit of the doubt*" is totally unsatisfactory. This very notion of doubt also seems to weigh on the judgment that will be rendered, which is also *doubtful*.
   Similarly, if the accused is acquitted on this basis, his innocence will also appear doubtful, even though it has been recognized by a court decision that has the force of res judicata. Finally, the accused does not benefit from doubt (as if he were presumed guilty but got off scot-free this time). On the contrary, he benefits from the presumption of innocence.
   The legal analysis is very simple: the presumption of innocence is a fundamental and immutable principle that applies to all legal proceedings until a final decision is rendered (**Article 17** of the DRC **Constitution**).
   The first consequence is that the burden of proof rests exclusively and solely on the prosecution to establish guilt. This is the meaning of the principle "*actori incumbit probatio*". It is the accuser who has the burden of proving the existence of the offence. The principle of legal certainty requires that this guilt be demonstrated and established with absolute certainty and that there be no uncertainty in this regard.
   This illustrates the judicial adage on which a fair system is based: better one hundred guilty people go free than one innocent person be convicted. This is not a choice; it is a legal obligation, whatever the ultra-repressive may think.

[11] Nothing being symmetrical, these two axes obviously combine with each other.
[12] See attached template

[13] Frédéric DEBOVE, François FALLETI and Emmanuel DUPIC, *Précis de droit pénal et de procédure pénale*, 6th updated edition, Paris, PUF, 2015

> Therefore, if the Public Prosecutor's Office has not succeeded in establishing the guilt of a suspect in its entirety, the suspect must be released. It is not up to the defense to provide any evidence of innocence.
> It is obvious that the defense fights with elements that it thinks will prove the innocence of the accused. Of course, this should not be denied. However, it is fundamental to always remember the above principle and to spend considerable energy in demonstrating the deficiencies of the prosecution's case before engaging in the demonstration of innocence. The opposite is illogical, yet this is a reflex that we all have and which, little by little, establishes a practice contrary to the presumption of innocence. Let's remember that it is difficult to bring negative evidence (which the accused did not do) and that it is much easier to demonstrate the shortcomings of the accusation (which it does not demonstrate).

Let us therefore say things clearly to the Court and to the accuser and refuse to let them believe that an acquittal is acquired "for *the benefit of the doubt*".

- VI -

Procedural nullities

Article 28 of the Congolese **Code of Civil Procedure** advocates the principle according to which there is no nullity without a grievance in these words: "*no irregularity of a document or procedural act entails their nullity only if it harms the interests of the opposing party*.

A) Elements of legal philosophy

The fundamental principle of Justice implies that barbarism, whatever its form, must be met with the sole weapons of legality. This is the essence of the notion of procedure. It constitutes the limits of the path that leads to the decision of justice and to the (often utopian) ideal of social peace. The consequence of this principle is that all actors in the judicial process are willing slaves of the procedure. The last level of this process is the magistrate. By magistrate we mean both the judge and the prosecutor.

As far as the court is concerned, the magistrate who judges, his true legitimacy comes from his scrupulous respect of the fundamental rules. More than any other, he is the one who will cancel an entire procedure, release a guilty person who admits the facts, a cold monster who has murdered, a swindler who has ruined dozens of people, because the rule of law has been flouted to such an extent that the entire case is tainted by illegality.
This annulment, this scrupulous respect for procedure, gives the judge his true power to judge all other cases, to condemn all other guilty parties as long as the rule has been respected. This is not only a source of pride but also the meaning of the mission of justice that judges take an oath to accomplish.

As for the Public Prosecutor's Office, a body that prosecutes, that accuses, like any magistrate, it cannot accept to work with the weapons of those against whom it fights. To violate the procedure is to enter into illegality in the same way as the thugs being prosecuted. If one admits that this is the basis of banditry, it is then for the magistrate the most inexcusable of practices. No one can accept that the prosecution or the judgement of thugs should be entrusted to thugs in robes. This reasoning is the basis of civilized, democratic justice.
In concrete terms, it is the duty of the Public Prosecutor's Office to request the cancellation of a dubious procedure, just as it is its duty, beforehand, to supervise its investigators, to give instructions, and to respect and enforce the rule of law. It is also his mission, prescribed by the Code of Criminal Procedure, to ensure that the personnel who act under his authority will be supervised and sanctioned.
Here again, it is in this way that the Public Prosecutor's Office acquires the legitimacy to request with all the severity that it wishes against those who are judged within the strict legal framework. In a word, for police officers as for lawyers and magistrates, respecting the procedure is above all respecting the fundamental deontology of each of these professions. One can only participate in the work of Justice in a just and legalistic way. The only way is the way of the Criminal Procedure. There is only one form of justice, and it is based on a fair trial and the respect of fundamental rights.

B) Cases of invalidity

In practice, and without being exhaustive, there are three main areas in day-to-day criminal proceedings that can draw attention to the procedure:

- The rights of the human person
- The rights of the defence
- The principles of judicial organization

There is no question here of making a list (which would in any case always be incomplete) of what is likely to lead to a nullity of procedure. It is up to each actor in the judicial process to identify what is a serious breach of procedure and should be sanctioned as such. We will see that not every breach justifies a nullity. The modern legislator often takes the trouble to specify the cases in which nullity is possible. It also happens that only the main principles are addressed or that they are simply implied by the law which refers to the General Principles of Law.

Article 11 of the DRC **Constitution** states that "*all human beings are born free and equal in dignity and rights. However, the enjoyment of political rights is recognized only for Congolese, except for exceptions established by law*. It is reinforced by **Article 12**, which states that "*all Congolese are equal before the law and have the right to equal protection of the laws*. Similarly, **paragraphs 2**, **3**, **4** and **5** of **article 16** provide that everyone has the right to life, physical integrity and the free development of his or her personality in accordance with the law, public order, the rights of others and morality. No one may be held in slavery or in an analogous condition. No one may be subjected to cruel, inhuman or degrading treatment. No one may be required to perform forced or compulsory labor.

We will therefore seek to punish police or investigative acts that are irregular (searches outside the legal framework, lawyers or legal defenders not summoned, physical violence against the suspect, etc.). First, there are disciplinary sanctions taken by the authority to which the offending judge, police officer or court clerk reports. Then there are the criminal sanctions that can be imposed in case of prosecution for illegal search or arrest, wrongful detention, violence and torture, etc. Finally, there are the civil sanctions resulting from the damages to which the injured party may be entitled.

We will focus here on the most effective sanction: the procedural sanction. This sanction is likely to affect the two usual types of procedural nullities, namely textual and substantial:

- On the one hand, if the **Code** has not instituted a very clear textual nullity relating to interrogations or arrests, their application is not, however, difficult from a theoretical point of view. In the event of a problem with an extorted confession, for example, it would be appropriate to have them annulled[14]. In practice, it is obvious that lawyers or legal defenders will have to produce concrete evidence (testimonies, attestations, medical certificates, etc.) in order for the judges to sanction. It should be remembered in this regard that while the lawyer or legal defender is the defender of these principles and rights, the magistrate is their guardian. Indeed, it is primarily the responsibility of the Prosecutors to "*put together*" their prosecution files and to exercise effective control over the police forces that they direct in judicial matters and from which certain elements (often marginal) would be tempted to extort

[14] In accordance with the circular mentioned below.

confessions. It is under the orders and authority of the Public Prosecutor's Office that the OPJs exercise the determined attributions within the limits of their competence, see **Article 1** of the Congolese **Code of Criminal Procedure**. Prosecutors are thus at the forefront of those who can instill the uselessness of the practice in terms of results: obtaining confessions that will make the entire procedure null and void is counterproductive. The judge seized with such a request for nullity could, once the torture (whatever its form) is established, only pronounce the nullity.

- On the other hand, the DRC, as a signatory to most international texts guaranteeing fundamental rights, including impartial and equitable justice, has a duty to sanction any substantial nullity that could taint a judicial procedure.

The nullity of procedure exists in Congolese law when:

- The exploit is not regular, the effect in this case is the regularization of the exploit
- One of the substantial mentions that must be contained in the exploit is missing, here the effect is the absolute nullity
- A deadline has not been met the effect is the regularization.

The legal basis will be found in the **Code of Criminal Procedure** when it organizes police or investigative acts. **Articles 2** and **following** of the Congolese **Code of Criminal Procedure**. The substantive nature of the nullity is that it is not necessary for it to be expressly provided for by the text. The idea of substantive nullity is therefore as follows: the seriousness of a failure or positive act is such that it affects the interests of the person who invokes it and is sufficiently prejudicial to him or her to incur nullity even if it is not specifically provided for by the texts.

This second category is subdivided into nullities of public order and nullities causing prejudice (or of private order). On the one hand, one can distinguish between substantial nullities which concern the disregard of principles of public order and which must be noted even if there is no infringement of the rights of the defence. This is the case of the absence of a formality, the incompetence of the author, the violation of the **C.O.J.** (Code of Judicial Organization) regarding the composition of the Tribunal, etc.
According to R. GARRAUD, these are "*the forms that are indispensable for the act to fulfill its function*", that is to say, for J. PRADEL, those that are not only protective of the interests of the parties, but which are relative to the higher interests of the judicial organization. Without the list being exhaustive, one can still quote: the territorial or material incompetence of the investigator or the examining magistrate, the absence of signature of the order of designation of the judge. With regard to concrete procedural acts: the absence of the oath of the experts, the absence of essential notifications, the total absence of the hearing of the accused, etc.
Case law is established on a case-by-case basis and can only be the result of decisions of the Supreme Court by virtue of a restrictive or non-restrictive practice of nullity that it has chosen.

On the other hand, there are substantial nullities (i.e., arising from the principles and not expressly provided for in the texts) that infringe on the right of defence.
One will have to consider (which makes it possible to mitigate the absence of textual nullities in the **Code of Penal Procedure**) that there is nullity when the ignorance of a substantial formality undermined the interests of the party which it concerns.

Here we find the notion of grievance. The idea of grievance is fundamental in order to combat the dilatory practice of invoking detailed nullities. It must be remembered that what counts is not so much the seriousness of the irregularity as the importance of the prejudice.

This principle entails the overriding consequence that anything that infringes on the rights of the defence is necessarily prejudicial. Thus, and by way of example, even if they are prescribed by the code but not on pain of nullity the problem of police custody and other control measures (detention is an exception to the principle of individual freedom of movement enshrined in **Article 17** of the **Constitution** under the conditions required by **Article 27** in **paragraphs 1 and 2** of the **Code of Criminal Procedure**), evidence, home visits, (**Article 3** of the **Congolese Code of Criminal Procedure**), the absence of a lawyer or legal counsel, the absence of a file, the absence of notification of rights, the medical visit, the intervention of an interpreter for a person who does not understand the language, etc... are cases of substantial nullity affecting the interests of the party concerned (in this case the rights of the defense).
In the case of infringements of the rights of the defence, there must be an absolute presumption of grievance[15].

A double level of sanctioning of nullities can be seen here. Indeed, in order to comply with international democratic standards, it is necessary to sanction not only direct infringements of the rights of the defense but also indirect infringements of these same rights. That is to say the fact of not putting people in a position to exercise them.

For the record, it should be remembered that the mere fact of not putting a suspect in a position to exercise his or her rights should be a cause for nullity even if he or she did not actually exercise them. For example, failure to inform a suspect that he has the right to the assistance of a lawyer or a legal defender constitutes a clear violation of the rights of the defense, even if the suspect later indicates that he did not want a lawyer or a legal defender.

The above example is intended to illustrate the difference between an impartial and fair justice system and one that is not. It is by sanctioning this failure to inform the suspect of his or her rights that the judge advances or maintains the justice system at a reasonable level.
It cannot admit and validate a procedure in which it will have been damaged in any way:

- To the public order of the judicial organization
- To the presumption of innocence
- To the right to a fair, impartial and equitable trial
- To the integrity of the human person
- To the rights of the defense
- To the substantial formalities as soon as it is prejudiced

C) <u>The implementation of nullities</u>

It should be noted here that the accused may make observations on the police custody bill. Likewise, the observations made during orders for pre-trial detention and extension, the briefs accompanying appeals of these orders, as well as the interrogations during the investigation, are moments conducive to the raising of nullities.

[15] J.PRADEL - *Criminal* Procedure - French Court of Cassation-2003

It is imperative to use it when it comes to pre-trial detention because it is a fundamental weapon. We cannot accept that a person (always presumed innocent) be placed in pre-trial detention even though the procedure may be tainted by nullity. This idea is unbearable in terms of principles.
It is then necessary to lay siege to the judges and demand that they decide this question of the validity of the procedure before even touching the freedom of the accused (even if he admits the facts).
For the lawyer or the judicial defender, the problem of the administration of proof arises when the nullity is based on an attack on the person (see defense strategies and interviews). In other cases, it is the very careful analysis of the procedural file that will illustrate the failures (lack of signature, search schedules, etc.).

It should simply be recalled that the administration of evidence with regard to nullities does not exclude, on the contrary, traditional means such as the hearing of witnesses who have seen blows at the police station or during searches for example, the provision of medical certificates, etc.

It is recalled that the defender has a twofold proof to administer:

- The existence of the violation of the procedure (there must always be a text)
- The existence of the prejudice caused to the party

he is defending **Assuming the nullity is proven, what will**

be the effects?

The effects of nullity when it is admitted are also to some extent an illustration of the choice of penal policy that has been made.

The judge, like the legislator, can be restrictive or liberal. The question arises in these terms: will the nullity be limited to the irregular act in question or will it extend to the subsequent procedure on the grounds that the acts constitute a whole which will have been vitiated by contagion (the theory of the American jurisprudence of the fruits of the poisoned tree)?
Obviously, it is up to the judge to decide on the seriousness of the irregularity and the consequences it may have. It is certain that a search outside the legal hours will not have the same consequences as the torture of a suspect.

The seriousness of an act of torture, whether physical or moral, and its universal prohibition in international and domestic law would have fully justified the drafting of a specific sanction in the **Code of Criminal Procedure**. However, one may wonder what would remain of a procedure in which the convictions have disappeared. Certainly not enough to condemn their author...

On a strictly personal basis, we believe that the freedom of the judge and the Supreme Court is total in terms of principles and can be exercised by the existence of a causal link between the nullity and the subsequent acts to annul the latter. However, it seems to us that the seriousness of certain procedural infringements and the violation of fundamental principles make it necessary to annul all subsequent acts and therefore the entire procedure in any case.

The requirement for a causal link should also be assessed on a case-by-case basis.
As a purely indicative example, the French judge is situated halfway between the two opposing

theories: for example, he considers that on the one hand, a confession following an irregular search must itself be annulled, but not an expert opinion that does not refer to the null act.

The general rule is that acts subsequent to an irregularity which is not likely to affect by way of contagion some other part of the proceedings should not be annulled. On the other hand, the French Court of Cassation considers as null and void the acts that proceed from acts that have themselves been annulled. While it has the merit of relative clarity, this system may be considered unsatisfactory in terms of principles.

Many American states apply the strict fruit-of-the-poisonous-tree theory. In any event, the annulled act is deemed never to have existed and cannot be referred to by any of the parties.

It is also possible to envisage, as is the case in certain European legislations, that these acts may be redone in a regular manner by order of the court if they are null and void in a formal sense. In no case may an act that is substantially null and void in principle, such as an attack on the physical integrity of a suspect or witness, be validly redone subsequently. In this field, respect for the rule is the mother of judicial legitimacy.

In concrete terms, it is advisable to raise the nullities in writing, whether at the hearing on the merits or during the pre-judicial memoranda and observations. The interest of writing is, on the one hand, to allow the respect of the adversarial process by giving a copy to the Public Prosecutor's Office, which will then know to which arguments it will have to respond. On the other hand, the fact of filing written documents obliges the court to answer in its decision and thus facilitates the censure by the appeal courts if necessary.

At the end of the book, you will find two models of pleadings and briefs articulating procedural nullities. Finally, the pleading in support of these writings must be based on the fundamental principles and analyze the national jurisprudence with precise decisions of the Supreme Court to facilitate the work of the Judge of first instance.

VII - APPENDICES

List of laws and texts applicable in the DRC Client interviews (Maltreatment)

Local:

1) The Constitution (revised by law n°11/002 of January 20, 2011)
2) The Penal Code
3) The Code of Criminal Procedure (Decree of August 6, 1959)
4) The law n°11/008 of 09/07/2011 on the criminalization of torture
5) Law n°09/001 of January 10, 2009 on child protection
6) The Military Penal Code (Law n°024-2002 of 18 November 2002)
7) The organic law n°06/020 of October 10, 2006 on the status of magistrates, which establishes torture as a disciplinary fault
8) Circular n°04/008/In/PGR/70 of May 16, 1970 of the Attorney General of the Republic addressed to the Officers of the Public Ministry
9) The Congolese Code of Civil Procedure
10) The Organic Law n°13/011-B of April 11, 2013 on the organization, functioning and competence of the jurisdictions of the judicial order.
11) Law n°06/018 of July 20, 2006 repressing sexual violence in the DRC
12) The decree of June 21, 1937 concerning the rehabilitation of convicts
13) Ordinance 344 of September 17, 1965 on the Penitentiary Regime
14) The ordinance-law n°82-017 of March 31, 1982 relating to the procedure before the Supreme Court of Justice.

International and regional:

Article 215 of the **Constitution** provides that international treaties and agreements duly concluded have, from the time of their publication, an authority superior to that of laws, subject, for each treaty or agreement, to its application by the other party.

3) The **African Charter on Human and Peoples' Rights**; Ratified by the Democratic Republic of Congo on **23/07/1987**
4) The **International Convention against Torture and Other Cruel**, **Inhuman or Degrading Treatment or Punishment**; Ratified by the Democratic Republic of Congo on **March 18, 1996**
5) The **Rome Statute of** the **International Criminal Court**; Ratified by the Democratic Republic of Congo on **April 11, 2002**
6) The **Rules of Procedure and Evidence of September 9, 2002**

7) The **International Covenant on Civil and Political Rights** of **19 December 1966**; Ratified by the DRC on **1 November 1976**

8) The **International Convention on the Rights of the Child**, ratified by the DRC on **September 27, 1990**

9) The African Charter on the Rights and Welfare of the Child; the DRC has not yet signed or ratified this charter

10) The **Geneva Conventions** of **1949** and their additional protocols. Ratified by the DRC on **24 February 1961.**

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HIGH COURT
OF BOURG EN BRESSE
Correctional Chamber
Hearing of December 3, 2008
Floor: 07010585

CONCLUSIONS OF NULLITY

FOR:

Mr. GULER Kenan, born on 14/08/1962, residing at 15, Rue Saint-Joseph, 01200 CHATILLON EN MICHAILLE.

PREVENTED

Master Mehdi BENBOUZID,
Lawyer

AGAINST:

Mr. Prosecutor of the Republic.

IN THE PRESENCE OF :

Mr. and Mrs. ROBICHON, residing in Colombys, 257 Route de Rogeland in 01170

GEX. PARTIES-CIVILES

Master Jean-François BOGUE
Lawyer

PLEASE THE COURT

I - –

On July 26, 2007, Mrs. Catherine ROBICHON addressed to the Public Prosecutor of BOURG-EN-BRESSE a complaint aimed at Mr. GULER Kenan *exercising at the sign KENOL IMPEX*.

This complaint was based on: "*the non-respect of the provisions of articles 1792 and following of the Civil Code as modified by the law of 2005, in particular with regard to the compulsory insurance for any construction work* (!? ...) *as well as for swindling and breach of trust*
»…

A report of report of Bailiff, taking again the indications of Mrs ROBICHON, was joined to this complaint.

Mr. GULER Kenan was summoned by bailiff on August 26, 2008 before the Court of Appeal.

The respondent intends to have this summons quashed.

II - –

It follows from the provisions of article 551 of the Code of Criminal Procedure that *the summons states the act being prosecuted and refers to the legal text that punishes it.*

This prescription is made under penalty of nullity when, in application of article 565 of the same code, the failure *has had the effect of harming the interests of the person it concerns.*

It is also a given that everyone has the right to be informed of the exact facts of which they are accused, the legal qualification of these facts and the law that provides for and punishes these facts.

This is the minimum requirement to ensure the effective exercise of the rights of the defense.

In this sense, art. 6 of the ECHR provides inalienably that *everyone is entitled to a fair hearing, which* implies being *informed of the nature and cause of the charge against him.*

In this case, Mr. GULER is cited on the basis of articles L.111-13 to L.111-16, L.11119, L.111- 20, L-111-28 and L.111-34 of the Consumer Code.

In addition to the fact that these texts do not exist at all, there is no mention of offences relating to a lack of insurance in the Consumer Code.

However, it is common knowledge that if the *summons is ambiguous* as to the offence being prosecuted and its basis, *all defendants have the right to be informed of the nature and cause of the offence.*
In the case of a criminal *offence, the* summons must be declared null and void. (***Cass. Crim. 6 March 1990, Bull. Crim. 1990 n° 106)***.

In the same way, the error or the absence of a repressive text is detrimental to the interests of the person concerned when, as in the present case, he or she may have *had doubts about the purpose and scope of the act by which he or she was brought before the Court. (**Cass. Crim. 20 October 1964, Bull. n0 269).***

The Court will therefore cancel the summons to appear before the Correctional Court issued to Mr. GULER.

NOW THEREFORE

Considering articles 551, 565 of the Code of Criminal Procedure; article 6 of the European Convention for the Protection of Human Rights.

Noting that the summons to appear before the Correctional Court issued to Mr. Kenan GULER does not mention the legal texts repressing the acts being prosecuted,

To declare and judge that by quoting articles L.111-13 to L.111-16, L.111-19, L.111-20, L-111-28 and L.111-34 of the Consumer Code, when these texts do not exist, the summons does not allow Mr. GULER to know what infraction he is accused of and what is the legal basis of the action taken against him.

To find that this lack of legal basis prejudices the rights of the defense and the interests of the accused.

To note consequently the nullity of the summons delivered to Mr. Kenan GULER on and this, with all the consequences of law.

WITH ALL RESERVATIONS

Mehdi BENBOUZID
A v o c a t t o t h e C o u r t
(Toque 22)
21, Rue François Garcin
69003 LYON

CORRECTIONAL COURT OF LYON
11th CHAMBER
HEARING OF OCTOBER 16, 1997
RG N° 92/25364

CONCLUSIONS FOR THE PURPOSE OF ACQUITTAL

FOR:

Mr. DAHMANI Djamel, born on May 27, 1964 in EL ATTAF (Algeria), of Algerian nationality, residing at the Centre de Semi Liberté of LYON, 69100 VILLEURBANNE,

PREVENTED — Maître BENBOUZID, Lawyer
Toque n°

AGAINST:

The Public Prosecutor of the Tribunal de Grande Instance of LYON

IN THE PRESENCE OF:

Mr. GONON Cyrille

CIVIL PARTYMaster — SALQUE, Lawyer
Toque n° 583

PLEAD WITH THE COURT

I - FACTS AND PROCEDURE

On October 6, 1992, GONON Cyrille filed a complaint against DAHMANI Djamel for extortion of funds by violence and constraint.

Cyrille GONON alleged that Mr. DAHMANI had extorted the approximate sum of 43.000,00 frs from him between April and October 1992.

According to Cyrille GONON, Mr. DAHMANI would have threatened him to reveal his complicity in a theft of wallet, thus leading him to give him various sums of money, and even pushing him to contract a loan of 47.000,00 frs.

GONON explained to the police services that during the period covering the months of April to October 1992, Djamel DAHMANI had permanently threatened him and forced him to withdraw sums of money at the counters of his bank and to give them to him.

In order to support his claims, he indicated to the investigators several dates of withdrawals and their amounts, sometimes even mentioning the location of the said banking operations.

However, the investigators established that it was impossible to confirm GONON's statements on the materiality of the remittances; the dates and amounts indicated did not correspond to the account statements submitted by him.

Continuing his "fanciful" declarations, GONON will even go so far as to affirm afterwards that he was physically threatened, contradicting his first declarations relating a moral constraint concerning blackmail to complicity.

Always versed in his psychosis, GONON even alleged before the magistrate the psychiatric expert the pseudo-existence of new money movements, allegedly for the benefit of the accused, and that he would have "omitted" to mention to the police.

Of course, it was once again impossible to find any written trace of these pseudo money withdrawals....

In a more objective way, it resulted in fact that during the period concerned, Mr. DAHMANI, dismissed from the company TELESERVICE where he had been employed with Mr. GONON, bought for the account of one of his friends, Mr. BELHADJ, a motorcycle worth 102.900 frs, financed by the bonus of dismissal of more than 100.000 frs received from his former employer.

From then on, Djamel DAHMANI lived on the allowances paid by the ASSEDIC, the progressive reimbursement in cash of Mr BELHADJ's debt and his AURORE credit account with the CETELEM company.

It was with this AURORE card that he paid for the hotel rooms he occupied, as was later shown by the statement of transactions on his CETELEM account.

Heard by the police Djamel DAHMANI ***categorically denied*** having extorted any sum of money from Cyrille GONON.

Presented to the Investigating Magistrate on December 15, 1992, Djamel DAHMANI was placed under a detention order following his first appearance interrogation.

He reiterated his categorical denial before the Examining Magistrate EYRAUD and maintained this position throughout the investigation.

Djamel DAHMANI was kept in detention until February 19, 1993, when he was released and placed under judicial supervision.

He was referred to the Correctional Court by order of the Examining Magistrate on July 18, 1994.

II - DISCUSSION

It is obvious that the file does not contain any evidence of the remittance of funds, nor of any threats or constraints,

Therefore, the Court of Appeal can only conclude that the offence does not exist.

1 - On threats and constraints

Mr. GONON Cyrille alleges facts that began in April 1992, although he only filed a complaint on October 6, 1992, which, in view of the statements made afterwards, creates a particular impression of incomprehension.

It is indeed totally incomprehensible that such a long period of time could have elapsed without anything interrupting the alleged pressures, which, as reported by the civil party, will challenge the Tribunal, as they appear inconceivable and contrary to all logic.

The court of law will note moreover that this incomprehension is accentuated throughout the procedure and that it leads to the evidence that Mr. DAHMANI is completely foreign to the facts motivating the lawsuit.

Cyrille GONON thus declares to have been the object of constant and regular pressures during these 7 months on behalf of the accused.

Mr. GONON makes contradictory statements on this subject, he affirms (side D2) that Mr. DAHMANI would have made him an accomplice to a theft of a wallet and that he would use it as a means of pressure.

The first statement of the civil party relates indeed that accompanied by the accused, he would have lunch in a cafeteria and that on this occasion the latter would have substituted, in the pocket of a jacket, a wallet to extract a bus card. The accused would have then given the wallet to Mr. GONON intimating to him to get rid of it, which at first sight is astonishing, the logic having wanted him to do it himself.

Consequently, Cyrille GONON would not have thrown the wallet but would have hidden it in the glove compartment of Mr. DAHMANI's vehicle, which again is surprising since the latter, sitting next to him, would not have noticed anything.

According to the statements of the alleged victim, Mr. DAHMANI would have affirmed to him a few days later to have been arrested in possession of this wallet in his vehicle and to be prosecuted for this fact.

He would have made him responsible for this situation and, threatening to implicate him as an accomplice, would have demanded from him the payment of multiple sums of money.

However, it appears that in a first statement the said theft of wallet would have been committed during a lunch agreed together and this, taking into account their links whereas later Mr. GONON will declare to the psychiatric expert (side D26 page 4) that Mr. DAHMANI would have taken him in his vehicle following a car accident that he would have had previously, which is totally different.

In a first version, GONON would have accompanied Mr. DAHMANI of his own free will, by friendship, or professional relationship... but he then contradicts himself by declaring himself forced from the beginning by an accident immobilizing his own vehicle. In this case, why then go to lunch with Djamel DAHMANI?

In any case, it is possible to note the uncertainty of Cyrille GONON's statements, who is not able to locate the source of the alleged threats and is unable to maintain his statements. It is therefore quite obvious that the plaintiff has progressively modified his statements, thinking that this will make them more credible.

Moreover, no deposition or element of fact allows to suspect the existence of threats or violence, whereas Cyrille GONON will affirm during the preliminary investigation that Mr. DAHMANI threatened him concretely with physical reprisals (coast D2).

Thus, he will maintain and detail his statements before the Investigating Magistrate (rib D31): ".....DAHMANI made threats to me ***first*** concerning my mother, then the woman with whom I live and then finally myself, either to throw myself from a bridge into the water, or to be burned in my car ".

However, it appears once again that such far-fetched and unsubstantiated threats cannot be taken seriously, even though Mr. GONON had ***previously*** stated that he had been originally forced by blackmail "into complicity", which was a determining factor in the remittances (rib D26 page 7 paragraph 1).

Why would Djamel DAHMANI have made the threat of physical violence (which never took place) when he supposedly had a sufficient argument through the blackmail of complicity.

In reality, the interference of alleged threats of physical violence, appears as a new attempt intended to reinforce (although contradicting!) the moral constraint previously alleged and probably judged, after reflection, and rightly, as unconvincing by Cyrille GONON.

In fact, it appears from the procedure that GONON presents different versions of the facts intended to make his initial "scenario" credible, which will however be contradicted throughout the investigation and the information.

One does not understand how the accused could be sent back to the Court of Appeal when nothing allows to support the accusation but on the contrary the contradictions contained in the depositions and those coming out of the factual elements undoubtedly establish the innocence of Mr Djamel DAHMANI.

Thus, the so-called victim will successively state:

- Before the examining magistrate, concerning his concubine Miss JUDE (rib D31): "it is the young girl with whom I live to whom *I had told a little of the story*, but *without making her aware of* the amounts claimed nor of the threats".

- Whereas this same "victim" explains to the psychiatric expert (coast D26 page 4), that Miss JUDE Virginie is perfectly aware of the affair, saying: "*we lived this history together*",

- and claims at the same time to have *confessed everything* to him *on July 31, 1992,* at the time of the CETELEM loan (rib D31).

The civil party thus gives three totally contradictory pieces of information.

In the same way, Cyrille GONON explains that his mother, Irène PLANETA, is very close to him and that she was the first of his family to be informed of his problems (rib D26 page 2).

However, it appears from another statement that the alleged extortion of funds was in fact revealed to Irène PLANETA by Jean-Philippe GIRARD, during the CETELEM loan to which the latter lent his support on July 28, 1992 (rib D10).

Mrs. PLANETA would then have taken the initiative of filing a complaint, not without having formulated (coast D26 page 5) "a sentence full of good sense: we could have reacted before!
».

The concluding party can only adhere to such a qualifier when it comes to the relevance of the remark and this all the more so, astonishingly, this hasty initiative will only take effect on October 6, 1992, date of the complaint of Cyrille GONON (coast D2), that is to say more than two months later!!!

The fact remains that Cyrille GONON does not give any explanation for his surprising assertions, which are characteristic of a particularly clumsy staging.

The Tribunal will therefore retain all of these particularly striking inconsistencies. It

will also note that, equally surprisingly:

The civil party never thought of filing a complaint (or at least to have the so-called threats of Mr. DAHMANI noted by a witness).

GONON's attempt to do so was unsuccessful because a Judicial Police Officer refused to register a complaint that he had "tried" to file.

Moreover, no trace of this episode will be found despite the description of the said OPJ given by the "victim" (reference D.32 - Confrontation report).

Moreover, if this was the approach of Cyrille GONON, having finally dared to file a complaint, it is not clear why he declares that he has continued to pay the defendant, still not daring to file a complaint when he had already taken the step.

It is not clear why the second attempt (which occurred several years ago) was not successful. months later), and without any additional elements, proved to be successful this time

Such findings appear in themselves to be particularly disconcerting and likely to give rise to more than legitimate doubts.

The Tribunal will furthermore base its conviction, if necessary, on all the other flagrant contradictions in the proceedings.

Thus, how to explain that the accuser of Mr. DAHMANI:

- had himself taken the initiative to ask Jean-Philippe GIRARD for his car registration document (coasts D10, D26) whereas he could have refrained from doing so and argued with the defendant about the categorical refusal of the credit institution and thus put an end to the alleged requirements.

- that as a result of this he not only did not try to interrupt the credit operations, but on the contrary went ***alone to*** get the check for 47.000,00 frs.

- that he affirms, against all logic, that Mr. DAHMANI would have demanded only 34.000,00 frs whereas this one knew the exact amount of the loan and, moreover, would have claimed to want to pay a guarantee of 70.000,00 frs.

It is therefore appropriate to note all these contradictions, which the Tribunal will certainly do.

It is moreover undeniable that these contradictions confirm the declarations of Mr. DAHMANI who firmly denies having extorted funds from Cyrille GONON by constraint or violence.

In any case, no violence was found and the alleged coercion was not established. In fact, the only categorical demonstration in the file is that of
maneuvers as clumsy as intolerable aiming at misleading the jurisdiction of this court and thus at harming Djamel DAHMANI.

This state of affairs perfectly illuminates the following developments:

2 - On the materiality of cash remittances

The procedure followed never made it possible to establish the reality of the alleged remittances but, on the contrary, highlighted the false nature of Cyrille GONON's statements.

Thus, basing himself exclusively on the statements of the author of the complaint, the accused intends to have it noted that the alleged victim affirms (side D2) that the first payment took place in June 1992 for an amount of 2,500.00 francs, withdrawn from a bank near 184 cours Lafayette in LYON.

However, this statement is categorically refuted by the police (D15), who establish that only a withdrawal of 1.800,00 frs appears on the statements of account of Cyrille GONON, the aforementioned withdrawal having taken place with the distributor of LYON Part-Dieu, not in the month of June 1995, but on April 30, 1992!

In the same way, Cyrille GONON dares to claim that he emptied his account in August 1992 and transferred the sum to Miss JUDE's account in order not to pay the defendant who was harassing him (coasts D2, D26 page 5); whereas the police establish with certainty that this statement is completely false and that the operation does not appear on the account statements (coasts D15 and D16).

Moreover, Cyrille GONON declares to the psychiatric expert (rib D26 page 5): "I was playing the fool, ***we went to my bank*** and I gave him 15.000,00 frs for lawyer fees".

It is, to say the least, "astonishing" that this sum was never mentioned to the investigators or the investigating magistrate.

This is easily explained by the fact that this operation, once again, does not appear anywhere and is the result of yet another scandalous and shameless lie by GONON.

It is therefore perfectly normal for the investigators to note that: "generally speaking, there is a discrepancy in the amounts and dates between the complaint and the sums underlined by Mr. GONON" (ribs D15 and D16).

And that finally, in execution of the commission rogatory of the Examining Magistrate, these same investigators conclude (rib D33) that: "finally, no formal evidence that could support the charge of extortion of funds could be collected, this investigation remaining on a questioning"!

These elements alone are such as to justify the acquittal of the accused, but in addition there are many certainties in the file that corroborate the statements of Mr. DAHMANI.

Indeed, the latter is the holder of an "Aurore" type credit card with the organization CETELEM.

Therefore, he assisted Mr. GONON in his dealings with this organization.

Similarly, and contrary to the assertions of the police officers (page D42), the defendant's hotel rooms were not paid for in cash, but by means of this same "Aurore" card (page D37).

In general, his lifestyle was guaranteed by the cash reimbursement of the advance made to Mr. BELHADJ Boumediene, thanks to his dismissal bonus (D38) amounting to more than 100.000 frs.

Thus, the police services are led to conclude that "finally, without the credit contracted with the CETELEM company and without its redundancy bonus of TELESERVICE, DAHMANI would certainly not have been able to have expenses as they appear" (rib D39).

These are the conclusions that the Tribunal will adopt.

All of these elements highlight, to say the least, a serious doubt as to the very existence of the offence.

In fact, it is perfectly possible to say that no extortion was committed.

Therefore, justice cannot be done by condemning Mr. DAHMANI on the basis of a file whose contradictions and uncertainties reveal both the fertility of Cyrille GONON's imagination than his shortcomings.

Finally, the Court cannot ignore that the personality of the alleged victim appears to be both incompatible with the submission mentioned, and perfectly likely to be the basis for the approach aimed at harming Mr. DAHMANI.

Indeed,

One cannot see a submissive being in Cyrille GONON when the expertise of which he was the subject (coast D26) reveals (page 3) that:

- He enters into open conflict with his employer during his hairdressing CAP.

- He left a job in SAINT MACLOU on his own initiative, which he considered too hard.

- He was dismissed from the TELESERVICE Company for "having allowed himself to express reservations about the professional qualities of his direct boss.

- He was exempted from military service on the basis of what he himself refers to as a problem of susceptibility.

How can we believe that this is a submissive individual incapable of resisting or even reacting to the least constraint?

Correlatively, this same measure of expertise of the "victim" reveals the foundations of a very probable will to harm the defendant.

It is in fact particularly instructive and revealing to note (Exhibit D.26 page 6) that:

- His relational life appears distorted by poorly structured neurotic arrangements that considerably hinder the harmony of his relational experiences.

- He thus delivers without much distance ***phobic symptoms made of the fear of Algerians;*** of the necessity to ***safeguard*** professional and personal relationships ***from the intrusion of foreigners!***

In view of all these elements, the court will conclude that the alleged threats, coercion and violence do not exist and that there is no proof of the materiality of the remittances.

In fact, in the absence of these constitutive elements of the offence of extortion, the Court will declare the release of Mr. Djamel DAHMANI.

NOW THEREFORE

To relax Mr. Djamel DAHMANI from the ends of extortion of funds by threats, constraints or violence,

To charge the costs to the Public Treasury,

WITH ALL RESERVATIONS.

IBJ SCORECARD FOR THE CRIMINAL JUSTICE SYSTEM[16]

Evaluation of:
Evaluator[17]:
Location:
Date:

PERFORMANCE ASPECT	YES	NO	Need for training
I. LAW ENFORCEMENT			
LEGAL AND REGULATORY FRAMEWORK			
There is legislation that defines the main responsibilities of police forces.			
The legislation affects and distinguishes the roles of the different agencies in the provision of policy services.			
The police are trained on, and bound by, the applicable laws and standards relating to to human rights.			
Current laws, rules and regulations govern the powers and conduct of law enforcement.			
The law defines the basis and limits for the application of coercive powers. E.g., the concepts of "good cause", "reasonable cause", "cause probable", etc., exist and are defined.			
The use of police powers is limited to the minimum reasonable force given the circumstances.			
The law establishes mechanisms for monitoring and overseeing the performance and conduct of the police, including a reference to specific to corruption.			
The law provides a right to file complaints against the police and provides a mechanism for filing such complaints.			
There is an independent monitoring of the complaint system.			
Differences in the role of police in urban and rural areas are recognized in legislation, including recognition of the practices of customary in rural areas.			
NATIONAL LAW ENFORCEMENT FRAMEWORK			
An updated, written plan or strategy exists at the national level.			

[16] This scorecard is used to assess the performance and needs of criminal justice systems. The scorecard is directive in that it provides information on how the system can be improved if the evaluator responds negatively to certain performance measures. It also allows IBJ to identify areas where training is needed, especially if there is a trend across the region that demonstrates that a particular practice is not being done properly. Finally, the Scorecard can identify internal performance measures affecting IBJ's training programs by administering the assessment instrument prior to the training program and then at defined intervals throughout IBJ's programming.

[17] To be completed by an IBJ member. This form is to be completed through interviews (of advocates, clients, other justice actors), review of case evaluation forms, and observations.
These aspects are particularly difficult to assess. However, the evaluator should still attempt to make general assessments based on behavioral attitudes, relationships between the parties, and the practice of advocates in general (e.g., are there many successful guilty pleas?).

The national plan identifies the primary functions of policing and assigns responsibilities for the execution of each function.			
The National Policing Plan provides guidance on the delivery of police services in local communities.			
PERFORMANCE ASPECT	YES	NO	Need for training
There are government priorities for policing.			
There are community strategies and priorities for policing.			
Targets and performance measures have been set in relation to the community policing priorities.			
Local police commanders have adequate information on policing requirements in their areas (e.g., databases, paper records, or other sources of information indicating the number of (e.g., calls from the public for assistance, crime levels).			
Formally defined and regular mechanisms are in place for consultation with the public, or its representatives, on local law enforcement.			
A complaint system exists, allowing members of the public to make complaints about the delivery of police services or about the conduct of officers. The system is:			
• Independent			
• Locally based			
• Easy to use			
• Publicly known			
NATIONAL INFRASTRUCTURE			
Police commanders are responsible for the management of their own budgets.			
Budgets and expenditures are subject to a national or local audit process.			
If necessary, the local police can request support from the central reserves (e.g. in the case of large demonstrations, crimes international, or special forensic investigations).			
STAFF			
The police are adequately and sufficiently staffed.			
Staff members go through a probationary period before being confirmed as officers.			
There is a sufficient budget for the police.			
The salary structure of the staff is adapted to the average national salary.			
Police officers and other staff receive their salaries regularly and on time.			
Salary increases are based on merit.			
Wages do not discriminate between different people doing the same job.			
If private groups or organizations are involved in the execution of the law enforcement:			
• They are held accountable.			

• Their allegiance is to the police and the state.			

RECRUITMENT			
Appropriate recruitment procedures are in place.			
Applications are open to all sections of the community.			
Job offers are widely and publicly advertised.			
Recruitment is based on an objective evaluation and interview.			
The selection process is fair, transparent and objective.			
PERFORMANCE ASPECT	YES	NO	Need for training
The police are representative of the community.			
• The police speak the local language.			
• The police live in the local community.			
The physical requirements (height, weight, eyesight) can be met by all minority and ethnic groups.			
TRAINING			
Basic onboarding training is provided to all new recruits of the police.			
The training focuses on practical policing skills and ethical behavior in accordance with the rights of man.			
Officers may describe aspects of training related to integrity, accountability and ethics.			
Officers receive ongoing refresher training.			
Training is provided on:			
• Control and restraint techniques			
• The use of weapons			
• Obtaining statements and confessions without the use of the coercion, force or torture			
• New laws, regulations and procedures			
CAREER DEVELOPMENT			
Promotions are granted based on the criteria of an evaluation independent and objective.			
The promotion system is not influenced by prejudices and favoritism.			
CORRUPTION			
The policy does not receive direct payments or benefits from the members of the public in exchange for special attention or additional protection.			
The lifestyles of police officers are consistent with their level of compensation (no excessively large cars, etc.).			
The police are periodically tested with a lie detector and are is asked about dishonesty and corruption.			
Members of the police force are periodically tested for substance abuse.			

Officers do not receive free items from merchants or the free food and alcohol from bar and restaurant owners.			
Officers do not engage in inappropriate sexual relationships with witnesses, suspects or informants.			
LOCAL LAW ENFORCEMENT STRUCTURES			
Police stations are easily accessible by members of the public.			

Police stations are secure and have secure evidence storage.			
The police stations have appropriate equipment (electricity, furniture, phones, computers, etc.).			
Police stations are open to the public at all times.			
Members of the public are able to report a crime, file a complaint, and complaint or inquire about property losses at police stations.			
PERFORMANCE ASPECT	YES	NO	Need for training
The police stations have equipment that allows questions to be asked confidential information is not heard by others.			
Visitors should not wait an excessive amount of time to be received.			
SURVEYS			
There are enough investigators to handle the workload.			
The evidence is handled properly, using latex gloves and sealable bags.			
There is a system in place to adequately preserve evidence and to prevent their falsification or contamination.			
Forensic analysis equipment is available.			
The identities of informants are recorded and kept confidential.			
PLACES OF DETENTION			
Secure and clean cells exist.			
Inmates are informed of their rights upon arrival.			
There is a written record of all incidents involving the detention of detainees/prisoners.			
The medical needs of inmates/prisoners are addressed in a timely manner.			
Places of detention/imprisonment include:			
• Toilets and washroom facilities			
• Separate areas for men, women and minors			
• Appropriate lighting during the day			
• An adequate ventilation and heating system			
• Recreation areas			
Detainees/prisoners are fed properly on a regular basis.			
Detainees/prisoners are regularly released from their cells to that they can exercise and get fresh air.			
II. JURISDICTIONS			

BUDGET AND ADMINISTRATION			
There is a sufficient budget to support the activities of the courts.			
Court employees, including judges and administrative staff, work regular hours and are present during plenary hours.			
JUDICIAL COMPETENCE AND INDEPENDENCE			
Judges demonstrate knowledge and understanding of applicable laws, including international human rights treaties/standards. the relevant man.			

Judicial decisions are made in a timely manner in accordance with applicable laws.			
Judges comply with any legal obligation to conduct inspections of the detention facilities on a regular basis.			
Judges conduct all regular monitoring of cases involving detained individuals required by law.			
The legal requirements for a prompt trial are met.			
PERFORMANCE ASPECT	YES	NO	Need for training
Judges maintain effective control over court proceedings, the lawyers, staff, witnesses and the public.			
The judges show their independence and do not respond to interference, incitement or intimidation.			
Judges are properly applying the laws regarding arrest and detention:			
• They apply the laws relating to the first appearance of the accused before the court.			
• They respect the rules concerning orders to reject mandates defective.			
• They carry out the appropriate remedies upon discovery of a illegal detention.			
Judges apply legal aid requirements:			
• They promote the access of defence lawyers to all phases of the of the case.			
• They refrain from questioning unrepresented defendants who have asked for a lawyer.			
Sentences are imposed on the basis of relevant legal grounds and are not based on prohibited factors such as race, gender or ethnicity of the accused.			
Judges give individual attention to cases and decide without undue disparity on similar cases.			
STAFF			
The court employs and dismisses its own staff.			
There is a policy against nepotism.			
The most qualified candidates are recruited for the positions and there is a non-discrimination policy.			

Court staff receive initial training appropriate to their positions.			
Ongoing training is available for court employees regarding skills, policies, professionalism, and changes in the law and in the procedures.			
Staff must follow a code of ethics.			
There are policies prohibiting bribery, and staff members who are found to accept financial or other benefits from members of the public in exchange for special attention are sanctioned in a manner that is consistent with the law. appropriate.			
COURT SERVICES			

There is an information point or other central location where members of the public can receive information about cases before the court and on procedures.			
Staff members who speak local languages are available to provide information to the public.			
A service user may obtain a copy of an order or judgment as well as procedures and processes.			
The courses provide translation services for the accused, victims and witnesses to the proceedings.			
The judicial proceedings are open to the public and the media.			
Court fees are not prohibitive and do not prevent public access.			
PERFORMANCE ASPECT	YES	NO	Need for training
Court calendars and schedules are available to the public.			
Cases are heard at the time they are scheduled on the court calendar.			
The courses are perceived as fair and equal by the members of the public.			
COURT RECORDS			
Court proceedings are recorded or summarized in writing.			
Court records exist for all cases.			
The files are updated.			
There is a graft.			
There is an efficient filing system for records.			
Court records are protected from theft and deterioration due to natural causes, including environmental and insect damage.			
FILE FLOW MANAGEMENT			
Files are started and completed on time by law.			
There is no excessive backlog of pending cases.			
Judges are assigned a share of appropriate cases.			

The judges are aware of the number of cases assigned to them.			
There is a plan for assigning incoming cases.			
Cases can be traced throughout the court system.			
INSTALLATIONS			
The courtyard is located in an area that is easily accessible by transportation public.			
Directions to the court facilities are readily available at public.			
The courthouse is clearly identifiable.			
The courtyard is accessible to people with disabilities.			
Weapons and other safety hazards are not allowed in the courthouse.			
Security personnel check visitors.			
The courthouse is generally clean and well maintained.			

Visitors are assisted in a timely manner.			
The workplaces for the court staff are adequate and equipped properly with phones, computers, furniture, etc.			
Courtrooms are well maintained and designed to be used for needs related to court activities.			
• Defendants may sit next to their counsel.			
• Workspaces exist to complete the hearing reports.			
There is ample seating for the public in the courtroom.			
The judges' chambers are adapted, adequately equipped and secured.			
The courtrooms are not excessively noisy.			
TRANSPORTATION and GUARDING of prisoners			
Men and women are transported to court separately.			
Minors and adults are transported to court separately.			
PERFORMANCE ASPECT	YES	NO	Need for training
There are adequate facilities for the custody of prisoners in the palace of justice.			
Restraints are used only when necessary.			
III. PRISONS			
Prisoners are classified to determine the level of prison security to which they should be sentenced (maximum security, minimum security, etc.).			
The prison system focuses on the treatment of prisoners, including the main goal is their amendment and social rehabilitation.			
PRISON MANAGEMENT			
There is a consistent and regularly used system for receiving prisoners; personal information is kept on each prisoner.			
Prisoners are presented with a clear list of the existing rules, the regulations and disciplinary procedures and sanctions.			

A prisoner's next of kin are informed of his or her admission in prison.			
Clear records are kept of an inmate's time in prison (regarding medical needs, furloughs, participation programs, etc.).			
All prisoners are held under a valid court order and are released when the order is no longer valid.			
LIVING CONDITIONS			
The infrastructure of the prison is clean and well maintained.			
Convicted prisoners are held separately from waiting prisoners their trials.			
The space in the cells is adequate for the number of people hosted.			
Each prisoner has a bed to sleep in with sheets and covers.			

Every area of the prison is adequately lit during the day.			
Each area of the prison has adequate ventilation.			
The prisoners have access to fresh water.			
Prisoners have access to toilets and showers.			
Prisoners are provided with an adequate amount of food (both in quantity and nutritional quality).			
Prisoners have access to proper medical care.			
Drug supplies and medical equipment are suitable.			
Recreation facilities exist and prisoners can access them periodically and regularly.			
CONTACT WITH THE OUTSIDE WORLD			
Prisoners are housed near their communities.			
Prisoners have access to legal aid.			
Prisoners can receive regular visits from their friends and family.			
Prisoners can receive mail and phone calls.			
PERFORMANCE ASPECT	YES	NO	Need for training
Prisoners have access to newspapers, magazines and television.			
PRISON REGIMES and PROGRAMS			
There is a daily program organized for the prisoners.			
Prisoners have access to educational facilities (curricula, libraries...).			
Prisoners have access to academic and vocational training programs. vocational training.			
Prisoners have access to work programs.			
Prisoners are dressed appropriately and are protected if they are doing work.			
The prison offers therapy and lifestyle modification programs behavior.			
The prison offers recreational activities.			

The prison provides adequate religious services and activities (including for religious minorities).			
Prisoners are appropriately prepared for release at the end of of their sorrows.			
The prison helps prisoners find housing and work in preparation for their release.			
SAFETY and SECURITY			
Jail security is adequate, including physical barriers such as walls, bars and motion detectors.			
Prisoners are classified according to the level of risk they pose to themselves and others.			
Regular searches of the prisoners' quarters are conducted to to ensure their safety.			
All visitors are searched.			
There are few, if any, serious incidents, such as hunger strikes riots or demonstrations.			

Specific punishments exist for prisoners who behave badly.			
There are maximum lengths of time beyond which prisoners can no longer be kept in punishment units (confinement measures, etc.).			
• The punishment units are equipped with lighting and a proper ventilation.			
• Prisoners placed in punishment units receive at least one hour of exercise per day.			
COMPLAINTS PROCEDURE			
A functional complaint system exists whereby prisoners can submit written complaints to the prison administration.			
Prisoners who file a complaint are not punished or harmed by the staff.			
Complaints are received by an independent body.			
Complaints are confidential.			
MINORS			
There are separate jurisdictions for juvenile offenders.			
PERFORMANCE ASPECT	YES	NO	Need for training
Juveniles are held separately from the general prison population.			
Minors receive special care in prison.			
Minors receive academic and vocational training.			
Minors may receive visits from their families.			
Juvenile records are kept confidential.			
WOMEN			
Women are held separately from the male population.			
Women have equal access to the same activities and services as men. men.			

The medical and hygienic needs of women are met.			
The needs of pregnant or breastfeeding women are met.			
MENTAL PATIENTS			
Prisoners with mental illnesses have access to treatment psychiatric.			
Prisoners are transferred to civilian treatment centers if necessary.			
MANAGEMENT SYSTEM			
The prison system is under civilian (not military) control.			
Corruption does not exist in the system.			
There is no hierarchy among the prisoners allowing them to extort money or other benefits or services from weaker prisoners.			
IV. LAWS AND LEGAL PROTECTIONS[18]			

[18] These rights are established by the International Covenant on Civil and Political Rights.

The internal laws protect all citizens with respect to equality and without discrimination of any kind based on race, color, gender, language, religion, political or other opinion, origin national or social status, property, birth or any other status.			
The law ensures the right for men and women to enjoy equally all the protections of the law.			
If the death penalty has not been abolished, the punishment of death is reserved for the most serious crimes in accordance with the laws in force at the time of the commission of the crime. Death sentences are carried out by virtue of a final judgment rendered by the competent courts.			
The death penalty is not imposed for crimes committed by persons under the age of eighteen.			
Domestic laws protect all persons from torture or other cruel, inhuman or degrading treatment or punishment. cruel, inhuman or degrading treatment or punishment.			
Domestic law prohibits the use of statements or confessions obtained at the by means of coercion or torture.			
Domestic laws protect all persons from arbitrary arrest or detention and from being deprived of their liberty except on grounds, and according to procedures, as established by law.			
Everyone who is arrested has the right to be informed, at the time of arrest, of the reasons for his arrest and has the right to be immediately informed of any charges against it.			
PERFORMANCE ASPECT	YES	NO	Need for training
Maximum and minimum prison sentences are prescribed for the various crimes.			
Any person arrested or detained on criminal charges shall have the right to be brought promptly before a judge or other officer authorized by the law.			
Everyone charged with a criminal offence has the right to a trial in a reasonable time or is entitled to be released.			
As a general rule, persons awaiting trial are not held in police custody. On the other hand, release is subject to guarantees to appear for the trial or any other stage of the proceedings or for the execution of the court's decision.			
Under domestic law, every person is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by the law, for the determination of any criminal charge against it.			
All judgments in criminal or civil matters shall be rendered publicly, except where the interests of minors or guardians of minors require otherwise.			
Every person charged with a criminal offence is presumed innocent until proven guilty according to law.			
In the determination of criminal charges, domestic law grants any person the following minimum guarantees, in full equality:			
• To be informed immediately and in detail in a language that she understands the nature and causes of the charges against him;			
• To have adequate time and facilities to prepare one's defense and to communicate with the council of one's choice;			

• To be judged without undue delay;			

• To defend themselves in person or through legal assistance of their choice; to be informed, if they do not have legal assistance, of their right; and to have legal assistance appointed ex officio in all cases where the interests of justice so require, and without payment by the person if he/she does not have sufficient means;			
• Interview, or cause to be interviewed, prosecution witnesses and obtain the participation and examination of witnesses on its side in same conditions as the witnesses against him;			
• Have the free assistance of an interpreter if she cannot understand or speak the language used in court;			
• Not being forced to testify against herself or confess her guilt.			
Anyone convicted of a crime has the right to have their conviction and sentence reviewed by a higher court.			
No person shall be tried or punished for an offence for which he or she has already been finally convicted or acquitted in accordance with the laws and procedures.			
Domestic laws prohibit the admission of guilt for any criminal offence by reason of an act or omission that did not constitute not an offence at the time of its commission.			
Internal or cross-border conflicts do not threaten or thwart not human rights protections and democratic government.			

EVALUATION GUIDELINE SHEET FOR THE DEFENDER[19]

EVALUATION OF:
EVALUATOR[20]:
LOCATION:
DATE:

PERFORMANCE ASPECT	YES	NO	Need for training
GENERAL			
The Board makes every effort to obtain access to the free of charge and complete to his client when necessary.			
* The counsel is respectful to his client and explains the privilege confidentiality between the lawyer and his client.			
The board must provide quality and diligent representation to its customers at any time.			
The board continually develops and re-evaluates the case theory.			
* The board adheres to ethical standards (no corruption or collusion with state officials) at all times throughout the trial (or at least, the suspicion is less).			
Counsel maintains open lines of communication with the client and with the attorney/court.			
Counsel ensures that the accused is present in the courtroom for all court proceedings (e.g., arraignment, trial, judgment).			
Once counsel is selected, he or she begins a detailed file including, but not limited to, interviews, detailed notes, statements, potential evidence, court precedents to begin building the defense case, and keeps this file until the end of the case.			

[19] This evaluation form is used to assess the performance and needs of public defenders. It is directive in the sense that if the evaluator responds to a performance measure in a negative way, it is then clear that the advocate needs to improve his or her performance. It is also a way for IBJ to assess what the training needs are, especially if there is a trend throughout an area where a particular practice is not being done well. Finally, this evaluation form can be used to reveal internal performance measures for IBJ trainings by administering the evaluation prior to training and then at set intervals throughout IBJ's programming.

[20] To be completed by an IBJ member. This form is to be completed through interviews (of the advocate, clients, other court actors), review of case evaluation forms, and observations.
These aspects are particularly difficult to assess. However, the evaluator should still strive to make a general assessment based on behavioral attitudes, relationships between the parties, and the practice of the defender corps in general (e.g., are there many successful guilty pleas?)

BEFORE THE TRIAL			
DETENTION and ARREST			
Counsel shall report to the place of detention as soon as possible possible, upon notification of the client's detention.			
At the outset of the meeting, the counselor informs the client of his or her rights and ensures that that the client understands what they entail.			
Before agreeing to act as a consultant, or accepting an appointment, you must The board ensures that it has sufficient time to do so,			
PERFORMANCE ASPECT	**YES**	**NO**	**Need for training**
resources, knowledge and experience to provide quality representation to a defendant in a particular case. If this is not possible, the Board must withdraw.			
The Board does not seek to withdraw from business without good cause.			
The counsel explains to the accused what he is accused of and the case the prosecutor has to prove. He also looks at whether the accused has been reasonably informed of the charges against him.			
If the client confesses or makes statements in the absence of his or her lawyer, the lawyer receives a copy of the statements and understands the circumstances in which they were made. in which these statements were made.			
Counsel explains to the client the maximum sentence and other options available to the court should the client go to trial guilty.			
* The board does not participate in any form of bribery/collusion with judicial or law enforcement officials to obtain confessions or the release of the accused.			
Counsel shall submit to the appropriate judicial officer a statement of the factual elements and legal criteria supporting the release and, if appropriate, make a proposal regarding the conditions of release.			
Counsel shall take all possible and necessary steps to file a pretrial release application as soon as possible.			
If the client is incarcerated and cannot be released prior to trial, counsel alerts the court to any special medical, psychiatric or security needs of the client and requests that the court order the officers to to meet these needs.			
Counsel obtains instructions from his client at all stages of the trial (bail, pre-trial release), advocacy, etc.).			
With the client's permission, the council explores and conducts plea bargaining with state officials. If there were negotiations, counsel would keep the client fully informed of any discussion.			

The existence of an ongoing plea-bargaining attempt with the prosecution shall not prevent counsel from taking any action necessary to preserve the defense.			
DISCOVERY AND INVESTIGATION			

Counsel ensures that he or she has adequate time for trial preparation and requests a continuance if not.			
Board conducts independent investigation without regard to confessions or statements made by the accused to counsel as evidence of guilt.			
The counselor conducts a thorough interview with the client as soon as possible and after the retention to obtain information regarding:			
• The incident			
• Police investigative practices that are not correct			
• Conduct of the prosecution that affects the rights of the client			
The Board seeks full disclosure of the elements of			
PERFORMANCE ASPECT	**YES**	**NO**	**Need for training**
the prosecution, within a reasonable time for the lawyer to prepare for the trial.			
In making discovery requests, the Board recognizes that such requests may trigger discovery obligations reciprocal.			
The board generally seeks discovery of the following as soon as possible:			
• Charging documents			
• Potentially exculpatory information			
• The names and addresses of all prosecution witnesses and any statements made by them			
• All oral or written statements made by the accused and the circumstances in which they were made			
• Criminal history of the accused			
• Any evidence of wrongdoing that the government may have the intention to use against the accused			
• Relevant physical evidence			
• Expert evidence			
• The statements of any co-accused			
• Any police reports or notes on the investigation			
• Please note that the prosecution should generally not disclose information regarding the attorney-client privilege, the informant privilege and immunities.			

Counsel conducts interviews with key prosecution witnesses and knows the objectives of their testimonies.			
The board interviews and obtains the participation of witnesses for the defense under the same conditions as those of the witnesses against him.			
The board considered using, at a minimum, the following survey sources following:			
• Charging documents (ensure that correct charging standards have been used and that the phrasing of the document is sufficiently specific as to time, place, date, person and nature of the offence)			
• Client interviews and sources recommended by the customer			
• Potential witnesses			
• The elements disclosed by the prosecution			

• Physical evidence (direct and indirect/presumptive)			
• The visit of the scene of the incident (use of a camera to conservation)			
• The experts' opinions			
The board considers the advantages and disadvantages of a trial at judge or jury trial and explains his or her options to the client.			
If a jury trial is selected, it then considers the following aspects criticisms of the jury's selection.			
The board seeks and follows the client's instructions to decide to initiate a lawsuit.			
PERFORMANCE ASPECT	**YES**	**NO**	**Need for training**
Counsel shall endeavour to plead not guilty in all circumstances, except in the exceptional case where a reasoning solid tactics indicate not to do so.			
Counsel does not unduly influence the client's decision to litigate guilty.			
The board tries to anticipate weaknesses in the evidence provided by the prosecution and prepares the corresponding motions.			
The consultant explores with the client the possibility and desirability of to negotiate the laying of charges rather than go to trial and, in so doing, completely explains the rights to which he could be waived in the event of a decision to litigate.			
If the prosecution uses expert witnesses, counsel shall investigate the expertise and credentials of the expert witnesses presented by the prosecution.			
On the basis of the prosecution's case, police reports and the interviews, counsel must consider whether the client's arrest was legal.			
The board conducts appropriate legal research, with a critical thinking.			

PROCEEDINGS PREPARATION (preliminary motions, etc.)			
The board is attempting to build a proper record for appellate review. In doing so, counsel should request that the court proceedings be recorded whenever necessary.			
The board provides for the free assistance of an interpreter for the duration of the trial if necessary.			
The board thinks critically and creatively and challenges the constitutionality of the laws if possible.			
Counsel considers filing pretrial motions (or requests for voir dire, pre-trial rulings) when there is a good faith reason to believe that the applicable law may entitle the defendant to relief that the court has discretion to grant:			
• Pre-trial detention			
• Constitutionality of provisions or laws			
• Potential Defects in the Filing of Charges			
• Joining and separating charges			
• Obligations of discovery			

• Illegally obtained evidence (were warrants used?)			
• Objections to potential witnesses (challenging the competency or compatibility or expertise of experts)			
• Involuntary statements or admissions by the accused			
• Publication ban			
• Unreliable evidence			
• Destruction of evidence			
• Right to a speedy trial			
• Right to a continuation of the court or courtroom proceedings			
PERFORMANCE ASPECT	**YES**	**NO**	**Need for training**
• Use of previous convictions			
Counsel provides all necessary notes to the court for the trial (e.g. use of expert witnesses).			

If the prosecution uses expert witnesses, counsel shall ensure that a notice was given to the court.			
Where appropriate, counsel shall advise the client on the maintenance and appropriate courtroom behavior.			
In preparing for trial, counsel should consider (with the accused) whether the client's interests are best protected by not mounting a defense and, instead, relying on the prosecution's failure to meet the constitutional burden of proving each element beyond of reasonable doubt.			
If expertise is lacking, the board conducts appropriate research and seeks advice from more experienced lawyers.			
Where appropriate, the Board has the following organized and available at the time of trial:			
• Copies of all relevant documents completed for the case			
• Relevant documents prepared by investigators (police, etc.)			
• Questions for voir dire			
• An outline or draft of the introductory speech			
• Cross-examination plans for all witnesses potential of the prosecution			
• Plans for the interrogation of all potential witnesses of the defense			
• Copies of defense subpoenas			
• Previous statements of all prosecution witnesses (e.g., transcripts, police reports)			
• Previous statements of all defense witnesses			
• The reports of the defense experts			
• A list of all the defense exhibits, and the witnesses through which they will be introduced			

• Originals and copies of all documentary evidence			
• The proposed jury instructions with case citations to support			
• Copies of all relevant standards and cases			
• An outline or draft of the closing remarks			
The council arranges with the client a method of communication effective throughout the trial.			
If there is a preliminary inquiry, counsel must apply for release or incarceration for a more slight if an essential ingredient of the charge is missing.			
PROCEEDINGS			
OPENING REMARKS			

The board ensures that its introductory speech meets the requirements eligible for an introductory speech under this jurisdiction.			
PERFORMANCE ASPECT	**YES**	**NO**	**Need for training**
In preparing the keynote address, the board considers the strategic advantages and disadvantages of disclosing a particular piece of information during the keynote address and deferring the keynote address until the beginning of the defense plea.			
The board's objectives, in its opening remarks, include the following items:			
• To provide an overview of the defence case			
• Identify weaknesses in the prosecution's case			
• Focus on the prosecution's burden of proof			
• Summarize the testimonies of the witnesses, and the role of each by in relation to the case as a whole			
• Describe the exhibits that will be introduced and the role of each in relation to the case as a whole			
• Clarify juror responsibilities			
• State the final conclusions that the board would like to see the jury draw.			
If the charge exceeds the bounds of proper introductory speech, counsel should consider objecting (even if sometimes disapproving), requesting a mistrial, or asking for cautionary measures, unless tactical considerations weigh against such objections or requests. These tactical considerations may include include, but are not limited to:			
• The importance of the prosecution's error			
• The possibility that an objection may reinforce the importance of information in the eyes of the jury			
• If there is a rule established by the judge against the objection during the prosecution's opening argument			
THE PROSECUTION'S CASE			
Counsel has attempted to anticipate weaknesses in the prosecution's case and plans to research and prepare motions corresponding for the acknowledgement.			

Counsel is vigilant during the prosecution's examination-in-chief to ensure that directed/irrelevant/imperfect questions are not installed.			
The Board ensures that no immaterial/irrelevant/paraphernalia evidence is used in the			

hearsay in the prosecution's case be admitted without objection.			
Counsel shall ensure that all evidence provided by the prosecution is properly certified in accordance with the rules of the jurisdiction.			
Counsel may choose to object to the admissibility of the prosecution's evidence because:			
• There is no identifying witness			
• There has been a possible alteration or contamination			
• There are gaps in the monitoring chain (in possession of of the article)			
• The article is not a true and accurate representation			
Counsel listens carefully to the examination-in-chief and takes notes.			
PERFORMANCE ASPECT	**YES**	**NO**	**Need for training**
Counsel needs to verify that the prosecution has provided copies of all prior witness statements as required by applicable law. If these statements have not been received, counsel should request adequate time to review these documents before to begin cross-examination.			
Counsel considers whether the prosecution's witnesses are competent witnesses (no spouses, co-accused, disabled persons minors) and objects in the opposite case.			
In preparing for cross-examination, counsel :			
• Considers the need to incorporate cross-examination of each individual witness that is likely to generate useful information.			
• Anticipates the witnesses that the prosecutor may call in his or her presentation of the case for the prosecution or in rebuttal			
• Creates any necessary cross-examination plan for each advance witness			
• Is alert to possible inconsistencies or variations in witness accounts and points out these inconsistencies to the court			
• Review all previous witness statements and any relevant testimony from potential witnesses			
• If applicable, review applicable laws and local police regulations for potential use in the counter interviewing of police witnesses			

• Is alert to issues of witness credibility, including bias and motives for testifying and highlights these issues through cross-examination			

If appropriate, at the conclusion of the charge's plea and in the absence of the jury, counsel shall move (or consider moving) for an acquittal on all counts. This request must include that the court immediately rule on the motion so that counsel can make an informed decision about whether to enter a plea of defense.			
Counsel is conscious of opening the client to character evidence by asking specific questions during cross-examination of witnesses for the prosecution.			
DEFENSE			
The board develops the entire defense strategy in consultation with the customer.			
The board is considering the advantages and disadvantages of having the customer.			
Counseling protects the client's right against self-incrimination.			
Counsel protects the client's right to remain silent.			
Counsel ensures that the client's failure to testify is not noted and that no negative conclusions are drawn.			
The council protects privileged relationships such as the marital relationship and the confidentiality of communications between lawyer and client.			
PERFORMANCE ASPECT	**YES**	**NO**	**Need for training**
If counsel organizes an affirmative defense, counsel has the necessary evidence available to submit to the court at support for his defense.			
In preparing the defense package, counsel has, where appropriate:			
• A plan for the examination-in-chief of each witness of the defense			
• Considered the effective order of witnesses to give their testimony			
• Utilized the potential of character witnesses (if necessary)			
• Utilized the potential of expert witnesses (if necessary)			
Counsel prepared all witnesses for direct examination and possibly cross-examination.			
Counsel advised witnesses on appropriate attire and behaviour during the hearing and explained the testimony.			
Counsel conducts re-examinations as appropriate.			
In conducting the examination-in-chief, counsel is able to refresh the memory of the witnesses.			
FINAL PLEA			

In making an effective closing argument, counsel uses the Final pleas for, if possible:			
• Highlighting the weaknesses of the prosecution's case			
• Describe the positive conclusions that can be drawn from the evidence			
• Highlighting positive testimonials			

If the prosecutor exceeds the scope of permissible arguments, counsel should consider seeking a mistrial or should seek cautionary measures unless tactical considerations suggest otherwise.			
Counsel concludes the proposal by asking the jury or judge to acquit the accused.			
AFTER THE TRIAL			
In the case of an acquittal, counsel explains to the accused that he or she is released.			
In the event of a verdict of conviction for the acts complained of, the advice:			
• Explains to the client what the next steps are			
• Considers with the client whether or not they should appeal, or whether the appeal is as of right.			
• If the client returns to custody, counsel should accompany the client if possible. If not, counsel should see the client again as soon as possible after the verdict.			
If possible, counsel should exhaust all avenues of appeal.			
CONDEMNATION			
If the client decides not to go to trial, sentence negotiations must take into account the implications of the convictions,			
PERFORMANCE ASPECT	**YES**	**NO**	**Need for training**
correctional and financial.			
At the time of sentencing, counsel must ensure that the court is aware of any mitigating and favourable circumstances that may exist in the client's favour (e.g. pleading guilty in case of remorse).			
In preparation for sentencing, counsel should inform the client of the possible consequences of the conviction and the penalties (therapies, volunteer time).			

In preparation for sentencing, counsel should interview the client to learn about his or her personal history, including prior criminal convictions, work history and skills, medical history and condition, financial status, and, if possible, should request letters from reference that might be beneficial to present to the court.			
In preparation for sentencing, counsel must prepare a record of the relevant material for submission to the court.			
At the time of sentencing, the client may address the court if he or she wishes (although this is not generally recommended) and counsel will not should not prevent or prohibit it.			
The board should seek to achieve:			
• The least restrictive and least burdensome alternative to the client's sentence that is most acceptable.			
• A sentence reasonably obtained on the basis of the facts and circumstances of the offence.			

• A sentence that takes into consideration the defendant's past.			
• A sentence that uses appropriate provisions regarding the determination of the most favorable sentences for the defendant.			
At sentencing, counsel must ensure that the client is not prejudiced by inaccurate information or information that is not correct before the court in sentencing to impose.			
Upon sentencing, counsel shall assist the client in:			
• Complete the necessary administrative formalities			
• Explain the parole system/who is the parole officer			
• Explain all possible conditions for release			
• Discussing avenues of appeal			
• Receive instructions on any assistance and tasks that the client asks the lawyer to perform (e.g., phone calls, etc.)			
If the client is sentenced to longer incarceration/detention, the attorney should then follow the client as soon as possible to discuss the next steps to follow if necessary.			

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