Tunisia Criminal Defense Practice Manual

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Preface

ABOUT INTERNATIONAL BRIDGES TO JUSTICE

Founded in 2000, International Bridges to Justice (IBJ) is a global movement to end torture in the 21st century and strengthen the rule of law across the world. Founded in 2000, IBJ collaborates with state, civil, and community-based organizations to comprehensively reform criminal justice systems that respect the rights of every individual. IBJ works to ensure that legal counsel is provided to the accused at the earliest stages of the criminal process with the aim of significantly reducing instances of torture, human rights abuse and other prohibited treatment. IBJ's primary focus is the empowerment and support of the drivers of the criminal justice system—public defenders. IBJ is a registered U.S. charitable organization with programs currently in Burundi, Cambodia, China, Democratic Republic of Congo, Indonesia, Mexico, Myanmar, Rwanda, [Country], Syria, Vietnam, and Zimbabwe.[1]

IBJ'S VISION

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

IBJ'S MISSION

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

IBJ'S APPROACH

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

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

Institutional Capacity Building – in recognition that implementation of the rule of law requires the cooperation of all participants within the justice community, IBJ joins with defenders, prosecutors, judges, court administrators, police, medical examiners, detention centre officials,

[1] https://www.ibj.org

local government representatives and legal academics in Criminal Justice Roundtable sessions to build mutual respect, exchange views and proposals, and establish the foundation for long-term criminal justice reform.

Rights Awareness - the lack of information and knowledge of legal rights by average citizens is a major factor enabling the continuation of rights abuses. IBJ administers advisement of rights campaigns through various communication tools (e.g. posters, brochures, street law sessions) to empower citizens to advocate for their rights and to seek legal recourse on their own or a family member's behalf.

HOW TO USE THIS MANUAL

All aspects of Tunisia's criminal justice system - including client rights and lawyer duties, procedural and evidentiary rules, pre-trial and trial matters as well as sentencing and appeals. In drafting this Manual numerous justice stakeholders, both within and outside of Tunisia, were consulted. The Manual focuses on Tunisia criminal and criminal procedural law and is primarily aimed at criminal defence lawyers representing clients charged with offences in Tunisia. We hope the Manual will also be of value to others operating in the country's criminal justice system – including (but not limited to) prosecutors, court registrars, police officers and prison wardens. Practitioners are also referred to IBJ's Defense Wiki at https://defensewiki.ibj.org/ for additional information about many of the topics in this manual.

Chapter 1 addresses certain foundational justice system issues relevant to Tunisia. ***Chapter 2*** discusses jurisdiction of the courts. ***Chapter 3*** set out the rights of the accused. ***Chapter 4*** deals with the rights and responsibilities of defence lawyers. ***Chapter 5*** provides guidance on how to approach and cultivate the client's trust and addresses issues relevant to specific vulnerable groups (special populations) including children; women; lesbian, gay, bisexual, transgender, and intersex persons; mentally disabled; and the tortured. ***Chapter 6*** explores the investigative stage of cases. ***Chapter 7*** discusses development of a defense case theory and themes. ***Chapter 8*** explores certain pre-trial matters. This leads into ***Chapter 9***, which provides a discussion of applicable rules of evidence. ***Chapter10*** sets out in detail trial and trial-related matters. ***Chapter 11*** covers post-trial issues such as sentencing, appeal and review. ***Chapter 12*** provides details of other relevant legal authority. The manual ends with helpful appendices and a list of resources.

Chapter 1
Justice System Overview

1.1 System Actors

1.1.1 Judicial Medical Experts

1.1.2 Supervision and Obligations of the Judicial Medical Expert

The Tunisian Ministry of Health and Ministry of Justice, in partnership with the Geneva Centre for Security Sector Governance (DCAF), have jointly formulated a compendium of best practices and recommendations tailored for judicial medical experts[2]. These guidelines place a significant emphasis on fostering effective collaboration with magistrates and refining the conduct of medical examinations.

Furthermore, considering that judicial medical expertise constitutes a medical practise, the judicial medical expert is bound by the medical ethical code and its corresponding ethical responsibilities. These obligations include:

(a) upholding respect for life and the dignity of the human person in all circumstances (Decree no. 93-1155 of May 17, 1993, Article 2);
(b) safeguarding medical and legal confidentiality;
(c) maintaining professional independence;
(d) adhering to the principle that the judicial medical expert cannot simultaneously serve as both the expert physician and the treating physician for the same patient (Medical Code of Ethics, Article 72); and
(e) ensuring that, prior to commencing any mission, the judicial medical expert duly informs the individual undergoing examination of the purpose of their evaluation.

The judicial medical expert is also obligated to adhere to the legal obligations that apply to legal experts in general, including the duty of confidentiality (Law no. 93-61 of June 23, 1993, on legal experts, Article 8) and the requirement to submit their report by the established deadline (Law no. 93-61 of June 23, 1993, Article 12).

In addition to the medical ethical code, the judicial medical expert must comply with procedural standards, primarily outlined in the Tunisian Code of Criminal Procedure. These standards include timely compliance with the deadlines stipulated in the appointment order, personally conducting the expert procedures, and submitting a comprehensive report (Code de Procédure Pénale, 2006 edition, French version: pp 45-7). The content of this report must be limited to the questions contained in the order issued by the competent judicial authority and the responses may not deviate from the questions asked in the order[3] .

[2] Ministry of Justice, Ministry of Health, DCAF, "*Guide portant sur l'évidence médico-légale en cas d'allégations de torture et de mauvais traitements*", 2017, available here.

[3] Z. Khemakhem, " *La réparation juridique du dommage corporel en droit tunisien* ", *Journal de l'information médicale de Sfax*, n°26, juin 2017, pp. 6-22 ; Z. Khemakhem et al, "L'évolution de la règle du secret médical en Tunisie", *Journal de Médecine Légale- Droit Médical*, 2009, Vol.52, N°3-4, pp. 75-79.

1.2 Primary Legal Authorities

1.2.1 National and Local Sources of Law

The principal national and local sources of law regulating Tunisian criminal law are the following:

(a) The *Tunisian Republic Constitution* (revised in 2022);
(b) The *Tunisian Criminal Procedure Code*;
(c) The *Tunisian Criminal Code*;
(d) The *Tunisian Child Protection Code*;
(e) *Law no. 2001-52 of May 14, 2001*, on the organization of prisons;
(f) *Law no. 2004-0073 of August 2, 2004*, amending and supplementing the Criminal Code concerning the repression of offences against public decency and sexual harassment;
(g) *Law no. 2005-0045 of 6th June 2005*, modifying and completing certain articles of the Criminal Code;
(h) *Law no. 2005-0046 of June 6, 2005*, approving the reorganization of certain provisions of the Criminal Code and their wording;
(i) *Law no. 2006-0034 of June 12, 2006*, amending certain articles of the Criminal Procedure Code;
(j) *Law no. 2007-0026 of May 7, 2007*, amending and supplementing certain provisions of the Criminal Procedure Code;
(k) *Law no. 2008-37 of June 16, 2008*, on the Higher Committee for Human Rights and Fundamental Freedoms;
(l) *Law no. 2013-43 of October 21, 2013*, on the national authority for the prevention of torture;
(m) *Law no. 2013-53 of December 24, 2013*, on the allocation and organization of transitional justice; and
(n) *Law no. 2015-26 of August 27, 2015*, on the fight against terrorism and the repression of money laundering.

Note that there is no code directly governing evidence. Instead, rules of evidence are governed by parts of the Civil Procedure Code and the Criminal Procedure Code.

1.2.2 International Treaty Obligations & Other Applicable Global Legal Standards

Tunisia has ratified or acceded to a number of seminal international treaties related to human rights and criminal justice. These treaties and the corresponding dates of their signature, ratification, or accession by Tunisia are set forth below:

(a) *International Covenant on Economic, Social and Cultural Rights* - ratified on 24th September 1982;
(b) *International Covenant on Civil and Political Rights* - ratified on 18th March 1969;

(c) *International Convention on the Elimination of All Forms of Racial Discrimination* - ratified on 13th January 1967;

(d) *Convention on the Elimination of All Forms of Discrimination against Women* - ratified on 20th September 1985;

(e) *United Nations Convention against Transnational Organized Crime* - ratified on 19th June 2003;

(f) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* - signed on 26th August 1987;

(g) *Optional Protocol of the Convention against Torture* - acceded on 29th June 2011;

(h) *Convention on the Rights of the Child* - ratified on 20th January 1982;

(i) *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts* - ratified on 02nd January 2003;

(j) *Convention for the Protection of All Persons from Enforced Disappearance* - ratified on 29th June 2011;

(k) *Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography* - ratified on 13th September 2002;

(l) *Convention on the Rights of Persons with Disabilities* - ratified on 02nd April 2008;

(m) *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* - ratified on 28th February 2001;

(n) *Equal Remuneration Convention* - ratified on 11th October 1969;

(o) *Convention against Discrimination in Education* - ratified on 29th November 1969;

(p) *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* - acceded on 15th June 1972;

(q) *Convention on the Prevention and Punishment of the Crime of Genocide* - acceded on 29th November 1956;

(r) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* - ratified on 4th May 1957;

(s) *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* - ratified on 4th May 1957;

(t) *Geneva Convention relative to the Treatment of Prisoners of War* - ratified on 4th May 1957;

(u) *Geneva Convention relative to the Protection of Civilian Persons in Time of War* - ratified on 4th May 1957;

(v) *Protocol Additional to the Geneva Conventions of 12th August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* - ratified on 9th August 1979;

(w) *Protocol Additional to the Geneva Conventions of 12th August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* - ratified on 9th August 1979;

(x) *International Convention Against the Taking of Hostages* - acceded on 18th June 1997;

(y) *International Convention for the Suppression of Terrorist Bombing* - acceded on 22nd April 2005;

(z) *International Convention for the Suppression of the Financing of Terrorism* - ratified on 10th June 2003;

(aa) *International Convention for the Suppression of Unlawful Seizure of Aircraft* - acceded on 16th December 1981;

(bb) *International Convention on the Prevention and Punishment of Crimes Against International Protected Persons* - ratified on 21st January 1977;

(cc) *Convention on the Privileges and Immunities of the United Nations* - acceded on 7th May 1957; and

(dd) *African Charter on Human and Peoples' Rights* - ratified on 13th August 1982.

The 1969 Vienna Convention on the Law of Treaties states that countries must comply in good faith with the treaties that they have ratified, and that they may not invoke provisions of internal law to justify failure to uphold international agreements. Further, it is a well-established principle of international law that countries have a duty to bring internal law into conformity with obligations under international law. Although Tunisia is a party to many international human rights treaties, it has been criticized by some for not giving full effect to a number of legal responsibilities as set out in these treaties.

Chapter 2
Jurisdiction of Courts

Shari'a Courts were abolished in 1956, and since then, Tunisia has operated under a unified judiciary structure. The judicial system, modelled on civil law, is organized into two branches: the judicial order and the administrative order.

The judicial system is structured according to Law no. 67-29 of July 17, 1967, governing judicial organization, the Supreme Council of the Judiciary, and the judiciary's status[4]. It encompasses, in ascending order of hierarchy:

(a) Cantonal Courts;
(b) Courts of First Instance;
(c) Courts of Appeal; and
(d) The Supreme Court (*cour de cassation*), sitting in Tunis.

In addition, the Tunisian legal system comprises military courts which form part of Tunisia's military justice system, which are not considered in this manual due to not being applicable to civilians.

1.1 Cantonal Courts (Tribunaux Cantonaux)

1.1.1 Organization

The Cantonal Courts *(tribunaux cantonaux*) occupy the lowest level in the Tunisian judicial hierarchy. Their jurisdiction includes cases of lesser value and matters such as death certificates, certificates of nationality, customs officers' oaths, garnishments and wage assignments, and the signing of civil status books. Established by Beylical decree on July 23, 1938[5], their territorial jurisdiction is defined by Decree no. 2009-2287 of July 31, 2009[6]. There are 85 Cantonal Courts in total, each handling minor civil and criminal cases, with a single judge presiding over them.

1.1.2 Jurisdiction

1.1.3 Jurisdiction in Civil Matters

The cantonal judge has first-instance jurisdiction over claims over personal rights, claims regarding payments, and cases related to workplace accidents and occupational illnesses, provided the claim does not exceed seven thousand dinars. Additionally, the judge addresses interim payment injunctions and ex-parte orders within the scope of their jurisdiction (motions for orders that can be granted without waiting for a response from the other side).

The cantonal judge has exclusive first-instance jurisdiction in the following matters:

(a) principal claims for alimony (spousal or child support), with judgments in these cases being enforceable despite any appeal; and
(b) possessory actions.

[4] Available here.

[5] Available here.

[6] Available here.

The Cantonal Courts can only issue summary judgments in the following cases:

(a) in matters of protective seizure, provided the amount of the seizure falls within its jurisdiction (7000 dinars);

(b) in urgent matters requiring immediate findings;

(c) when difficulties arise in the enforcement of its judgements, even if those decisions have been overturned on appeal; and

(d) in cases concerning the stay of execution of its judgments when they are opposed by third parties.

1.1.2 Jurisdiction in Criminal Matters

The cantonal judge has final jurisdiction over contraventions. It hears the following cases in the first instance:

(a) offenses punishable by a prison sentence of no more than one year or a fine of no more than one thousand dinars. However, the Court of First Instance retains exceptional competence for offenses involving involuntary bodily injuries and fires; and

(b) offenses assigned to it by specific statutes.

1.2 Courts of First Instance (*Tribunaux de première instance*)

1.2.1 Organization

The Courts of First Instance consist of several divisions, including the personal status division, commercial division, criminal division, correctional division, and one or more civil divisions. There are 27 Courts of First Instance distributed across different districts under the jurisdiction of Courts of Appeal. The delineation of their territorial boundaries is defined by the geographical limits of each governorate or by a cluster of delegations when multiple courts exist within the same governorate.

1.2.2 Jurisdiction

1.2.3 Jurisdiction in Civil Matters

The Court of First Instance has jurisdiction over all civil actions in the initial stage, unless otherwise specified by law. It also hears appeals from judgments rendered by cantonal judges within its jurisdictional area.

Additionally, the Court of First Instance has jurisdiction to review decisions made by the Labour Court (*Conseil des prud'hommes*).

1.2.4 Jurisdiction in Criminal Matters

The Court of First Instance has jurisdiction over all offenses at the initial stage, except for those under the jurisdiction of the Cantonal Courts. It serves as the ultimate appellate authority for judgments issued by Cantonal Courts within its jurisdictional area.

Additionally, since 2000[7], the criminal division of the Courts of First Instance has been empowered to handle felony cases at the first instance[8].

1.3 Court of Appeal

1.3.1 Organization

Currently, there are fifteen Courts of Appeal in Tunisia, situated in various cities: Tunis, Nabeul, Bizerte, Béja, Kef, Jendouba, Sousse, Monastir, Kairouan, Sfax, Gafsa, Gabès, Médenine, Kasserine, and Sidi Bouzid. Each Court of Appeal encompasses multiple divisions including civil, commercial, correctional, criminal, and indictment.

The Court of Appeal sits in a collegiate formation to hear appeals lodged against judgments rendered in the first instance by the Court of First Instance within its jurisdictional area. Its rulings are conclusive.

1.3.2 Jurisdiction

1.3.3 Jurisdiction Over Civil Matters

The Court of Appeal has jurisdiction to hear appeals against judgments rendered in the first instance by the Courts of First Instance within its jurisdictional area, as well as appeals against summary judgments and payment orders issued by the presidents of the Courts of First Instance.

1.3.4 Jurisdiction Over Criminal Matters

The Court of Appeal holds ultimate appellate jurisdiction over misdemeanours and felonies tried by the Courts of First Instance situated in its jurisdictional area[9]. Additionally, each Court of Appeal comprises at least one indictment division, tasked with hearing appeals against orders issued by the investigating judge (*juge d'instruction*).

1.3.5 Jurisdiction Over Certain Administrative Matters

The Court of Appeal, functioning as a second-instance court, has the authority to review appeals against decisions made by professional bodies like the Tunisian Bar Association. Additionally, it adjudicates appeals regarding constraints and specific tax matters in its capacity as a first-instance court.

1.4 Supreme Court (*Cour de cassation*)

1.4.1 Organization

[7] Law No. 2000-43 of April 17, 2000 amending and supplementing certain articles of the Code of Criminal Procedure and establishing the principle of dual jurisdiction in criminal matters, available here.

[8] New article 124 of the Criminal Procedure Code amended by Law No. 2000-43 of April 17, 2000.

[9] Article 126 of the Code of Criminal Procedure amended by Law No. 2000-43 of April 17, 2000, and Article 103 of the Child Protection Code amended on May 22, 2000.

The Supreme Court, the highest court in the Tunisian judicial hierarchy, was established as a supreme institution by decree on August 3, 1956[10]. Its jurisdiction covers the entire territory of the Republic of Tunisia.

1.4.2 Jurisdiction

1.4.3 Jurisdiction in Civil Matters

Appeals against decisions of the Supreme Court may only be lodged against final rulings in seven sets of circumstances, as defined by the Civil Procedure Code, Article 175. These are outlined below:

(a) if the judgment violates the law or results from an error in its application or interpretation;
(b) if the court lacked jurisdiction;
(c) if there was an excess of power;
(d) if the prescribed formalities, on pain of nullity or forfeiture, were not followed during the proceedings or in the judgment;
(e) if there is a conflict between judgments given at the last instance between the same parties, on the same subject, and for the same cause;
(f) if a ruling has been made on matters not requested, or more than what was requested, or if the appellate decision neglected to rule on claims already decided by the first judge, or if the same judgment contains contradictory provisions; or
(g) if an incapable person was convicted without proper representation, if they were manifestly ill-defended, and if this was the principal or sole cause of the rendered judgment.

The Supreme Court is also responsible for settling disputes between judges and transferring cases from one court to another. In such cases, it is composed of the First President, the Presidents of the Chambers, and the most senior member of each chamber, in the presence of the public prosecutor and a court clerk (Civil Procedure Code, Articles 198 and 199).

1.4.3.2 Jurisdiction in Criminal Matters

In criminal matters, the Supreme Court has jurisdiction to hear appeals "against decisions rendered on the merits and at last instance, even when executed, on grounds of lack of jurisdiction, misuse of powers, violation or misapplication of the law" (Criminal Procedure Code, Article 258), as well as in matters involving the appointment of judges and transfers from one court to another (Criminal Procedure Code, Articles 292 and 294).

The appeal of the Supreme Court decision, unless otherwise provided by law, does not render the contested decision void in civil or even criminal matters.

[10] Available here.

1.5 Jurisdiction for Offenses Committed Under Other Laws

1.5.1 Labour Court (Conseil de Prud'hommes)

Established in 1939, the "*Conseils de Prud'hommes*" underwent reorganization through the Law of 4 November 1958, followed by the Labour Code of 30 April 1966. The Labour Courts hold jurisdiction over disputes arising from employment contracts between employers and their employees, workers, or apprentices, regardless of the amount of the claim. Decisions made by Labour Courts can be appealed and appeals will be heard by the Court of Appeal.

Each Labour Court comprises a professional magistrate serving as president, along with two judges; one elected by a college of employers and the other by a college of employees. Additionally, a Labour Court is established within the territorial jurisdiction of each Court of First Instance, except for the Tunis Court of First Instance, which has three Labour Courts[11].

1.5.2 Administrative Branch

Regarding administrative cases, the Constitution has established the Council of State, comprising Administrative Courts and the Court of Auditors.

1.5.3 Administrative Courts

The Administrative Court operates under the provisions of Law No. 72-40 of 1 June 1972, which has been supplemented and amended on multiple occasions. It falls under the remit of the Prime Ministry, with its headquarters located in Tunis.

The Administrative Court is vested with the authority to adjudicate disputes concerning administrative matters and appeals regarding abuse of power, with the ability to nullify actions undertaken by central, regional, and local administrative authorities, as well as local public entities and public administrative institutions. Additionally, it provides counsel to the various administrative bodies.

1.5.4 Court of Auditors (Cour des Comptes)

The Court of Auditors operates in accordance with the provisions of Law No. 1968-8 of 8 March 1968, which has been supplemented and amended on several occasions. It falls under the administrative remit of the Prime Ministry and is headquartered in Tunis.

This institution is responsible for scrutinizing the finances and management practices of the State, local authorities, public industrial and commercial entities, as well as any other entities, regardless of their designation, in which the State, regions, or municipalities have a stake.

Additionally, the Court of Financial Discipline was established by Law No. 85-74 of 20 July 1985. It has jurisdiction to adjudicate cases involving mismanagement committed against the State, public administrative entities, or local authorities.

[11] Decree no. 2010-1536 of June 21, 2010.

Chapter 3: Rights of the Accused

3.1 Right against Unlawful Arrests, Searches and Seizures

The detainee must be informed of the charges against them in a language they understand. The lawyer should ensure that this right is respected and that the detainee comprehends the nature of the accusations.

The detainee has the right to have a lawyer present during all interrogations and confrontations. The lawyer must ensure that they are present and that the interrogation is conducted fairly.

The lawyer should remind the detainee of their right to remain silent during interrogation. Any statements made without the presence of a lawyer should be scrutinized for legality.

It is essential to ensure that the detainee has access to legal counsel from the moment of arrest. The lawyer must be allowed to communicate with the detainee privately and review the case files and evidence.

The lawyer must ensure that all legal guarantees are provided to the suspect, including informing them of their rights, providing medical examination, and appointing a lawyer if needed.

Recording in the hearing and confrontation reports must be reviewed by the lawyer, ensuring their presence and noting any procedural breaches.

The lawyer must review the register and verify its records. Article 13 quarter stipulates that the suspect's lawyer or family members must visit the detention register daily, and a copy of the record must be sent to the public prosecutor.

Article 13 bis requires that every detainee has the right to request a medical examination, which must be conducted by a doctor. The lawyer should ensure that this examination is conducted, especially if there are signs of ill-treatment or the suspect is in a vulnerable condition.

The lawyer must verify that the family of the detainee has been informed about the detention. This is crucial for safeguarding the detainee's rights and ensuring transparency.

All interrogations must be documented, including the presence of the lawyer and any statements made by the detainee. The lawyer should review these records to ensure accuracy and completeness.

Any violations of the detainee's rights during detention or interrogation should be reported immediately to the relevant authorities. The lawyer must document these violations and take necessary legal action to protect the detainee's rights.

Detainees should be treated humanely and with respect. The lawyer should monitor detention conditions and advocate for improvements if necessary.

The lawyer should ensure that the detainee is protected from physical and psychological abuse. Any incidents of abuse should be documented and reported.

3.2 Right against Unlawful Police Detention

Article 13 requires judicial police officers to include a set of mandatory notes in the detention report for crimes, misdemeanors, or infractions.

The lawyer must verify all of these notes, as any breach produces invalidity according to Article 199 of the Code of Criminal Procedure.

Detention reports are not considered evidence unless they comply with the mandatory and legal notes, according to the text of Article 155 of the Code of Criminal Procedure: "The report is not considered evidence unless it is formally prepared according to the law." Information Indicating the Suspect was Informed of the Action Taken Against Them:

- The reason for it, its duration, and the possibility of extension.
- Information indicating the suspect was informed that they or their family members could appoint a lawyer for defense.
- Reading of legal guarantees to the suspect.
- Information indicating that one of the detainee's family members or someone designated by the detainee was informed.
- Request for medical examination by the suspect, their lawyer, or a family member.
- Request to appoint a lawyer, if made by any of those mentioned.
- In the case of a felony, request for appointing a lawyer if the suspect did not choose one.
- Start and end date and time of detention.
- Start and end date and time of hearing.
- Signature of the judicial police officer and the detainee, and if they are unable or refuse, note that and the reason.
- Signature of the suspect's lawyer.

According to Articles 78 and 142 of the Code of Criminal Procedure, if it involves opening a detention report for implementing an arrest warrant:

Article 78, paragraph 3: "In this case, judicial police officers cannot perform any preliminary investigation except to prepare a report for registering the identity of the person against whom the arrest warrant was issued. They must respect the provisions of Article 13 bis regarding medical examination, registering the identity in the detention register, and the provisions of Article 13 quarter regarding the suspect's right to visit their lawyer."

Compliance with Article 13 Provisions:
- Requesting a medical examination.
- Registering the identity in the detention register.
- The right to the lawyer's visit.
- Preparing a report on implementing the arrest warrant or detention.

Detention Register:
- It is important for judicial police officers to comply with their obligation under Article 13 to keep a detention register at the regional unit level, containing the date and time of the start and end of detention and hearing.

3.3 Right to be Informed of Charges

Presence During Interrogation: The detainee has the right to have their lawyer present during police interrogations. The lawyer should ensure that their presence is allowed and that the interrogation is conducted fairly.

Legal Guidance: The lawyer should provide legal guidance to the detainee during the interrogation, advising them on their rights and the best course of action.

Ensuring Due Process:
Proper Documentation: All actions taken during the detention and interrogation should be properly documented. The lawyer should review these documents to ensure accuracy and completeness.

Challenging Illegal Procedures: If any illegal procedures are identified, the lawyer should challenge them in court and seek to have any improperly obtained evidence excluded.

The Right to Liberty:
Every person has the right to life, liberty, and personal security (Article 3 of the Universal Declaration of Human Rights).

No one shall be subjected to arbitrary arrest, detention, or exile (Article 9 of the Universal Declaration of Human Rights).

Every person has the right to liberty and personal security and shall not be deprived of their liberty except for reasons and in accordance with procedures established by law (Article 9 of the International Covenant on Civil and Political Rights).

Every individual has the right to liberty and personal security and shall not be deprived of their liberty except for reasons and in cases prescribed by law. In particular, no one shall be subjected to arbitrary arrest or detention (Article 6 of the African Charter).

No person shall be arrested or detained by judicial decision, and they shall immediately be informed of their rights and the charges against them. They have the right to appoint a lawyer. The duration of detention is determined by law (Article 35 of the Tunisian Constitution).

Right to a Speedy Trial: The detainee has the right to a speedy trial to avoid prolonged detention without resolution. The lawyer should ensure that the case is processed in a timely manner and take legal action if there are unnecessary delays.

Right to Privacy: The detainee's privacy should be respected throughout the legal process. This includes confidential communication with the lawyer and protection of personal information.

Right to Adequate Facilities: The detainee should be held in facilities that meet basic human rights standards. The lawyer should visit the detention facilities to verify conditions and advocate for improvements if necessary.

Access to Legal Resources: The detainee should have access to legal resources, including legal texts and materials necessary for their defense. The lawyer should facilitate this access and provide relevant documents.

3.4 The Right to the Presumption of Innocence

The basic principle is innocence until proven guilty by a final and definitive judgment. The suspect must be treated as innocent, and no punishment of any kind can be imposed until the crime is proven.

All international covenants, the constitution, and Tunisian criminal laws affirm the presumption of innocence. Unfortunately, the Tunisian judiciary has largely violated this principle, reversing the rule to make conviction the default.

Article 33 of the Tunisian Constitution states: "The accused is innocent until proven guilty in a fair trial that guarantees all the rights of defence during the investigation and trial phases."

Article 11 of the Universal Declaration of Human Rights states: "Everyone charged with a penal offense has the right to be presumed innocent until proven guilty according to law in a public trial at which they have had all the guarantees necessary for their defense."

3.5 Right not to be Tortured or Ill-Treated

The lawyer must ensure that the detainee is protected from torture and ill-treatment. Any signs of abuse should be reported and documented, and immediate medical attention should be sought.

Vulnerable groups, such as minors, women, and persons with disabilities, have specific rights and protections. The lawyer should ensure that these rights are upheld and that the detainee receives appropriate care and support.

The lawyer should advocate for the rights of vulnerable detainees and seek additional protections and accommodations as needed.

3.6 The Right to Remain Silent

Silence generally means refraining from expressing or disclosing what is inside oneself, either explicitly or implicitly. Explicit expression is typically verbal but can also be written or by commonly understood gestures. Silence means that the accused "remains silent" and does not speak either negatively or affirmatively, whether during the collection of evidence by the police or during the preliminary investigation by the public prosecutor or the investigating judge, without their silence being considered evidence against them.

The right to remain silent is a freedom granted by law to the suspect or accused, enabling them to refuse to answer questions or make statements, either partially or completely, without their silence being seen as evidence of the actions attributed to them.

3.7 Presence of a Lawyer with the Witness

Although the criminal text does not explicitly address the presence of a lawyer with the witness, it is practiced in most security units.

Detainees who cannot afford a lawyer have the right to legal aid. The lawyer should assist in securing legal aid and ensure that the detainee receives competent legal representation.

Article 13 bis (see Annex No. 1) is a new procedural legal system that emphasizes the legislator's commitment to ensuring that criminal policy aligns with the human rights system and the foundations of a fair trial.

Despite its shortcomings, the procedures of Article 13 bis have established constitutional and universal principles.

The legislator has regulated the institution of detention and clarified the lawyer's intervention field. Hence, it supported the set of legal articles related to preliminary investigation: Articles 13, 57, 78, and 142.

The detainee should have the right to confidential communication with their lawyer. The lawyer should ensure that this communication is protected and not monitored by authorities.

3.8 Right to Mount a Defense

The presence of a lawyer before judicial police officers: Judicial police officers, as defined in Article 10 of the Code of Criminal Procedure, include public prosecutors and their assistants, magistrates, police commissioners, officers, and heads of police stations, national guard officers, non-commissioned officers, and heads of stations, local chiefs, and officers authorized by special laws to investigate certain crimes or write reports, and investigating judges.

The presence of a lawyer before judicial police officers is mainly for police commissioners, national guard officers, and officers authorized to investigate, as stipulated in Article 13 bis and Article 13, paragraph 7, and Article 57 of the Code of Criminal Procedure during judicial delegation and Article 77 of the Child Protection Code, where "judicial police officers cannot hear a suspected child or take any procedural action against them except after informing the public prosecutor. If the actions attributed to the child are of serious danger, the public prosecutor must appoint a lawyer if the child has not previously appointed one for their defense."

3.9 Right to Due Process

Detainees must be informed of their rights and the reasons for their detention in a language they understand. The lawyer should ensure this information is communicated clearly.

Detainees have the right to challenge the legality of their detention. The lawyer should assist in filing any necessary motions or petitions to contest unlawful detention.

The detainee has the right to access the evidence against them. The lawyer should review this evidence and use it to build a strong defense.

The detainee has the right to a public hearing, ensuring transparency and accountability in the legal process.

3.10 Right to Equal Protection under the Law

The detainee has the right to have a lawyer present during all stages of the investigation. The lawyer should ensure that this right is respected and provide legal guidance throughout the process.

The lawyer should advise the detainee of their right to remain silent and ensure that any statements made are voluntary and not coerced.

The lawyer should ensure that the detainee is not subjected to coercion or pressure to confess. Any signs of coercion should be documented and reported.

The detainee has the right to present evidence in their defense. The lawyer should assist in gathering and presenting this evidence to the authorities.
The lawyer should ensure that all legal procedures are accurately documented. This includes records of interrogations, evidence, and any legal motions filed.

If there are any irregularities in the legal process, the lawyer should challenge them in court. This can include filing motions to dismiss improperly obtained evidence or challenging procedural violations.

The lawyer should conduct thorough legal research to support the detainee's defense. This includes reviewing case law, legal texts, and relevant precedents.

The lawyer should provide the detainee with information about their legal rights and options. This helps the detainee make informed decisions about their case.

3.11 Right to language interpretation
If the detainee does not understand the language of the proceedings, they have the right to an interpreter. The lawyer should ensure that language assistance is provided and that the detainee understands all legal processes.

3.12 Rights during and after trial
The detainee must be presumed innocent until proven guilty. The lawyer should emphasize this principle during trial proceedings.

The detainee is entitled to a fair trial, which includes the right to present evidence, cross-examine witnesses, and receive a public hearing. The lawyer must ensure that these rights are upheld throughout the trial.

If the detainee is convicted, they have the right to appeal the decision. The lawyer should inform the detainee of this right and provide assistance in filing an appeal.

The detainee is entitled to receive a written copy of the judgment. The lawyer should ensure that this document is provided and explain its contents to the detainee.

If the detainee is acquitted or if their rights were violated during detention or trial, they may be entitled to compensation. The lawyer should assist in filing for compensation and ensure that the detainee's rights are fully protected.

3.13 Role of the Lawyer
The primary role of the lawyer is to advocate for the detainee's rights at all stages of the legal process. This includes ensuring that legal procedures are followed and that the detainee receives fair treatment.

The lawyer must provide the detainee with accurate legal advice and explain their rights and options. This includes advising on the best course of action and potential outcomes.

The lawyer represents the detainee in court, presenting evidence, cross-examining witnesses, and making legal arguments to support the detainee's case.

3.14 Monitoring and Reporting
The lawyer should regularly monitor the detainee's condition and treatment in detention. This includes checking for any signs of abuse, ensuring access to medical care, and verifying that legal rights are respected.

Any violations of the detainee's rights should be reported to the relevant authorities, including the public prosecutor and human rights organizations. The lawyer should document these violations and pursue legal remedies.

3.15 International Standards and Practices
The lawyer should ensure that the detainee's rights are protected in accordance with international conventions and treaties, such as the International Covenant on Civil and Political Rights and the Convention Against Torture.

The lawyer should stay informed about best practices in legal defense and apply them in the detainee's case. This includes using international case law and legal precedents to strengthen the defense.

3.16 Community and Family Support
The lawyer can engage the community and local organizations to support the detainee and raise awareness about their case. This can help in mobilizing resources and garnering public support.

The lawyer should involve the detainee's family in the legal process, keeping them informed and seeking their support. Family members can provide valuable information and assistance in the defense.

Lawyers can educate the public about detainee rights and the importance of legal protections through workshops, seminars, and public events.

The lawyer should provide support to the detainee's family, keeping them informed about the case and involving them in the legal process.

Lawyers should work to raise public awareness about detainee rights and the importance of legal protections. This can include public speaking, writing articles, and participating in advocacy campaigns.

The lawyer can engage with the media to highlight cases of rights violations and advocate for legal reforms.

3.17 Medical and Psychological Support

The detainee has the right to access healthcare services. The lawyer should ensure that the detainee receives necessary medical and psychological support, especially if they are suffering from health issues or trauma.

Any health conditions or injuries should be documented and reported to the relevant authorities. The lawyer should ensure that these records are included in the case file.

3.18 Internal and International Collaboration

Lawyers should engage with international bodies and organizations to seek support and resources for defending detainee rights. This can include working with the United Nations, human rights organizations, and international legal networks.

Lawyers should use international legal instruments, such as treaties and conventions, to strengthen the defense and advocate for the detainee's rights.

Lawyers can advocate for legal reforms to enhance detainee rights by engaging with lawmakers and participating in legislative processes.

The lawyer can collaborate with non-governmental organizations to advocate for detainee rights and provide support to detainees.

Chapter 2
Rights, Duties, and Responsibilities of Defense Counsel

The Defence counsel represents and safeguards the rights of individuals accused of crimes, particularly those unable to defend themselves. Their role is to ensure that the legal process is conducted fairly and that the rights of the accused, as granted by law, are meticulously upheld.

By way of context, the 2022 Tunisian constitution (the "Tunisian Constitution") guarantees, in Article 35, the principle of legal protection and due process, ensuring that no person can be arbitrarily deprived of their liberty.

The Tunisian Constitution, Article 35 states the following: *"A person may not be arrested or detained except in flagrante delicto or by a judicial decision, and he is immediately informed of his rights and the accusation against him, and he may appoint a lawyer. The period of suspension and retention shall be determined by law*".[12]

2.1 International Framework

Tunisia is a party to several international conventions governing human rights. These supranational instruments play an important role in a democratic society, serving to enforce and promote human rights. Below is a non-exhaustive list of the main instruments to which Tunisia is a signatory:

(a) *International Covenant on Civil and Political Rights* (ratified on the 18th of March 1969);
(b) *Convention on the Elimination of all forms of discrimination against women* (ratified on the 20th of September 1985);
(c) *Optional Protocol to the Convention on the Elimination of discrimination against Women* (accessed on the 23rd of September 2008);
(d) *Protocol against the smuggling of Migrants by lands, Sea and Air, supplementing the United Nations Convention against Transnational Organized crime* (ratified on the 14th of July 2003);
(e) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (ratified on the 23rd September 1988);
(f) *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (accessed on the 29th of September 2011);
(g) *Convention on the Rights of the Child* (ratified on the 30th of January 1992);
(h) *Freedom of Association and Protection of the Right to Organise Convention* (ratified on the 18th June 1957); and
(i) *Right to Organise and Collective Bargaining Convention* (ratified on the 15th of May 1957).

[12] Constitution of the Tunisian Republic 25/July/2022

At the international level, the United Nations Basic Principles on the Role of Lawyers[13] outline the rights and role of lawyers.

It is important to recall certain principles that sometimes seem to be overlooked[14], such as the fact that governments must ensure that lawyers can perform their duties without interference. Governments must ensure that lawyers can perform their professional duties without facing intimidation, hindrance, harassment, or improper interference (Basic Principles on the Role of Lawyers, Article 16).

Lawyers should have the freedom to travel and consult with their clients both domestically and internationally.

Additionally, lawyers should not face prosecution or any form of sanctions for actions taken in line with their professional responsibilities, standards, and ethics. If lawyers' security is threatened due to their professional activities, authorities are responsible for providing adequate protection (Basic Principles on the role of Lawyers, Article 17).

2.2 Rights of Defence counsel

In addition to the protections related to their professional functions, lawyers also enjoy fundamental civil liberties.

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

At the national level the constitution grants the liberties cited above in its second chapter (2022 Tunisian Constitution, Article 22 to 55).

2.2.1 Right to information

At the international level the right to information law is governed by the UN resolutions (General assembly of the United Nations, 1946 Resolution No.59), the Universal declaration of human rights (Universal Declaration of human rights, Article 19), the International Covenant on civil and Political Rights (International Covenant on Civil and Political Rights, Article 19) and recommendation of the OECD Council on Open Government[15].

At the national level, Tunisia has a right to information organic law[16] promoting transparency in public institutions.

[13] Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers

[14] Letter from European Lawyers (CCBE) to the Tunisian president 24 March 2024

[15] OECD Legal Instruments

[16] Organic Law n°2016-22 of the 24th of March 2016

This right to access information is important because it helps individuals and in that case lawyers to make their decision based on correct data, and it is necessary to detect violations and protect rights.

The right to information, or the right to access information (Organic Law n°2016-22, Article 3), of a defence counsel is a crucial aspect of legal defense that ensures a fair trial and effective representation. This right encompasses several key elements:

(a) Any person can request to access information. (Organic Law n°2016-22, Article 9)
(b) The requester is not obliged to justify its request. (Organic Law n°2016-22, Article 11)
(c) The relevant organisation has to answer every access request within 20 days of such request being made. (Organic Law n°2016-22, Article 14)
(d) Any person has free access to information. (Organic Law n°2016-22, Article 23)

2.3 Duties and Responsibilities of Defence Lawyers

Duties and responsibilities of defence counsel in Tunisia are governed by a set of national and international standards, including the Decree law No. 2011-79 of August 20, 2011 Organizing the Legal Profession and the United Nations Basic Principles on the Role of Lawyers.

2.3.1 Duty to Avoid Conflicts in Representations

Defence counsel are prohibited from representing parties with conflicting interest in the same case. (Chapter 4 of Decree law No. 2011-79 of August 20, 2011 Organizing the Legal Profession, Articles 28 and 32)

2.3.2 Duty to Maintain Confidentiality of Client Information

Defence counsel must ensure professional secrecy by preserving any secret that his or her client has entrusted to defence counsel or which defence counsel has become aware during the exercise of defence counsel's profession. (Chapter 4 of Decree law No. 2011-79 of August 20, 2011 Organizing the Legal Profession, Articles 29 and 31)

2.3.3 Duty to be a Zealous Advocate

Defence counsel must be worthy of the profession (Chapter 4 of Decree law No. 2011-79 of August 20, 2011 Organizing the Legal Profession, Article 29) and act diligently. (United Nations Basic Principles on the Role of Lawyers, Article 14)

2.3.4 Duty to be Independent

(a) Defence counsel are prohibited to concurrently act as a lawyer and hold any other paid position with the following exceptions:

    (i) teaching on an occasional or contractual basis; and

(ii) temporary and limited position where compensation is paid from the funds of the state, public establishments or local authorities. (Chapter 4 of Decree law No. 2011-79 of August 20, 2011 Organizing the Legal Profession, Article 22)

(b) Notwithstanding paragraph (a) above, defence counsel is prohibited to concurrently act as a lawyer and hold any of the following positions:

(i) positions involving commercial activity;
(ii) participation or hosting, periodically or continuously, in media programs of any nature with or without remuneration;
(iii) manager or chief executive officer or deputy general director in commercial companies, with or without remuneration, with the exception of the chairmanship of the boards of directors in public limited companies; and
(iv) positions which are incompatible with the profession of lawyer. (Chapter 4 of Decree law No. 2011-79 of August 20, 2011 Organizing the Legal Profession, Article 23)

1.1.2 Duty to be Ethical

Defence counsel must at all times act freely and diligently in accordance with the law in force (Chapter 4 of Decree law No. 2011-79 of August 20, 2011 Organizing the Legal Profession, Article 27) and ethics of the legal profession. (United Nations Basic Principles on the Role of Lawyers, Article 14)

1.2 Attorney Discipline

Defence counsel is subject to civil liability in the event of any professional misconduct and is enforced by the council of the national bar association. (Chapter 4 of Decree law No. 2011-79 of August 20, 2011 Organizing the Legal Profession, Article 27)

Defence counsel is also subject to other applicable law governing the conduct of defence counsel in Tunisia including criminal law.

Chapter 2
The Client

2.1 Client-Centered Representation

Client-centred lawyering views the client, whose interests are to be served and protected, as integral to the representation. It includes respect for the client, frequent and open communication to keep the client informed and involves him/her in decision-making and promotes a confidential and trusting relationship. In turn, it enables the client to make a well-informed decision.

2.1.1 Benefits of Client-centered Lawyering

(a) Enhances client competence by treating them as co-equals in finding options, assessing consequences;
(b) Promotes autonomy by fully informing them while encouraging and allowing them to make autonomous decisions; and
(c) Satisfies client needs for relatedness by using collaborative actions and building relationships emphasising mutual trust, respect, and caring.

2.2 Benefits of Client-centered Values and Objectives

(a) Problems belong to clients, not their attorneys, and clients must live with the consequences of their choices;
(b) Clients are better at identifying and assessing non-legal consequences than their attorneys;
(c) Clients can better determine acceptable risk levels which exist in all difficult decisions because they run these risks in more personal ways and have to live with resulting consequences;
(d) Clients are usually capable, interested, and willing participants in making decisions that affect their professional and personal lives and situations.

2.2.2 Special Cases: Representing Juvenile Clients

In order to be client-centred with child clients, attorneys must use language that a child can understand. When the defendant is a child, there are additional barriers to understanding, including lack of sophistication and immaturity. It is also important to consider their cultural backgrounds and to understand how cultural values may impact their understanding. Moreover, children are particularly vulnerable in the court system, and may feel intimidated and afraid to indicate that they don't understand the proceedings. The defence attorney should carefully and thoroughly discuss the case with the juvenile client in meetings before court hearings to facilitate the child's understanding and ability to participate in his/her own defence.

2.2.3 Establishing the Lawyer-Client Relationship

The client will form a first impression of the defence counsel and the defence counsel will similarly form a first impression of their client. One of defence counsel's primary objectives

with the initial client interview will be to establish a positive attorney-client relationship based on mutual confidence, trust and respect.

In order to provide the most effective legal representation, the defence lawyer should meet with the defendant as soon as possible to conduct an initial interview. Another important aspect of establishing trust is to follow-up on all tasks you have told the client you will undertake; it shows the client can depend on you and have confidence in you.

Attorneys need good communication skills when interviewing clients and meeting these expectations. These include:

(a) explaining what decisions are needed and why, in clear and non-legal jargon;
(b) identifying and explaining the available options for each of these decisions;
(c) encouraging and allowing the clients to make autonomous decisions that have substantial legal or non-legal impact on their lives.

The defence lawyer should make sure to set aside enough time to conduct a thorough interview. In preparation for the initial interview, the defence lawyer should become familiar with the elements of the defendant's alleged crime and its accompanying punishment. If possible, the defence lawyer should also obtain copies of any relevant documents such as arrest warrants, search warrants, police reports, and any additional documents that relate to the criminal charges. The inability to obtain these documents should not delay the interview (if these cannot be obtained before the initial interview, they should be obtained as soon as possible following the interview).

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

The Tunisian Criminal Code protects the right of the accused to communicate with his lawyer at any given time. This right remains upheld even where the judge orders a prohibition to communicate (Criminal Code, Article 70).

The defendant's confession does not exempt the investigating judge from seeking other evidence (Criminal Code, Article 69(8)).

2.3 Initial Client Interview

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

During the initial interview, the defence lawyer will learn critical information such as the identity of witnesses, the identity of co-defendants, the location of evidence, and details concerning any potential violations of the defendant's legal rights. This information is vital to

the development of a successful defence strategy and should be obtained as quickly as practicable.

Developing a good defence extends beyond just understanding your client's version of the events. While it is important to know your client's "story", it is also important to test that story against what others say. For example, if your client is charged with assaulting another, and he denies the assault, you should learn from others whether he is known to be a violent person. You should also consider whether, for example, the alleged victim is much larger than the defendant and therefore an unlikely target for assault.

The defence lawyer should use the initial interview as a forum to advise the defendant of his legal rights, explain the parameters of the attorney-client relationship and discuss the legal procedures involved in the case.

The initial meeting should:

(a) provide necessary legal information and assistance to the client;
(b) obtain information helpful to gaining the client's release from custody;
(c) start gathering preliminary information about the case;
(d) ascertain the client's version of the facts and events;
(e) take instructions from the client;
(f) start building a defence;
(g) start developing the theory and theme of the case; and
(h) consider and initiate any preliminary legal steps that need to be taken in order to safeguard the best interests of the client.

To be an effective interviewer and communicator, you must learn to use basic listening skills. Try to understand your client's goals and concerns. Tell your client that you are not there to judge the client but are, in fact, trying to get the client out of trouble using the most painless methods possible. Tell the client that any information the client shares about the alleged crime is confidential.

Empathy and compassion are imperative during the initial visit with the client. A defence lawyer must earn the client's trust in order to effectively represent the client. It is important to explain to the client that the meeting is privileged and confidential; however, inform the client that you cannot do anything illegal on the client's behalf. Let the client know that the client has control of the interview. The client should be informed not to discuss the charges or facts of the case with anyone, including friends and family. Lastly, stress the importance of honesty and to tell the truth at all costs.

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

It is also helpful to give control of the interview to the client at the beginning of the narrative segment of the interview. This allows the client to get his/her troubles "off their chest" by sharing it with you, the problem-solver, and most clients appreciate the opportunity to vent their frustrations, fears, anger, and anxieties. The only negative aspect of giving the client control is that he/she may tell you more than you need to know at this early stage.

After listening to the client's narrative, repeat it to him. In this way, the client will know that you have been carefully listening and understood his narrative.

1.2 Practical Tips for the Initial Interview

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

1.2.1 Listen to your client's story

(a) use your basic listening and interviewing skills (make eye contact and use other body language to indicate you are interested and listening);
(b) try to understand your client's concerns and position;
(c) listen to and observe your client — by listening, you show your respect for them. use body language that demonstrates you are listening and seeking to understand what he/she is saying;
(d) encourage the client to provide a full narrative of what transpired;
(e) if possible, have the client write down his/her version of events;
(f) let the client know you are there not to judge him/her;
(g) take brief notes to guide you in asking follow-up questions. Note-taking also expresses your interest.

1.2.2 Be empathetic, yet firm

(a) Show concern for the client;
(b) While showing concern, however, maintain professional distance and demeanor as counsel.

1.2.3 Cede some control to the client during the beginning portion of the interview

(a) Allow the client to "vent";
(b) Remember: you are the problem-solver and the client needs to explain his/her troubles and problems to you.

1.2.4 Ask open-ended questions

(a) Ask questions requiring an explanation or narrative from the client;
(b) Remember, open-ended questions are the WWWWH— questions: WHO, WHEN, WHY, WHERE and HOW;
(c) Except when asking for basic biographical information, avoid closed-ended questions — they provide less information than open-ended questions, and have the effect of leading the client.

1.2.5 Avoid confronting the client

(a) Do not interrogate your own client;

(b) Try to avoid a direct line of questioning;
(c) Try, at this stage, to avoid pointing out any contradictions or inconsistencies in the client's account with other witness' accounts: this will eventually need to be done, but can come later in follow-up consultations and preparation for trial.

1.2.6 Ask questions, but do not talk too much

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

1.2.7 Always end the interview with a promise of positive action

(a) No matter how big or small, leave your client with an indication of the next action or practical step you as defence counsel will take, and make sure you take that step and the client knows that you did so;
(b) Schedule a follow-up interview; and
(c) Never make promises to your client you cannot keep.

1.3 Initial Client Interview Checklist

The following points serve as a useful guideline as to what information ought to be gathered during the initial interview with the client:

1.3.1 Client Background Information

During the initial interview the defence lawyer should obtain the following background information from the defendant (as applicable and relevant to the particular circumstances). This information allows the defence lawyer to get to know the defendant, as well as informs the lawyer's defence strategy:

(a) Name
(b) Address
(c) Telephone number(s)
(d) Date of birth
(e) Ties to the community (including time at current address, family relationships, immigration status (if applicable))
(f) Height, weight, and identifying features
(g) Armed services history
(h) Educational history
(i) Employment history
(j) Criminal history
(k) Family history
(l) Physical and mental health
(m) Immediate medical needs
(n) Emergency contact information

1.3.2 Arrest

(a) When were you arrested?
(b) Where were you arrested?
(c) Who arrested you?
(d) Were you informed of the reason for your arrest?
(e) Did you understand the reason for your arrest?
(f) At the time of your arrest, were you shown an arrest warrant or summons?
(g) Were you able to read and understand the arrest warrant?
(h) Were you provided a copy of the warrant or summons?
(i) Were you informed of your legal rights?
(j) Was your family or work unit notified of the reasons for your detainment and of the place of custody within 24 hours of your detainment?
(k) Was anyone else arrested at the same time you were? If so, do you know their names, addresses and telephone numbers and how to contact their family members? Do you know what offences they were charged with?

1.3.3 Search and Seizure

(a) Were you searched?
(b) Was it a strip-search?
(c) What has been taken from your person?
(d) Were any of your clothes seized? Were any articles taken from your clothes?
(e) Were any of your bodily fluids or hairs taken for testing?
(f) Was a search conducted at the place of your arrest?
(g) Was a search conducted at your residence?
(h) Was a search conducted at your workplace?
(i) Do you know of any other people or places that were searched? If so, what are the people's names, addresses and telephone numbers? What are the addresses of the places searched, and what types of places are they (eg. residences, workplaces)?
(j) Did you see the police or investigators seize any evidence?
(k) What objects were seized?
(l) Was there a search warrant, and did you see it? Did you understand it?
(m) Were there any witnesses present at the time of the search? If so, what are their names, addresses and telephone numbers?
(n) Was the search recorded? Did the investigators sign it? Did you sign it? Did anyone else sign it? Did anyone refuse to sign it, and if so, why?
(o) Did the investigators make a detailed list and duplicate copy of the articles and documents seized at the scene? Did they give a copy of the list to the owner of the seized items?

1.3.4 Government Interrogation

(a) What was said to you at the time of your arrest?
(b) What was said to you after your arrest?
(c) Were you interrogated within 24 hours after your arrest?
(d) Who interrogated you? How many people interrogated you?
(e) Who initiated the conversation with you?
(f) How did you respond to them?
(g) What was your state of mind at the time?
(h) Was any physical or psychological pressure used during the interrogation?
(i) Were your statements recorded?
(j) Did you write your statement yourself?
(k) Were you allowed to adequately review and modify your statements?
(l) Were you allowed to write down your opinions?
(m) Have your co-defendants been interrogated? If so, do you know what they said about you?

1.3.5 Requests for Legal Aid and Family

(a) Did you ask for a legal defender?
(b) Did anyone inform you that you could have a legal defender?
(c) When were you informed that you could have a legal defender?
(d) After your arrest, did you request to see a family member, friend, co-worker or doctor?
(e) Have you seen your family members, friends, co-workers or doctor after the arrest?
(f) Was your family notified of the circumstances and the place where you were being held within 24 hours of your detention and arrest?

1.3.6 Detention

(a) Describe the place where you were detained after your arrest.
(b) How many public security officers were present during your arrest?
(c) Were any compulsory measures taken against you before your interrogation (you may need to ask specific questions about the types of measures sometimes taken; eg. were you or your family threatened with violence, were you told your children would be taken away from you, etc)?
(d) Were you threatened with physical abuse during and after the arrest?
(e) Were you treated with violence during or after the arrest (again, you may need to ask specific questions — were you slapped, punched, kicked, etc)?

(f) Were you verbally abused or threatened during and after the arrest?

1.3.7 Information about the Alleged Victim

(a) Do you know the alleged victim? If so, describe your relationship with the alleged victim.
(b) Do you know the alleged victim's name, age, address, telephone number, and vocation? Does he/she have a criminal record?
(c) Has the alleged victim been physically or mentally injured? If so, what type of injuries and how serious are the injuries? Has the alleged victim recovered? Has the alleged victim suffered any property damage? If so, tell me about the nature and the extent of damage.
(d) Has the alleged victim received any compensation? If so, when, how much and who paid the compensation?
(e) What are your feelings towards the alleged victim?

1.3.8 Information about the Co-Defendants

(a) Do you know the co-defendants? If so, describe your relationship with them.
(b) What are the names, ages, addresses, telephone numbers, vocations and criminal histories of the co-defendants?
(c) Do you know whether the alleged co-defendants have been arrested? If so, do you know what items, if any, were seized from them?
(d) Do you know what statements, if any, the co-defendants made about you?
(e) What is your response to their version of events?

1.3.9 Criminal Charges

(a) Do you understand the nature of the criminal charges against you?
(b) Do you understand the legal meanings of the charges?
(c) Do you understand the defences you might have to the charges?
(d) Is there anyone who can attest that they were with you at the time of the crime, but away from the scene of the crime? If so, what is their name, address and telephone number?
(e) What part of the charges do you believe to be inaccurate?
(f) Is there anyone else who was charged or who should be charged? If so, what are their names, addresses and telephone numbers? How would you describe their involvement in the case?

1.3.10 Quick Investigation

(a) Who should I contact? What are their names, addresses and phone numbers?
(b) Are there any witnesses I should talk with? If so, can you give me their names, addresses and telephone numbers? What information do you think they might be able to provide? Do you think they are credible?
(c) Is there any evidence that must be secured? If so, can you tell me what it is and where I can find it? Do you know whether it has already been seized?

1.3.11 Actions/Behaviours to Avoid

In order to prevent unnecessary trouble or risks, defence counsel is to avoid the following actions and behaviour during the interview:

(a) to leak information about the case to the client, including information relating to written accusations;
(b) to encourage the client to lie about his part in the case;
(c) to lend your own cell phone to the client;
(d) to include anyone who is not a member of the defence team covered by the attorney-client privilege when meeting with the client.

***ALWAYS REMEMBER*:** When interviewing a client, whether or not he/she is in custody, the lawyer must be careful not to concoct a defence for the client. The lawyer must find out what the client's story is — that is to say, what the client alleges are the facts of the case — and the lawyer may suggest possible defences for the client that are supportable on the basis of those facts. For a lawyer to invent or suggest defences for a client that go beyond the facts disclosed by the client or discovered through investigation is unethical.

1.4 Special Populations

The 2016-2020 strategic vision had foreseen, within this framework, to achieve a stronger judicial protection of vulnerable groups, particularly women, children, and adolescents.

1.4.1 Juveniles

Tunisia has provisions relating to juveniles in its Criminal Code and its Child Protection Code.

The age of the minor is determined at the time of the offence (Child Protection Code, Article 72). If the age of the offender cannot be determined, the judge in charge of the proceedings is competent to determine it.

According to the Tunisian Criminal Code, Article 38, an infraction will not be punishable when the author has not reached thirteen years of age at the time of the actions.

In Tunisia, the criminal law applies to offenders aged between thirteen and eighteen. Minors under eighteen may not be sentenced to death or life imprisonment. These sentences are replaced by ten years' imprisonment. If the penalty is imprisonment for a specified period, this period shall be reduced by half, up to a maximum of five years. Any additional penalties set out in Article 5 of this Code do not apply, nor do the rules governing repeat offences (Criminal Code, Article 43).

If an infraction is committed by a minor under the age of thirteen, the proceedings will be deferred to the juvenile judge, which sits alone. The child does not need to be present, unless he or his legal guardian expresses the desire to be (Child Protection Code, Article 73).

Minors have a right to choose and be represented by a lawyer (Child Protection Code, Article 9). Judicial police officers may only interview the accused child or take any action against him or her after having given notice to the competent public prosecutor. When the acts attributed to the child are of a serious degree, the public prosecutor must automatically appoint a lawyer to assist the child, if the child has not chosen one already. In all cases, a child under the age of 15 can only be interviewed by the judicial police in the presence of his or her sponsor, parents, guardian, guardian, relative or adult neighbour (Child Protection Code, Article 77).

Article 99 of the Criminal Code provides that if the facts are established with regard to the minor, the juvenile judge or the juvenile court shall, by reasoned decision, order one of the following measures:

(a) Surrender of the child to his or her parents, guardian, custodian or a person of trust;
(b) Surrender of the child to the family court;
(c) Place the child in an approved public or private educational or vocational training establishment;
(d) Place the child in an approved medical or medico-educational centre; or
(e) Place of the child in a re-education centre.

A criminal sentence may be imposed on the child if it is found that his or her re-education is necessary, taking into account the provisions of this code. In this case, the child's re-education will take place in a specialised establishment or, failing that, in a section of the prison reserved for children (Child Protection Code, Article 100).

The measures listed above may only be pronounced for a duration determined by the judicial decision and shall not exceed the period until the child reaches eighteen years of age (Child Protection Code, Article 101).

Where one of the measures provided for in Article 99 of this Code or a criminal conviction is handed down, the child may also be placed under probation until the age of twenty (Child Protection Code, Article 102).

The juvenile judge may order the provisional executions of the sentence notwithstanding appeal (Child Protection Code, Article 102). Any decision on provisional measures ordered by the judge or the investigative judge may be appealed in front of the president of the juvenile court. Such appeal may be lodged by the minor or its legal representative, or the representative of the public prosecutor (Child Protection Code, Article 104).

1.4.2 Women

Under Tunisia's Constitution, Article 21, all citizens are equal before the law.

Under the Constitution, Article 46, the Tunisia must take the necessary measures to eradicate violence against women. There are many forms of violence against women, most of which are punishable under Tunisian law. The Tunisian Criminal Code currently criminalises rape, sexual

assault classified as indecent assault and sexual harassment. However, while rape is criminalised, sexual, moral and economic violence within marriage is still not.

Legal assistance is one of the rights granted to victims under the law on the elimination of violence against women. Feminist NGOs for example offer free legal assistance. As a general rule, judges have very conservative attitudes and do not hesitate to trivialise or minimise the aggression or the harm in the interests of 'preserving the family' or the social order.[17]

1.4.3 Lesbian, Gay, Bisexual, Transgender and Intersex

The Tunisian Criminal Code, Article 230, criminalizes consensual relations between people of the same sex (up to three years in prison). However, several associations campaigning for LGBTQI+ rights are legally registered and officially recognized by the State.

1.4.4 Mentally Ill

According to the Tunisian Criminal Code, Article 38, people in a state of dementia at the time of the infraction, cannot be held criminally liable. However, the judge may order, in the interests of public safety, the surrender of the accused mentally ill person to the administrative authorities.

In the event of insanity on the part of the accused since the offence was committed, the committal for trial or trial is stayed. However, the accused may be retained in custody or placed under a committal order (Criminal Code, Article 77).

[17] *EuroMed Rights, Tunisia. État des lieux sur les violences à l'égard des femmes, March 2018*, p. 3, available here : https://euromedrights.org/wp-content/uploads/2018/03/Factsheet-VAW-Tunisia-Fev2018-FR.pdf.

Searches may only take place between 6am and 9pm, unless the individual being searched was caught in the act of committing an offence (Criminal Procedure Code, Article 95).

The examining magistrate must be accompanied by a woman (Criminal Procedure Code, Article 96).

[6.5.3] Search of Place

Searches may be conducted in any location where evidence supporting the investigation is expected to be identified.

Only the investigating judge is competent to carry out house searches. However, the following officers may also carry out searches of private premises (Criminal Procedure Code, Article 93):

- The State law enforcement investigation officer, in the event an offender is caught in the act of commission;
- The following law enforcement officers, as assigned by virtue of rogatory commission by the investigating judge[18]:
    1. District governors;
    2. Police governors, officers, and station heads; and
    3. National guard officers, non-commissioned officers, and station chiefs.
- Office staff and officers authorized by virtue of a special legal provision.

Searches of houses, outbuildings, and private premises can only be conducted between 6 am and 8 pm except in the following events:

1- an individual being caught during the commission of an offence; or
2- a house raid without the need to obtain the owner's permission, motivated by the urgent need to arrest a suspect or an absconding prisoner (Criminal Procedure Code, Article 95).

If it is decided that the suspect cannot be caught, or that his or her presence is not necessary for the search, the investigating officer must be accompanied by two witnesses who reside in the same place or, if no such witnesses exist or are available, their neighbour, who must sign the search report.

If it is necessary, a woman of good standing can accompany the investigating judge or the State law enforcement investigator when conducting a search of a house or private premises (Criminal Procedure Code, Article 96).

[6.6] Seizures of Property and Documents……

Documents and objects likely to help establish the truth in a case may be seized by the examining magistrate.

[18] These law enforcement officers are referred to in numbers 2 and 4 of article 10 of the Criminal procedure code.

When objects are seized, a list of these objects is drawn up in the presence of the suspect or the person who was found in possession of the seized objects, and a report is drawn up to this effect.

The items seized are placed in a sealed envelope or folder bearing the date of seizure and the case number (Criminal Procedure Code, Article 97).

An auction may be ordered, if the circumstances of the investigation allow for it, in two cases:

- if there is a risk of loss of the items seized; or
- if it would be costly to keep them.

To do this, the examining magistrate must first consult the public prosecutor and the seized party.

The owner of the seized items may exercise his right to seek the return of the property within the time limits set out in the Criminal Procedure Code, Article 100.

Indeed, any person who claims to be entitled to property in the hands of the law may request its return from the examining magistrate or, the magistrate refuses, from the indictment division by way of a statutory request. Items not claimed within 3 years are acquired by the State (Criminal Procedure Code, Article 100).

The investigating judge may order the seizure of all items of correspondence and other items sent if deemed necessary in establishing the truth in a case (Criminal Procedure Code, Article 98).

Objects held by the court may be claimed from the examining magistrate by any person who claims ownership of them. If the investigating judge refrains from doing so, the items may be claimed from the indictment division (…) (Criminal Procedure Code, Article 100).

[6.10] Post-Mortem Examinations……...

Under Tunisian law, in the event of a violent or suspicious death, or a death posing a medico-legal problem, a judicial investigation is always opened, and a medico-legal autopsy is requested by the competent judicial authority.

In the event of the death of a prisoner inside the prison, the prison governor shall immediately inform the competent judicial authorities, the prison and re-education administration, the family of the prisoner concerned, and the registrar (Law no. 2001-52 of 14 May 2001, Article 43 on the organisation of prisons).

An autopsy may also be requested by the head of the health department in the event of the death of a detainee in hospital.

A death certificate is issued to the family of the deceased by the public health physician..

Autopsies can only be performed by forensic doctors.

[6.11] Subpoenas

The investigating judge shall be entitled to hear anyone whose testimony is deemed useful (Criminal Procedure Code, Article 59).

Witnesses shall be subpoenaed:

- administratively; or
- by way of notary.

Any witness appearing on his/her own may be heard without necessity of subpoena, with due reference to that in the transcript of the investigation (Criminal Procedure Code, Article 60).

When a person is called as a witness, he or she must:

- be bound to appear;
- take an oath; and
- testify in accordance with the provisions of the criminal procedures regarding professional secrecy (Criminal Procedure Code, Article 61).

Should the witness be unable to appear, his/her testimony may be heard in his/her place of residence (Criminal Procedure Code, Article 62).

The investigating judge may hear, for the sake of guidance and without the need for an oath (Criminal Procedure Code, Article 63):

- a person lodging a claim in relation to personal rights or in respect of a payment due;
- persons whose testimony cannot be admissible by virtue of the provisions of the Code of Civil and Commercial Procedures (for instance, a person who has previously been convicted may have their right to testify restricted resulting into the inadmissibility of their testimony) (Criminal Code, Article 5);
- persons barred from testifying at courts by virtue of the law or by court order; or
- persons who have spontaneously reported the crime and the perpetrator in return for bounty payment and who are not bound to testify in view of their functional duty.

Before testifying, the witness shall take the solemn oath of telling the truth and nothing but the whole truth (…) (Criminal Procedure Code, Article 64).

A translator is appointed ex officio by the investigating judge if the suspect or the witness is unable to speak Arabic (…) If the interpreter is not sworn, he or she takes an oath to translate the evidence faithfully and shall state his name, title, age, profession, domicile, and sig the records as a witness (Criminal Procedure Code, Article 66).

Chapter 3
Defence Case Theory & Theme

3.1 Introduction and crafting the outline of the case

A critical legal skill and tool of a lawyer is to organise and prepare a case around a central theory — or focal point. The theory of a case forms the defence of an accused and is a detailed, coherent and accurate version or 'story' of what happened. This is what case theory is all about: every case contains a story and it is the duty of a lawyer to tell this story on behalf of their client or clients.

The case theory must ultimately demonstrate that the client is entitled to relief: in a criminal case, this equates to acquittal or conviction of a less serious charge. The case theory is the strategic plan for conducting a case and defence on behalf of a client as well as the tactical presentation of the defence. A defence case theory involves a legal theory, detailed factual support woven into a persuasive story of innocence or reduced culpability:

(a) *Legal theory*: the legal arguments for why the accused should not be charged;

(b) *Factual theory*: an explanation of how a particular course of events happened that persuasively supports the legal theory; and

(c) *Persuasive theory*: the fact-based story that supports the argument as to why the accused should be acquitted or found guilty of a lesser charge as a matter of fairness and justice.

Following the initial consultation, it is important to begin to formulate the theory of the case. In doing so, a number of questions must be asked:

(a) Was the accused illegally arrested?

(b) Was the accused tortured and/or mistreated in any way?

(c) Were there sufficient statutory grounds to arrest the accused?

(d) If the accused is/was detained, was it lawful?

(e) If a search was completed, was it lawful?

(f) If necessary, was an interpreter provided to the accused?

(g) Did the accused have the mental capacity to commit the crimes charged?

(h) Did the accused indeed commit the crime?

(i) Has the accused signed any documents, such as a confession and, if so, was it obtained legally?

(j) Does the accused want to plead guilty?

(k) Are there lay witness statements that need to be gathered?

(l) If the accused has an alibi, can this be substantiated?

(m) Has the statutory time limit for criminal prosecution expired?

(n) Can you prove the innocence of the accused?

(o) Is there a legal justification or defence for the accused's actions?

(p) Is there anyone who should take more responsibility than the accused for the alleged offence?

(q) Is the accused eligible for a lighter or mitigated punishment?

(r) Will the prosecution be able to bear its burden of proof?

The above is a non-exhaustive list — keep in mind it is a flexible guideline that will alter with the facts of every individual case. After gathering the initial information, review the statutes or codes listed within the charge or charges being made against the accused, as well as the elements of the crime. Review the criminal code for the potential penalties that the accused will face should they be found guilty of the relevant criminal offence.

1.2 Determining the Case Theory

Whatever the facts of a matter may be, a good case theory:

(a) is not based on assumptions about any aspects or facts of the case;

(b) takes into account and explains or argues away unfavorable facts or aspects of the case;

(c) can be accepted by the presiding officer or/and jury without having to stretch their imagination;

(d) is built on facts; and

(e) consistent with incontestable facts (if any).

1.1.1 Why is it important to develop and have a case theory?

Having a good case theory is important as your case theory controls:

(a) your case investigation;

(b) your questions to your client/the accused;

(c) your discovery and trial preparation;

(d) what is said in your opening statement to the trial panel;

(e) what is asked during chief and cross-examinations;

(f) what questions to put to prosecution and defence witnesses;

(g) what is said during your closing arguments to the trial panel; and

(h) what your case theme will be.

A thorough case theory therefore provides a strategic roadmap of the case and ultimately how to present it tactically in court to the trial panel.

1.1.2 How do I create and develop the theory of a case?

The **first** step in creating a case theory is to review the charge or indictment to determine precisely what the accused is being charged with. At this stage, it is critical to determine the essential elements of the crime and charge.

The **second** step is to thoroughly investigate the facts and background of the case. This is done through various actions:

(a) interviews with the accused to obtain information, facts and instructions;

(b) inspect and examine fully all documents, exhibits and other materials made available by the prosecution or the procuracy;

(c) interview any available eye witnesses to the alleged crime to obtain their version of the facts;

(d) interview any other potential witnesses who may have information relevant to the case;

(e) if possible or applicable, examine the scene of the alleged crime; and

(f) check whether the accused's constitutional rights have been or are being violated in any way in the handling of the case.

The **third** step in determining a case theory is deciding how to conduct the accused's defence in the courtroom:

(a) determine whether any initial objections or procedural points should be raised before the client submits their plea, for example, jurisdictional issues, defective charge or indictment, etc;

(b) identify the facts you will need to establish and prove in presentation of the accused's defence;

(c) identify how to prove those facts and what witnesses you need to call, or other evidence you need, to establish those facts;

(d) determine whether the prosecution's witnesses have any (or significant) credibility

(e) issues;

(f) determine the strongest points in your case as well as that of the prosecution; and

(g) determine the weak points in the prosecution's case as well as your own.

A lawyer should, from the outset, build a general theory of the case centred on the client's best interests, the applicable law and the facts of the matter. This will not only help him/her evaluate what choices to make throughout the defence process, but also guide his/her focus during the investigation of the matter and trial preparation. In this sense, it remains the lawyer's duty to continuously emphasise and expand upon the facts and evidence available that supports the client's version of events and theory of the case.

1.2 Determining the Case Theme

An effective story (or theory) requires a clear theme to tie the different elements together. It is important to remember that the *theme* of your case is but one element within the broader *theory* of what the case is about. A theory of the case includes a theme. The theme of the case is a word, phrase or simple sentence that captures or illustrates the dominant emotion or reality of the theory of the case — the theme must be brief and easily remembered by the trial panel. The theme of a case is the critical element that ties the other elements of it together.

Some practical tips for developing the theme of your case are set out below.

1.3 Storytelling and Presenting the Theory and Themes of the Case

In court, a lawyer tells the client's story. He/she uses a theory of the case infused with a powerful theme. To defend a client effectively, a lawyer must understand how to tell a story to the court — the more convincing the story, the more persuasive the argument becomes to the trial panel who ultimately decides the facts of the case.

With the above elements in mind, storytelling allows the lawyer to set the stage, create atmosphere, introduce characters and organise evidence and ideas into a carefully planned framework. Without such a defence framework, the trial panel may prefer to accept evidence and testimony in accordance with the prosecutor's argument.

By utilising such a framework, defence counsel can lead the trial panel to understand and accept evidence and testimony favorable to their client and in the context of the client's experience. When telling your client's story in court, it is important to create a positive environment in which the evidence presented will be evaluated. The following skills make for more effective storytelling in court:

(a) varied tones and volume of voice;

(b) the use of evocative, descriptive language that resonates with the listener;

(c) proper rhythm and tempo when questioning witnesses;

(d) proper rhythm and tempo when addressing either judge or jury;

(e) body language and open hand gestures;

(f) measured pauses and silence for effect and emphasis;

(g) eye-communication and maintaining eye contact; and

(h) application of different rhetorical skills.

To effectively develop the theory of a case, defence counsel should objectively evaluate the prosecution's case. Balancing this with the client's instructions and version of the facts and applicable law, defence counsel should proceed to structure a moving story based on the facts of the matter as well as any emotive factors that will collectively serve as a rebuttal.

A reasonable theory of the case must be conceptualised as early as possible as this will dictate the investigation of the case, witnesses, evidence to be tested and presented as well as arguments to be made. By combining the above in a reasonable and convincing story, defence counsel may persuade the trial panel to acquit the accused, mitigate the accused's sentence or exempt them from criminal responsibility altogether.

1.4 Defences

In the process of developing a theory of the case, a defence lawyer shall decide whether it is possible to exonerate the client from guilt. If so, the lawyer shall further consider how to prove the innocence of the client at trial.

The requirements for the various defences that can be raised in respect of criminal charges are set out in Book One, Chapter IV of the Criminal Code. It is imperative that defence lawyers familiarise themselves with the available defences as well as their essential requirements. The following are possible defences for exonerating an accused from criminal liability under Tunisian law.

1.4.1 Incapacity

A child under the age of 13 cannot bear legal responsibility for a criminal offence (Criminal Code, Article 38).

A child over the age of 13 but under the age of 18 can be held liable for a criminal offence, but the relevant penalties will be reduced as follows:

1. where the penalty is the death penalty or life imprisonment, it shall be replaced by a term of 10 years' imprisonment; and
2. where the penalty incurred is imprisonment for a fixed period, that period is reduced by half, with a maximum term of imprisonment fixed at 5 years.

Additionally, any additional penalties set out in the Criminal Code, Article 5 (such as, for example, the confiscation of assets or the removal of the right to vote) do not apply, nor do the rules governing recidivism (Criminal Code, Article 43).

1.4.2 Insanity

A person in a state of insanity cannot bear criminal responsibility. The judge may however, in the interests of public safety, order the surrender of the accused person to the administrative authorities (Criminal Code, Article 38).

1.4.3 Threat of Death or Coercion

A person will not bear criminal responsibility if he/she was compelled to commit an offence due to circumstances that exposed his life or that of one of his relatives to imminent danger, and when this danger could not have been otherwise be deterred (Criminal Code, Article 39).

A ‘relative’ for these purposes can be:

1. Descendants or ascendants;
2. Brothers or sisters; or
3. A spouse.

If the threatened person was not a relative, the judge will assess the degree of responsibility of the person who committed the crime under coercion (Criminal Code, Article 39).

Additionally, there is no criminal liability in the following scenarios:

1. if a murder or bodily harm was inflicted while repelling, at night, the climbing of fences, walls or entrances to a dwelling its outbuildings; or
2. if a criminal act took place while defending against the perpetrators of robbery or looting carried out with violence (Criminal Code, Article 40).

It should be noted that the fear of God does not qualify as coercion (Criminal Code, Article 41).

1.4.4 Following the law or orders of a superior

A person who has committed a crime by virtue of a provision of the law or an order from a competent authority will not be criminally liable (Criminal Code, Article 42).

1.4.5 Mistake of fact

Mistake of fact is not listed as a specific defence in the Criminal Code. It should however be noted that under Tunisian law, it is a general principle that no one may undergo criminal punishment except for an act committed intentionally (subject to legal exceptions such as strict liability offences) (Criminal Code, Article 47). A person who committed a criminal act may therefore not be criminally liable if he can prove that the commission of the act was based on a mistake of fact.

The aforementioned legal exceptions include all the offences provided for in Book Three of the Criminal Code: these offences shall be punishable irrespective of any intention to cause harm or to contravene the law (Criminal Code, Article 313). Examples of such offences include public disturbance (Criminal Code, Article 316) or littering (Criminal Code, Article 320).

1.4.6 Intoxication

Intoxication is not a defence under Tunisian law. It is a criminal offence to serve alcohol to Muslims or to people who are intoxicated. It is also a criminal offence to be intoxicated in public (Criminal Code, Article 317).

1.4.7 Alibi

The Constitution, Article 33 guarantees that all accused persons are presumed innocent until proven guilty. Any alibi provided by an accused person will therefore need to be disproved in order to convict a person accused of a crime.

Chapter 2
Pre-trial Matters

2.1 Bail

Provisional release of the accused may be requested (Criminal Procedure Code, Article 86):

- by the examining magistrate after consulting the Public Prosecutor;
- at the request of the Public Prosecutor;
- at the request of the accused; or
- by the accused's counsel.

A decision on a request for provisional release must be taken within four days of the request being made.

The examining magistrate or the court hearing the case may issue a new sentencing order despite issuing a release order (Criminal Procedure Code, Article 88). If the accused fails, without legitimate excuse, to appear for all the proceedings and at the sentencing, the bond is forfeited to the State. (Criminal Procedure Code, Article 91)

Counsel may request the court hearing the case to consider provisional release of the accused at any time. (Criminal Procedure Code, Article 92)

2.2 Bail Checklist

The provisional release of the accused shall be granted only if the accused agrees to comply with all or part of the measures prescribed by the court. The following may be required (Criminal Procedure Code, Article 86):

- obligation for the accused to reside in an area that falls within the remit of the court's jurisdiction;
- prohibition from leaving a certain area as defined by the judge (except under specific conditions);
- prohibition from being in specific places;
- a requirement to keep the examining magistrate informed of their movements in specific areas; or
- undertaking to appear before the judge whenever requested and to respond to summons sent to him by the authorities concerning proceedings brought against him.

2.3 Preliminary Inquiry

A preliminary inquiry is compulsory for felony offences, but is optional for misdemeanours, contraventions and other smaller offences. (Criminal Procedure Code, Article 47)

The role of the examining magistrate is to investigate criminal proceedings, to diligently seek out the truth and to establish all the facts upon which the court's reasoning and decision will ultimately be based (Criminal Procedure Code, Article 50). Its role is limited to investigating the facts in question. It may only investigate these facts, unless any novel facts revealed by the investigation merely serve as aggravating factors in relation to the existing offence (Criminal Procedure Code, Article 51).

The case may be referred to the examining magistrate in any of the following locations: where the offence was committed, where the defendant is domiciled, where the defendant last resided, or where the defendant was found (Criminal Procedure Code, Article 52).

Assisted by the court clerk, the examining magistrate:

- hears the witnesses;
- questions the accused; and
- makes on-the-spot observations, conducts home visits and seizes evidence.

The examining magistrate orders expert reports and conducts all actions necessary to uncover incriminating or exonerating evidence.

The examining magistrate may carry out, or have carried out by judicial police officers, an investigation into the character of the accused and their financial, family or social situation. He may also arrange for a medical and psychological examination of the accused (Criminal Procedure Code, Article 54).

2.4 Trial Preparation

2.4.1 Charged

If the accused is not in custody, they are summoned in writing for questioning (Criminal Procedure Code, Article 68). The summons shall indicate:

- the surname, first name, profession and address of the accused;
- the place, date and time of the court appearance;
- the nature of the charge.

At the first appearance, the examining magistrate:

- establishes the identity of the defendant;
- informs the defendant of the charges against them and the legal texts applicable to these charges, and takes the defendant's statements; and
- informs the defendant of their right to reply in the presence of counsel of their choice.

The accused person in custody may communicate with their counsel at any time from their first appearance onwards (Criminal Procedure Code, Article 70). The accused shall only be questioned in the presence of their counsel (Criminal Procedure Code, Article 72).

The examining magistrate shall present the evidence to the accused and the accussed may declare whether they recognise the evidence before making any observations on the evidence (Criminal Procedure Code, Article 76).

2.4.2 Instruction

When the above outlined procedure has been completed, the examining magistrates passes informs the Public Prosecutor of the outcome. The Public Prosecutor then has eight days to:

- refer the case back to the competent court;
- dismiss the case; or

- relinquish jurisdiction on grounds of lack of competence (Criminal Procedure Code, Article 105). If the examining magistrate finds that they have no jurisdiction, the Public Prosecutor must issue an order dismissing the case.

As soon as the Public Prosecutor has made their submissions, the examining magistrate makes an order:

- relating to all the defendants and the charges against them; and
- which addresses the conclusions of the Public Prosecutor's indictment.

The order includes the accused's surname, first names, age, place of birth, place of residence, and occupation. It also contains a summary and legal description of the facts, the reasons for determining whether there are sufficient charges, and the investigating judge's decision (Criminal Procedure Code, Article 104).

If the accused or the witnesses do not speak Arabic, an interpreter will be appointed by the examining magistrate (Criminal Procedure Code, Article 66).

If the examining magistrate decides (Criminal Procedure Code, Article 106):

- That (1) the public prosecution is not admissible, (2) the facts do not constitute an offence, (3) there are insufficient charges against the accused, they declare by order that there are no grounds for prosecution and order the release of the accused if they are in custody.
- That the facts constitute a misdemeanour not punishable by imprisonment or a minor offence, the court shall order that the accused be referred to the competent judge and shall order their release if they are in custody.
- That the facts constitute an offence punishable by imprisonment, they refer the accused, depending on the case, to the cantonal judge or to the criminal court.
- That the facts constitute a crime, they order the accused to be referred to the Indictment Division with a detailed account of the proceedings and a list of the documents seized (Criminal Procedure Code, Article 107).

The committal order puts an end to the pre-trial detention or any existing prescribed measure.

A defendant prosecuted for a felony or misdemeanour punishable by imprisonment must appear at the hearing in person (Criminal Procedure Code, Article 141).

The defendant may instead be represented by a lawyer for:

- offences not involving imprisonment; and
- in all cases where they have been summoned directly by the complainant in a case initiated by a private citizen and brought by the state prosecutor.

The court may always, if it deems fit, order the defendant to appear in person. The plaintiff may in all cases be represented by a lawyer, unless the court orders them to appear in person. The defendant may be represented by a lawyer in all cases.

Parties must be represented by a lawyer when before the Court of First Instance in criminal cases and also before the Criminal Division of the Court of Appeal. If the accused does not nominate a lawyer to represent them, the president appoints one for them ex officio (Criminal Procedure Code, Article 142).

2.4.3 Hearing witnesses

The examining magistrate has the right to hear any person whose testimony they consider will prove useful or relevant (Criminal Procedure Code, Article 59).

Witnesses are summoned through administrative channels or by a notary public. Witnesses who appear voluntarily may be heard without prior summons. This is noted in the verbal report (Criminal Procedure Code, Article 60).

As explained in Chapter 9 of this Manual, before being heard, witnesses must take an oath to tell the truth, the whole truth and nothing but the truth (Criminal Procedure Code, Article 64). If they give false testimony, they may be prosecuted in accordance with the provisions of the Criminal Code. If the summoned witness fails to appear, the examining magistrate may, at the request of the Public Prosecutor, impose a fine of between ten and twenty dinars.

The Code of Criminal Procedure, Article 63 lists the persons who may be heard without oath and for information purposes by the examining magistrate. Please see Chapter 9, section 9.3 for further details.

Chapter 3
Rules of Evidence

3.1 General

Under Tunisian Law, any criminal charge must be supported by evidence. Tunisian Law does not prescribe the forms of evidence admissible in court or a specific regime for evidence. Instead, the overarching principle provided in the Code of Criminal Procedure, Article 150 is that judges are required to rule on the basis of the evidence available in accordance with their reason and diligence. The established jurisprudence requires judges consider and weigh all evidence that either supports or undermines the charge without overlooking the circumstances or facts that may affect the evidence (*case no. 69632 of 23/03/2019 Court of Cassation*). Such evidence may take any form except such forms prohibited by law. Judges are given wide and unfettered discretion to formulate their judgment based on the evidence, however, their judgments must be based on evidence that is presented at trial verbally in the presence of all parties and subject to examination. If the evidence fails to establish the prosecutor's arguments, the judge must acquit the defendant (Code of Criminal Procedure, Articles 150 and 151).

3.2 Documentary Evidence

The Code of Criminal Procedure sets out certain provisions that relate to the collection, presentation and examination of documentary evidence.

Documentary evidence, such as correspondence relating to the suspect, as with other pieces of physical evidence, is collected by the investigating judge who must document all pieces of evidence seized in the presence of the suspect and seal them in an envelope or folder. The power to seize documentary evidence is specific to the investigating judge and is does not fall within the remit of law enforcement officers, except in the case of a felony or *in flagrante delicto* misdemeanor (where the suspect is caught whilst in the act of committing an offence).

Documents such as transcripts, records or reports prepared during the investigation by law enforcement officers or legally authorised assistants authorised to investigate misdemeanors and summary offences may be relied upon in court. This is provided that the documents adhere to the formalities set out in law and only contain material which the relevant investigating person has heard or witnessed personally. The law presumes such records and reports are valid. This presumption may be rebutted by the defence through written submissions or witness testimony (Code of Criminal Procedure, Articles 154 and 155).

Documents used in the proceedings can also be challenged on the grounds of forgery. If a document is alleged to be forged, the court will hear arguments from the prosecutors and the litigants and may suspend the proceedings until the question of forgery has been settled by a specialized court. (Code of Criminal Procedure, Articles 156 and 287).

3.3 Witness Testimony

Witness testimony may be heard during the investigation and at trial.

During the criminal investigation, the investigating judge may call upon witnesses to testify by serving an administrative summons. Witnesses may also be summoned by the bailiff. However, this does not preclude witnesses from coming forward on their own accord, provided a note is made in the investigative record that the testimony was collected without service of an administrative summons (Code of Criminal Procedure, Article 60). As explained in Chapter 8

of this Manual, a witness who is summoned by the investigating judge must take an oath to tell nothing but the complete truth. Witnesses must be warned that failure to tell the truth under oath may result in criminal prosecution. If it appears to the investigating judge that a witness has given a false testimony, the investigating judge must issue a report to the state prosecutor.

A witness who has been summoned by the investigating judge but who:

(a) fails to appear before the investigating judge;

(b) does not swear an oath to tell the truth; or

(c) refuses to provide testimony,

may be liable for a fine ranging between 10 and 20 dinars. In addition, the investigating judge may issue an arrest warrant for a witness who fails to appear pursuant to a summons (Code of Criminal Procedure, Article 60).

Certain witnesses may be heard without the requirement of swearing an oath. Such testimonies may be relied upon by the investigating judge for information purposes only, but they are not admissible. Testimonies that are not given under oath may be collected from:

(a) the complainant in a case initiated by a private citizen and brought by the state prosecutor;

(b) persons who are precluded from giving testimony by the provisions of the Code of Civil and Commercial Procedure;

(c) persons who are precluded from swearing oaths before court pursuant to any legal provision or court rulings; and

(d) persons who reported the crime and/or the suspect in return for a reward.

Witness testimonies must be given in private and in the absence of the suspect. When testifying, witnesses cannot rely on any written materials. The witness must disclose any conflicts of interest they may have when testifying. Once a witness has testified, the investigating judge may cross-examine the witness (Code of Criminal Procedure, Article 65). If a witness does not speak Arabic, or is deaf or mute, then the investigating judge must take the necessary arrangements to facilitate the witness testimony (Code of Criminal Procedure, Article 66).

Witness testimonies must be recorded in a transcript and signed by the witness as well as the investigating judge, and any others who are present, such as the court stenographer.

As previously mentioned, at trial, witnesses are summoned by an administrative summons or by the bailiff (Code of Criminal Procedure, Article 134). The witness summons may be requested (i) by the general prosecutor, (ii) by the plaintiff in a personal suit, or (iii) by a government department with the necessary legal authority. The witness summons must identify:

(a) the alleged criminal act being deliberated;

(b) the relevant legal provision;

(c) the competent court;

(d) the location of the trial;

(e) the time and date of the trial;

(f) that the person is being summoned in their capacity as witness; and

(g) in that case of a personal suit, the name and details of the plaintiff,

and, in any case, the witness summons must include notice that failure to appear or testify as well as bearing false witness may result in criminal prosecution (Code of Criminal Procedure, Article 135).

The witness summons must be issued no less than three days before the trial. If a witness is not a resident of Tunisia, then the summons must be issued no less than thirty days before trial (Code of Criminal Procedure, Article 136).

During the trial, once the plaintiff has stated their case, the court will call upon the witnesses to testify and their testimonies will be subject to examination (Code of Criminal Procedure, Article 143). Hearing witnesses at trial is subject to the court's discretion, however, the general prosecutor, plaintiff and suspect may request that their witnesses testify before the court. Where such requests are denied, the court must provide a reason in its ruling (Code of Criminal Procedure, Article 144). Once a person has been called to testify, they must exit the courtroom and remain in an allocated witness waiting room until it is their turn to testify (Code of Criminal Procedure, Article 145). As with testimonies collected during the pre-trial investigation, witnesses at trial must swear an oath before testifying. They also cannot rely on written materials and the defendant should not be present during the testimony (Code of Criminal Procedure, Article 146). The judge may then proceed with examining and corroborating the various testimonies. Generally, the litigants and their counsel are not permitted to raise questions during trial, except with the judge's permission (Code of Criminal Procedure, Article 143). If it becomes apparent during the hearing that a witness willfully gave false testimony, then the court must make a note of the incident and may make a ruling against the witness during the hearing (Code of Criminal Procedure, Article 161).

Witness testimony that was extracted by torturous methods or by duress is inadmissible (Code of Criminal Procedure, Article 155).

1.1.2 Accomplices

The testimony of an accomplice is admissible and, as with all other forms of evidence, is subject to the judge's consideration, reasoning and discretion. An accomplice's testimony that is corroborated by the testimonies of other witnesses may be given more evidential weight (*case no. 65879 of 27/02/2018 Court of Cassation*). In line with the overarching principle at the Code of Criminal Procedure, Article 150, it is for the judge to apply their reasoning and diligence when assessing the testimony of one defendant given against that of another defendant (*case no. 74629 of 30/01/2019 Court of Cassation*).

1.1.3 Expert Witness

Expert witnesses are given the same treatment as non-expert witnesses.

1.2 Expert Reports

Experts may be appointed by the investigating judge to carry out any technical analyses, as the investigating judge may require. Any appointment of an expert must include a deadline by which the expert must complete their analysis. The experts must liaise with the investigating judge while conducting their analysis. Once they complete their analysis, experts must provide a report that specifies the tests they carried out and the results of their analysis. Experts must sign their reports and testify that they personally conducted the tests/analyses assigned to them (Code of Criminal Procedure, Articles 101 – 103).

1.3 Confessions

Confessions, like all forms of evidence, must be considered by the judge and are subject to the judge's final discretion (Code of Criminal Procedure, Article 152). In any event, confessions extracted from the defendant through torture or duress are inadmissible (Code of Criminal Procedure, Article 155).

Chapter 2
Trial

2.1 Introduction

Under Tunisian law, the seriousness of the alleged offence determines the appropriate forum.

The least serious infractions, offences, and misdemeanors are referred to a District Judge. More serious misdemeanors can be directly sent to a Trial Court. Finally, the more serious offences and crimes are referred to the Criminal Chamber of the Trial Court, otherwise known as the Criminal Court. The procedural rules applicable to each type of court vary, and will be set out below.

Before appearing in front of the relevant court, all parties must be subpoenaed, as set out in section 6.11 of this Manual.

2.2 General provisions relating to hearings

2.2.1 Organization of the hearing

The presiding judge of the court runs the proceedings and maintains order in the court room (Criminal Procedure Code, Article 143).

The proceedings take place as follows (Criminal Procedure Code, Article 143):

a. The plaintiff (if they are present) is heard by the court;

b. The parties' submissions are made;

c. The witnesses and experts are being called for anyone to petition their recusal. The court examines the facts and comes to a decision on the recusal after hearing their statement;

d. The defendant is interrogated;

e. The evidence in the case is presented, if needed, to the witnesses and the parties;

f. The parties (or their respective counsel on their behalf) submit any questions to the presiding judge of the court;

g. The relevant issues are debated by the parties; and

h. The presiding judge of the court brings the proceedings to an end when the court considers that it has sufficient information.

2.2.2 Publicity of the proceedings

Proceedings are public and must take place in presence of the representative of the public prosecution and the parties unless the court decides to hold the proceedings behind closed doors. This may be done by operation of the law, or on request of the public prosecution in order to preserve public order or moral decency (Criminal Procedure Code, Article 143).

2.2.3 Witnesses and testimonies

The court will hear any witness whose testimony is deemed useful. The public prosecutor, the plaintiff, and the defendant are entitled to demand to call witnesses, provided that they disclose their identity and the subject of their testimony. The court has discretion when considering whether to allow specific witnesses (Criminal Procedure Code, Article 144).

2.2.4 Defendant's behavior in the court room

The defendant may be removed from the court room if they behave in a disorderly fashion or disrupt the progress of the proceedings. The proceedings may continue in their absence, and the judgment's validity will not be affected. The court clerk will notify the defendant of the judgment accordingly (Criminal Procedure Code, Article 147).

The judgment's validity will also not be affected if the defendant refuses to answer questions (Criminal Procedure Code, Article 148).

2.3 District judge

2.3.1 Proceedings before the District Judge when hearing offences

The defendant appears in a public hearing, either in person or represented by a lawyer or another person acting under a power of attorney (Criminal Procedure Code, Article 201).

If the district judge deems it necessary for the defendant to appear in person, the judge may order for the defendant to be summoned. The hearing will then be set for another date, at the judge's discretion.

If on that day the summoned defendant fails to appear in court, a judgment in absentia may be handed down by the district judge. The defendant's absence will not affect the validity of the judgment (Criminal Procedure Code, Article 201).

The District Judge can order a detention warrant, if the defendant:

a. is intoxicated;

b. is unable to confirm his/her identity;

c. does not have a fixed place of residence; or

d. his/her release may result in public disorder (Criminal Procedure Code, Article 202).

However, in no case shall the defendant be detained beyond a period of eight days.

A claim cannot be brought before the District Judge for a value which exceeds the threshold for claims to be heard by the District Judge (Criminal Procedure Code, Article 203).

2.3.2 Procedures before the District Judge when hearing misdemeanors

The District Judge may also hear misdemeanour cases. In such cases, the procedures applicable to the Trial Court (contained in the Criminal Procedure Code, Article 206) will be applicable.

A misdemeanor claim cannot be brought before the District Judge for a value which exceeds the threshold for claims to be heard by the District Judge (Criminal Procedure Code, Article 204).

2.4 Trial Court

2.4.1 Composition of the Trial Court

The Trial Court hearing misdemeanour cases is composed of a presiding judge and two judges. In the presiding judge is unavailable, they shall be replaced by another judge. The presiding judge has discretion to add one or two judges to the panel of the court for hearings which require lengthy pleadings. The additional judge(s) attend the hearings but do not take part in the deliberations, unless one or both official judges failed to attend (Criminal Procedure Code, Article 205).

The Trial Court shall be composed of a sole judge when hearing the following misdemeanours:

a. Misdemeanours related cheques being returned for insufficient funds;
b. Misdemeanours related to construction without prior permit (under Law number 76-34 dated 4 February 1976); or
c. Economic misdemeanour provided for in Chapter I of the fourth title of the law number 91-64 of 29 July 1991 pertaining to competition and pricing (Criminal Procedure Code, Article 205).

2.4.2 Referral of the Trial Court

The Trial Court may hear cases by direct referral from:

a. the public prosecution should the latter not deem it necessary to refer the case to preliminary investigation;
b. any administrations and financial subdivisions authorized which may, by law, file claims;
c. from the plaintiff in case the public prosecution refrains to prosecute on its own[19].

The Trial Court may also hear cases referred to it by the investigating judge or by another court. In such a case, the public prosecutor will subpoena the defendant and the plaintiff to a hearing as soon as possible.

Lastly, the Trial Court may hear a case by virtue of an immediate referral of the defendant to the Court by the public prosecutor, if the defendant is caught during the commission of an offence. The public prosecutor may remand the defendant in custody by means of a detention warrant if there is no availability for a same-day hearing. The prosecution must ensure that the defendant is heard without undue delay.

Should the case not be ready for a decision, the Trial Court delay it for further inquiry to the earliest possible hearing, confirming the detention warrant or ordering the temporary release of the defendant (with or without bail). The Court may even decide to drop the case, leaving it up to the public prosecutor to proceed as it deems appropriate (Criminal Procedure Code, Article 206).

[19] In such a case, the plaintiff will arrange for the other parties to the proceedings to be summoned by the court.

2.5 Criminal Court

Each Trial Court which is established in the premises of a Court of Appeal has at least one Criminal Chamber (Criminal Procedure Code, Article 221).

2.5.1 Composition of a Criminal Court

The Criminal Chamber of the Trial Court is composed of (Criminal Procedure Code, Article 221):

a. A high ranking judge ("third grade"), who will be the president of the Chamber; and
b. Four second-degree judges.

If need be, the presiding judge can be replaced by a deputy president. Similarly, the second-degree judges may be replaced by two judges from the same Trial Court. The presiding judge has discretion to appoint an additional judge or several judges in cases that require lengthy proceedings. Supplementary judges shall attend the hearing but cannot take part in the deliberations, unless one or several official judges fail to attend the hearing (Criminal Procedure Code, Article 221).

2.5.2 Proceedings of a Criminal Court

The Criminal Chamber of the Trial Court will hear a case if it is referred to it by the indictment chamber. If defendant is detained pending a hearing, the hearing will need to be scheduled within a maximum period of three months from assignment of the case to the Court (Criminal Procedure Code, Article 222).

In the event of a death sentence, the case is referred to the prosecutor general of the Court of Appeal if the ruling is handed down by a Trial Court, and to the prosecutor general of the Supreme Court if the decision is handed down by a Court of Appeal (

Chapter 3
Post-trial

3.1 Sentencing

3.1.1 General

Tunisia's legal system, and in particular its criminal justice system, is a civil law system, with strong resemblances to the French legal system model. Serious criminal cases (i.e., crimes involving imprisonment) are in most instances brought by the state prosecutor general before an investigating judge (*juge d'instruction*), who examines the evidence brought before him or her, interrogates the defendants, and recommends whether to refer the case to trial. If the case goes to trial, the trial judge, who is a different individual from the investigating judge in the case, is required to examine the evidence afresh.

The Criminal Procedure Code, Article 50 states that judges "who handled cases as investigating judges cannot participate in deciding the verdict in those cases." Article 151 states, "The [trial] judge is to base his or her decision only on the evidence introduced during the proceedings and discussed before him orally and in open debate (*contradictoirement*) among the parties.".

The Criminal Code punishes crime of violence (Criminal Code, Article 101), ill-treatment (Criminal Code, Article 103) and crimes of torture (Criminal Code, Article 101 bis *et seq*).

Any sentence passed will be counted as starting from the date of the arrest. Any fine imposed bears a 50% extra charge for taxes, etc.

3.1.2 Sentencing Framework in Tunisia

The sentencing framework can be divided into three categories, ranked from least to most serious: (i) offences ("*contraventions*" in French), (ii) misdemeanours ("*délits*" in French) and (iii) crimes ("*crimes*" in French).

Offences are the least serious form of crimes, and include prohibited behaviour such as selling food above the prices set by the authorities (Criminal Code, Article 315, para. 4) or serving alcoholic beverages to Muslims or intoxicated persons (Criminal Code, Article 317(1)).

Misdemeanours correspond to the intermediate category of crimes such as defamation or taking part in a brawl (Criminal Code, Article 15 bis).

Crimes are the most serious criminal offences such as rape (Criminal Code, Article 227) or wilful killing (Criminal Code, Article 201).

Judgements are issued by a majority of votes but sentences of death or life imprisonment require at least four votes (Criminal Procedure Code, Article 162). The court pronounces its judgement after deliberating in accordance with the law and after closing the proceedings. In misdemeanour cases, the court may postpone the delivery of the judgment to a later hearing that it sets. In criminal cases, the judgement must be read in full at a public hearing (Criminal Procedure Code, Article 164).

If the defendant is free and has been sentenced to imprisonment, or to imprisonment and a fine, the court may order the provisional execution of the prison sentence notwithstanding any opposition or appeal. In the event of acquittal or a conditional sentence of imprisonment or a

fine, the accused in custody shall be released immediately and notwithstanding any appeal (Criminal Procedure Code, Article 173).

Tunisian law also provides for the possibility of a prisoner being tried in absentia (Criminal Procedure Code, Article 175) when the accused fails to appear in person on the date of the hearing. The accused tried in absentia may object to the judgment within ten days of service of the judgment and within thirty days if the accused lives outside the territory of the Republic of Tunisia. When the sentence is capital punishment (i.e., death penalty), the accused who lodged an opposition against the judgement is imprisoned, but the sentence cannot be carried out until the judgment is final.

Limitation periods vary depending on the gravity of the crime committed (offence, misdemeanour or crime). In that respect, the limitation period framework is the following (Criminal Procedure Code, Article 349):

(i) two years for offences;
(ii) five years for misdemeanours; and
(iii) twenty years for crimes.

The limitation period runs either from the date of the final conviction or from the date of notification of the judgment by default if this notification was not made and if it is not apparent from the acts of execution of the judgment that the convicted person was aware of it (Criminal Procedure Code, Article 349).

The limitation period is suspended by any de jure or de facto obstacle preventing the execution of the sentence. In addition, the arrest of the convicted person interrupts the limitation period in the case of a custodial sentence (Criminal Procedure Code, Article 350).

Moreover, Tunisian law provides for presidential pardon. Pardon consists of the remission of a sentence, the reduction of its duration, or the substitution of a lesser penalty provided for by law (Criminal Procedure Code, Article 371). The right of pardon is exercised by the President of the Republic (Criminal Procedure Code, Article 372). Pardon is personal and may or may not be conditional and can only be granted for final convictions (Criminal Procedure Code, Article 373).

3.1.3 Sentencing: Mitigating and Aggravating Factors

Regarding mitigating factors, the court may reduce the sentence below the legal minimum where the circumstances of the act being prosecuted appear to justify a reduced sentence. The court must mention these circumstances in its judgment (Criminal Code, Article 53-1).

Recidivism is an aggravating circumstance. A repeat offender is anyone who, having been convicted of a first crime commits a second crime before five years have elapsed since the first sentence was served, remitted or time-barred. The period is ten years if the two crimes carry a penalty of ten years or more (Criminal Code, Article 47). In the event of a repeat offence, the penalty may not be less than the maximum provided for in the text of the new offence, nor more than twice this figure (Criminal Code, Article 50).

3.2 Sentencing Outcomes

3.2.1 Relevant Legislation

Once the judgement has been handed down, the convicted person must serve their sentence (Criminal Procedure Code, Article 336). Execution of the sentence takes place when the decision has become final (Criminal Procedure Code, Article 338).

The sentencing judge shall visit the prison at least once every two months to find out about the conditions in which prisoners are serving their sentences. The sentencing judge may also in his or her discretion permit the prisoner to leave the prison premises (Criminal Procedure Code, Article 342-3).

When the sentence is a community service order, the sentencing judge in the convicted person's place of residence or that of the court of first instance in which jurisdiction the judgment was handed down (if the convicted person does not reside in Tunisia), will monitor the enforcement of the community service sentence, with the assistance of the prison services (Criminal Procedure Code, Article 336).

Where the death penalty is imposed, the sentence can only be executed if presidential pardon has been refused (Criminal Procedure Code, Article 342).

3.2.2 Suspended Sentences

In the event of a conviction for a misdemeanour or a sentence of imprisonment for a crime, courts may, in all cases where the law does not preclude it, order in the same judgment, giving reasons for their decision, that the sentence be suspended if the defendant has not previously been sentenced to imprisonment for a crime or misdemeanour (Criminal Code, Article 53-13).

However, a suspended sentence may be granted in criminal cases only if the minimum sentence imposed, with the application of mitigating circumstances, does not exceed two years' imprisonment (Criminal Code, Article 53-13).

Suspended sentences do not include payment of trial costs, damages and fines in the case of tax and forestry crimes (Criminal Code, Article 53-16). Moreover, suspended sentences do not include supplementary penalties or disqualifications resulting from the conviction (Criminal Code, Article 53-17).

3.2.3 Monetary Compensation

Tunisian law provides for a mechanism called "*réparation pénale*", whereby a prison sentence handed down by a court may be replaced by a compensation payment, to be paid by the convicted person to those who have suffered personal and direct harm as a result of the offence (Criminal Code, Article 15 quater).

When the court imposes a prison sentence for offences or a sentence of less than six months for misdemeanours, it may replace the sentence with *réparation pénale*. In such a case, two requirements must be met:

(i) the judgment must have been rendered in adversarial proceedings;
(ii) the accused must not have previously been sentenced to *réparation pénale* or imprisonment.

The amount of compensation may not be less than twenty dinars nor more than five thousand dinars, notwithstanding the number of injured parties.

Moreover, *réparation pénale* does not prevent the exercise of the right to seek civil damages, but the court hearing the case must take into account the criminal compensation awarded when assessing civil damages.

The time limit for execution of *réparation pénale* is no more than three months from the date of expiry of the time limit for appeal in the case of judgements handed down at first instance, or from the date of delivery of the final judgement.

Replacing an imprisonment sentence by *réparation pénale* is forbidden for some offences which are listed in the Criminal Code, among which are bribery of a witness and compelling a witness to give false testimony / evidence (Criminal Code, Article 244) or extortion (Criminal Code, Article 284).

3.2.4 Community Service Orders

If the court hands down a custodial sentence of less than one year, the imprisonment sentence may be replaced by community service for no more than 600 hours on the basis of two hours for each day served in prison (Criminal Code, Article 15 bis).

Three conditions must be satisfied for an imprisonment sentence to be replaced by community service (Criminal Code, Article 15 ter):

(i) the accused must be present at the hearing;
(ii) the accused must not be a repeat offender;
(iii) it must be established in court, based on the circumstances, that this sentence is effective in preserving the integration of the accused into social life.

The accused has the right to refuse community service and the court must inform the accused of such a right. In the event of refusal, the court will impose the other sentences provided for (Criminal Code, Article 15 ter).

The sentencing judge determines the work to be carried out by the convicted person, their timetable and the duration of the work. All these points must be submitted to the public prosecutor for approval (Criminal Procedure Code, Article 336).

3.2.5 Imprisonment

The duration of any custodial sentence is counted from the day on which the convicted person is detained by virtue of a conviction that has become final (Criminal Code, Article 15). However, when the convicted person has been held in police custody or has been remanded in custody, this period is deducted in full from the sentence imposed by the judgment, unless stipulated otherwise (Criminal Code, Article 15).

3.2.6 Conditional Discharge

The sentencing judge may propose that certain prisoners be eligible for conditional discharge (Criminal Procedure Code, Article 342 bis).

In order to be granted conditional discharge, (i) the offender must have demonstrated their reformation through their conduct while in prison, or (ii) the release of the offender must be deemed to be in the interests of the community (Criminal Procedure Code, Article 353).

A first-time offender may not be granted conditional discharge until they have served half of their sentence. If the offender is a repeat offender, conditional discharge may not be granted until they have served two-thirds of the sentence (Criminal Procedure Code, Article 342).

Application for conditional discharge may be at the initiative of the following people (Criminal Procedure Code, Article 342):

(i) the sentencing judge;
(ii) the convicted person or one of their ascendants or descendants or their spouse or legal guardian; or
(iii) the prison governor.

The decision of the sentencing judge may be appealed to the indictment division by the public prosecutor within four days of the date on which they become aware of the decision. This appeal suspends the execution of the decision. The indictment division has eight days to give its decision from the date of receipt of the application, and its decision is final (no appeal is allowed against such a decision) (Criminal Procedure Code, Article 342 bis).

Conditional discharge is granted by an order issued by the Minister of Justice on the recommendation of the conditional discharge board (Criminal Procedure Code, Article 356).

The order may require the person conditionally discharged either to (i) remain under house arrest, if they have not been sentenced to the supplementary penalty of a residence ban or administrative supervision, or (ii) compulsory placement in a public service or private institution (Criminal Procedure Code, Article 357).

Furthermore, execution of supplementary sentences begins on the date of conditional release (Criminal Procedure Code, Article 358).

3.2.7 Death Penalty

The death penalty is still in force under Tunisian law and can therefore be imposed as a sentence (Criminal Code, Article 5 a) 1). The death penalty is carried out by hanging (Criminal Code, Article 7).

The accomplice of a person sentenced to death will be sentenced to death as well (Criminal Code, Article 33), unless they are only guilty of receiving the proceeds of the crime, in which case the life sentence will be replaced by life imprisonment (Criminal Code, Article 34).

Criminal law is applicable to offenders over the age of thirteen and under the age of eighteen (in addition to adults), but when the penalty is death or life imprisonment, it is replaced by imprisonment for ten years (Criminal Code, Article 43).

Where the death penalty is imposed and as soon as the sentence has become final, the Republic Attorney General shall bring the sentence to the attention of the Secretary of State for Justice, who shall submit it to the President of the Republic for the exercise of their right of pardon. The sentence can only be executed if pardon has been refused (Criminal Procedure Code, Article 342).

Examples of crimes punishable by death are:

- treason (Criminal Code, Article 60-1 or art. 60-5)

- espionage by a foreigner (Criminal Code, Article 60 ter)
- attempt on the life of the Head of State (Criminal Code, Article 63).

3.2.8 Women

Tunisian law contains a number of specific provisions applicable to women.

For instance, the law expressly provides that pregnant women sentenced to death only serve their sentence after giving birth (Criminal Code, Article 9).

Moreover, apart from the cases provided for by the regulations in force, women who, by gesture or word, offer themselves to passers-by or engage in prostitution, even on an occasional basis, are punished by six months to two years' imprisonment and a fine of twenty to two hundred dinars (Criminal Code, Article 231). Any person who has had sexual intercourse with one of these women is considered an accomplice and is liable to the same penalty (Criminal Code, Article 231).).

Adultery by the husband or wife is punishable by five years' imprisonment and a fine of five hundred dinars. The accomplice is punished in the same way (Criminal Code, Article 236).

Moreover, abortion is punishable by law. The law declares that anyone who, by means of food, drink, medicines or any other means, procures or attempts to procure the abortion by a pregnant or supposedly pregnant woman, whether she has consented to it or not, will be punished by five years' imprisonment and/or a fine of ten thousand dinars (Criminal Code, Article 214). Any woman who procures or attempts to procure an abortion, or who agrees to use the means indicated or administered to her for this purpose, will be punished by two years' imprisonment and a fine of two thousand dinars or one of these two penalties only (Criminal Code, Article 214).

Artificial termination of pregnancy is authorised when it takes place within the first three months of pregnancy in a hospital or health establishment or in an authorised clinic, by a doctor legally practising his profession (Criminal Code, Article 214). After three months, termination of pregnancy may also be carried out if the mother's health or mental balance is likely to be compromised by continuing the pregnancy, or if the unborn child is likely to suffer from a serious illness or disability. In such cases, it must be carried out in an establishment approved for this purpose (Criminal Code, Article 214).

3.3 Appeals

3.3.1 General

Court decisions handed down in respect of misdemeanours or crimes can be appealed (Criminal Procedure Code, Articles 207 and 209). For misdemeanours, only the court’s substantive decision on the charges or the jurisdiction can be appealed. This limitation does not apply with respect to crimes (Criminal Procedure Code, Article 209).

3.3.2 *District Court to High Court, or High Court to Court of Appeal*

The persons who can appeal decisions of a District Court to the High Court, or decisions of the High Court to the Court of Appeal, include a defendant convicted of a crime or a misdemeanour and the party found civilly liable; the civil claimant as regards its civil interests only; the public prosecutor; the administration and financial subdivisions as representative of the State

prosecution office as authorized by the law to proceed directly with public lawsuit; and the Appeal Court's prosecutor general.

The time limit for filing an appeal is, absent "*force majeure*":

(a) for convicted defendants, 10 days from the date of the court's decision (Criminal Procedure Code, Article 213); and
(b) for the public prosecutor and the Appeal Court's prosecutor general, 60 days from the date of the court's decision (Criminal Procedure Code, Article 213).

The enforcement of the original court decision is suspended during the period within which a party can file an appeal as well as the period during which the determination of the appeal is pending. Nonetheless, any detention warrant remains in force until the expiry of the sentence rendered by the first instance court and, if the appeal has been lodged by the public prosecutor, until a decision is rendered by the Court of Appeal (Criminal Procedure Code, Article 214).

3.3.3 Outcome of appeal

If the public prosecution appeals, the Court of Appeal may uphold or overturn the first instance decision (in whole or in part) in favour of or against the defendant. If a convicted defendant or the party civilly liable appeals, the Court of Appeal may not increase the appellant's sentence on appeal. If the appeal is lodged by a civil claimant, the Court of Appeal may not modify the decision to the detriment of the appellant (Criminal Procedure Code, Article 216).

3.3.4 Appeal to Supreme Court

Decisions of the Court of Appeal can be appealed to the Supreme Court by:

- a convicted defendant;
- the party civilly liable;
- the civil claimant as regards its civil interests only;
- the public prosecutor;
- Tunisia's attorney general; and
- the Appeal Court's prosecutor general (Criminal Procedure Code, Article 258).

The abovementioned persons are entitled to challenge the definitive decisions of the Court of Appeal rendered on the substance, even when already enforced; for lack of jurisdiction; abuse of power; or violation or wrongful application of the law (Criminal Procedure Code, Article 258).

The time limit for filing an appeal to the Supreme Court is, absent force majeure (Criminal Procedure Code, Article 262):[20]

(a) for a defendant sentenced to death, 5 days;
(b) for a convicted defendant, the party civilly liable and the civil claimant as regards its civil interests only, 10 days from the date of the Court of Appeal's decision; and

[20] However, the prosecutor general at the Supreme Court may file an appeal "*in the interests of law*", even after expiry of the appeal deadline, if there was a "*legal flaw*" in the proceedings that the parties did not appeal prior to the expiry of the appeal deadline (Criminal Procedure Code, Article 276).

(c) or the prosecutor general at the Supreme Court, 60 days from the date of the Court of Appeal's decision.

Further, for appeals filed by anyone but the public prosecution, the appellant's lawyer must file a statement setting out the reasons for the appeal within 30 days of the date of the Court of Appeal's decision (Criminal Procedure Code, Article 263 bis).

Except for death sentences, a decision ordering the destruction of any evidence deemed to be fraudulent or cancelling its effect, or a decision voiding a marriage, an appeal of a decision by the Court of Appeal to the Supreme Court does not suspend the enforcement of the Court of Appeal's decision (Criminal Procedure Code, Article 265). A decision by the Supreme Court to reject an appeal cannot be appealed further (Criminal Procedure Code, Article 266).

Tunisian criminal procedure includes a mechanism which allows the State Secretary of Justice, the convicted defendant (or his representative in case of incapacity) or his/her partner, children or heirs, to petition any decision rendered by any court in the following situations (Criminal Procedure Code, Article 278) :

- when, in a case of conviction for homicide, documents or supporting evidence are presented that constitute compelling proof establishing that the person alleged to be killed is alive;
- when, after an individual is convicted, another individual is convicted on the same charges, the contradiction between the two convictions establishes the innocence of one of the two convicted individuals;
- when, after the conviction, a witness who testified against the convicted individual is prosecuted and convicted for perjury, and this witness cannot give evidence in further court hearings; or
- when, after the conviction, a new fact emerges or unknown documents at the time of the trial are produced and may establish the innocence of the convicted individual or may prove that the offence is less serious than that for which the individual was convicted (Criminal Procedure Code, Article 277).

The petition for review is open solely for the reparation of a factual mistake committed to the detriment of an individual convicted of a crime or a misdemeanour (Criminal Procedure Code, Article 277).

3.4 Judicial Review

Since Tunisia's legal system is based on the French model, the mechanism of judicial review is not the one that can be found in common law countries.

However, one mechanism can be compared to US-style judicial review which is constitutional review ("*contrôle de constitutionnalité*" in French). The review of the constitutionality of laws is an *ex ante* judicial review, designed to ensure that laws comply with the Constitution. Tunisian law provides for such review for laws and treaties and the Constitutional Court will carry out the constitutionality review (Constitution, Article 127).

The Court shall give its decision by a two-thirds majority of its members within thirty days of the date on which the action for unconstitutionality was lodged (Constitution, Article 128).

Resources……

Domestic Laws/Ordinances/Regulations
A. Constitution
B. Penal Code
B. Code of Criminal Procedure Act
C. Evidence (Special Provisions) Act

International Treaties
A. International Covenant on Civil and Political Rights
B. Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
C. Optional Protocol to the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment
D. International Convention for the Protection of All Persons from Enforced Disappearance
E. United Nations Convention on the Rights of the Child
F. Convention on the Elimination of All Forms of Discrimination against Women

International Declarations/Principles/Guidelines
A. Universal Declaration of Human Rights
B. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders
C. United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems
D. United Nations Basic Principles on the Role of Lawyers
E. UN Nelson Mandela Rules – The Standard Minimum Rules for the Treatment of Prisoners
F. International Bar Association (IBA) Standards, Guidelines or Principles
- IBA International Principles on Conduct for the Legal Profession (2018)
- IBA Standards for the Independence of the Legal Profession (1990)

Appendices……

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