



The Office of the Attorney General  
of The Republic of Somaliland



## **A Reference Manual for Prosecutors**

Criminal Justice Compendium  
for Somaliland



**UNODC**

United Nations Office on Drugs and Crime

# **A Reference Manual for Prosecutors**

## **Criminal Justice Compendium for Somaliland**

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Having declared independence from the Republic of Somalia in 1991, and formed the Republic of Somaliland, a major challenge for the new government was to establish a practical criminal justice system and process. The first steps in this regard included the adoption of the Somaliland Charter, which in turn was replaced by the Constitution in due course, and the retention of the Somali Penal Code.

The **Penal Code** drafted for the Republic of Somaliland, and which came into effect in 1964, remains the main legislation for the prosecution of criminal offences. There is a qualification to its application however, provided by **Article 130(5) of the Constitution of the Republic of Somaliland** which states:

*'All the laws which were current and which did not conflict with the Islamic Sharia, individual rights and fundamental freedoms shall remain in force in the country of the Republic of Somaliland until the promulgation of laws which are in accord with the Constitution of the Republic of Somaliland. At the same time, laws which conform to the Constitution shall be prepared, and each such law shall be presented within minimum time scales set by the House.'*

This condition for the application of the **Penal Code** may allow for some flexibility in the way in which crimes can be prosecuted, as the Republic of Somaliland adopts developing expressions of individual rights and fundamental freedoms, as well as interpreting and upholding the requirements of Sharia'h law. However, there is no specific reference as to how any conflict in applying the law will be identified, or the mechanism by which resolutions to such conflicts will be remedied and put into effect consistently. This situation leads to significant gaps and uncertainty in the Somaliland criminal justice system that are difficult to rationally and uniformly account for without further legislative action, which has not, to date been taken.

The task to construct an effective criminal justice system in Somaliland following its break away from the republic of Somalia also demanded the establishment of institutions capable of working together to allow the citizens of Somaliland access to justice and to permit the authorities to promote rule of law. This also appears as a work in progress at the current time, with the relationships between the Ministry of Justice, Supreme Court and Attorney General's Office becoming more apparent with time and practice. The existence of a constitutional Judicial Commission assists, although it may be argued that there is some confusion between the roles of the Commission as it affects the authority of the Attorney General and the Chief Justice. Additionally, there may be scope for clear conflicts of interest in the prescribed duties of the Judicial Commission, and the roles to be played by the commission members who are officers allied to the Supreme Court, Office of the Attorney General or Ministry of Justice.

The need for a practical, working distribution of responsibilities is obvious in the lack of a case management process in the conduct of prosecutions. This applies to ineffective file management within the respective offices dealing with criminal prosecutions, as well as the lack of a coherent system for the lodging, listing and hearing of criminal matters in court. Much of the prosecutors' day can be spent waiting outside of court, waiting for a case to be called on. Often cases may not be dealt with even though the defendant, witnesses and prosecutor are waiting at court. This may be due to the number of cases that the court is required to deal with, and the inefficiency of listing matters before the court. However, this is the situation of the courts that

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this Manual seeks to advise upon, and the prosecutor must prepare to deal with this set of circumstances in the best way possible, and with the appropriate means that may be available.

The above situation may be remedied by legislative developments, or by practical, organizational efficiencies to encourage coordination between the respective institutions and agencies. However, as laws and practice stand in Somaliland, there are gaps to be filled, and the process is neither wholly consistent nor supportive of independence on behalf of the agencies involved. There has been some confusion over the passing into legislation of two versions of the **Law on the Organization of the Judiciary** that urgently requires legislative remedy. This represents, together with a need for the legislature to bring the **Penal Code** up to date, a specific duty for the Somaliland Parliament, which has yet to be carried out.

This Manual aims to advise the prosecutor on how the prosecution process can be conducted in a fair and professional manner given the gaps that exist in the process, and in the current laws. It also seeks to set out guidance for working processes that will strengthen the integrity of the prosecutors' function, and accommodate development of the criminal justice system. The proposal is that the Manual is reviewed and updated to ensure that changes in guidance and practice are taken account of, and that the instruction to prosecutors throughout Somaliland is up to date and well informed.

The Manual is a document that reflects the participation of the Office of the Attorney General in the criminal process, and it is the responsibility of the Attorney General to ensure that it is properly maintained, and that prosecutors are trained in, and made aware of, the standards of practice expected of them. It is the benchmark for prosecutors in Somaliland.

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AG:	Attorney General
AGO:	Office of the Attorney General
CRC:	Children’s Rehabilitation Center
CJS:	Criminal Justice System
CL:	The Companies Law of Somaliland (2004)
CoC:	Code of Conduct and Disciplinary Rules for Somaliland Judges and Prosecutors (2011)
CPC:	Criminal Procedure Code (1963)
DAG:	Deputy Attorney General
IAP:	International Association of Prosecutors
JJL:	Juvenile Justice Law
LC:	Litigants' Charter
LOJ:	Laws on the Organization of the Judiciary (2008)
PC:	Penal Code (1962)
SGBV:	Sexual & Gender Based Violence
Sh.So.:	Somali Shillings
UDHR:	Universal Declaration of Human Rights (1948)
UN:	United Nations
UNODC:	United Nations Office on Drugs and Crime

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# I. Administrative Section

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## 1. Introduction

### 1.1 Objective

The Reference Manual for Prosecutors (hereinafter referred to as “*the Manual*”) is designed to be a readily available toolkit to assist prosecutors in the day-to-day performance of their duties, in a practical and accessible way. An objective of the Manual is to inform consistent and professional decision making and practice in the conduct of a criminal prosecution by the Office of the Attorney General (AGO) of the Republic of Somaliland. It is intended that the Manual is published and issued to each prosecutor working in the AGO. It is further intended that training on the contents, application and relevance of the Manual will be delivered to all prosecutors to whom it is issued, focusing on its use, updating the contents and the context in which it will be used.

The Manual will set the minimum standards for the assessment of the performance of AGO Prosecutors. It is written guidance on activities in the prosecutors’ general field of work, it is formally approved, and it is available to all prosecutors. The conduct of a case by a prosecutor that does not comply with the authorized guidance contained in the Manual will signal a break from the practice, guidance and standards promoted by the AGO as an institution of the Somaliland Government.

It is emphasized that the Manual is a developing document that needs to adapt to the frequent changes in the Criminal Justice System, whether they are legislative, practical or of any other nature. It is important that the AGO is responsible to promptly update the contents of the Manual to reflect any changes that affect it, and inform prosecutors of any amendment appropriately. This may be through a directive, or through training should the change be substantive and require that level of guidance and direction. The Manual is structured in independent sections to allow each to be modified as required, without negatively affecting other sections of the Manual.

It is therefore necessary for the AGO to regularly review the contents of this Manual, and the implementation of new initiatives and legislation in the Criminal Justice System. This function is assisted by the establishment of the Training and Development Committee (the Committee)<sup>1</sup> which is authorized to make executive decisions on the Manual and its contents, and will be held responsible for managing the dissemination of information on changes in its content to all AGO prosecutors. Such dissemination needs to be comprehensive, universal and timely, with the Attorney General (AG) giving the weight of his authority to the directives of the committee. The development of the Manual should be an exercise in delegated authority and strategic planning.

The over-riding objective in the implementation of, and adherence to, the Manual is an assurance that prosecutions will be conducted transparently, consistently and to a high professional standard in accordance

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1 The Training and Development Committee is chaired by a Training Officer designated by the Attorney General.

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with the guidance in the Manual. It is the responsibility of the AGO management to ensure that the Committee is effective in keeping the Manual up to date and accurate.

## 1.2 Structure of the Manual

The Manual is organized so that the respective areas of activity for prosecutors are dealt with in a recognizable order:

### 1.2.1 The Administrative Process

The Manual in the first instance deals with the background and practicalities of the work of the prosecutor. The function of the AGO in assisting the prosecutor to perform the professional duties required calls upon an administrative structure that is effective, transparent and principled. The AGO will seek to provide a prosecution service that is consistent and neutral, ensuring equality before the law in Somaliland, with a fair and open dispensation of justice.

The administrative requirement of prosecutors' work is a fundamental, important and practical element for prosecutors to understand so that they can effectively perform their duties. The aim in this part of the Manual is to provide guidance on key areas of responsibility, so that they are understood as necessary to the integrity of the prosecutors' purpose, and as a contribution to the sound judgment in, and management of, criminal cases brought before the courts for prosecution.

The objective is therefore that all prosecutors have guidance on their role in the larger criminal justice process, and on how to conduct themselves to an appropriate standard.

The Administration Section examines the following areas:

- The scope of the Manual, and how it should be maintained and applied in practice;
- The function and duties of the AGO, including the responsibility for advocacy (procuracy), and statutory duties, and
- The management of cases, including interaction with other agencies to ensure that prosecutions are conducted efficiently and fairly.

### 1.2.2 Professional Standards and Procedure

The presentation of a prosecution case is the most visible element of the work of a prosecutor. The administrative process exists to support the prosecutor in the important tasks of assessing the evidence against the accused, making the professional decision to proceed with a prosecution or not to do so, and then being responsible for justifying that decision within the rules and guidelines that exist to make sure that it is fairly made, and represents justice. The process requires a prosecutor to interact with other members of the criminal justice system, and to operate both according to law, and to standards that are expected of the prosecutor as a professional person, and as someone who acts on behalf of the state.

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The objective of this section of the Manual is to provide guidance on:

- The role of the prosecutor, including:
  - The criminal prosecution process.
  - Criminal File Review.
  - Strategic Case Planning.
  - The Penal code.
  - Advocacy.
  - The Conduct of a Case.
  - Appeals.
  - Defense Representations.
- Ethics and Professional Conduct.
- The Role of the Police.
- The Role of the Defense.
- The Court System.
- Prison Monitoring and Inspection.

The professional obligations of prosecutors go further than assessing and organizing the evidence produced by an investigation for a decision to prosecute to be made. The prosecutor must also be aware of sensitive issues that arise in cases, and deal with such issues professionally and appropriately. Specific reference is made to crimes involving children and young adults, as well as those concerning sexual offences and gender-based violence (SGBV). Although in such instances the prosecution process maintains the same standards, the procedures available to assist the protection of vulnerable witnesses, and those needing protection, are covered in the Manual.

### **1.3 Management of the Manual**

The Manual is intended to represent AGO policy guidance to prosecutors in the field on the conduct of their duties. To be effective, the document must be able to change and adapt as the laws change, and as new processes and methods of practice develop. The AGO will, as part of a training development strategy, have a duty to update the Manual as legislation and/or practical policy develops. As outlined above, the Training and Development Committee exists to ensure that the advice and guidance that the AGO provides to prosecutors is current and up to date.

The AGO also has a duty to ensure that any updates to the Manual are readily available and are distributed to prosecutors, additionally making sure that training needs arising out of any changes that require further instruction are met and delivered. The draft law currently being considered to define the role and scope of the

AGO is one circumstance in which the Manual will need some fundamental amendment, which will need to be promptly and authoritatively done.

The Training and Development Committee has an important role to play in ensuring that the management requirements of the Manual are carried out. This will include not only the prompt updating of its contents, but also broader issues such as ensuring that the Manual and the Prosecutors' Curriculum are consistent with each other, and that the planning and strategy of AGO training proposals are well planned and take account of any modifications to the Manual. The Committee must implement and modify the AGO training agenda as circumstances dictate.

#### 1.4 Application

It is essential that the Manual is universally applied across Somaliland. The Manual represents the acceptable standards of practice for prosecutors in their professional function, so that prosecutors will explain their conduct of a case with reference to the processes referred to in the Manual. The setting of standardized practice across the AGO will allow consistency in prosecution delivery across Somaliland, with a reasonable expectation of the same application of the prosecution process, whether in Hargeisa, Erigavo, Gabilay or elsewhere in the Republic of Somaliland.

Currently the first instance District courts in Somaliland are not served by AGO prosecutors presenting prosecution cases, but by representatives of the local Police Authority. Prosecutions in the District Courts are presented by police officers, and are outside of the work assigned to any of the Deputy Attorney Generals (DAGs), or their formal Police Prosecutor colleagues in the Regional Courts (or higher Appeal or Supreme Courts<sup>2</sup>). This situation may in due course change as the AGO grows in authority and in numbers, so that it becomes the institution of state that prosecutes all allegations of crime. It is important that broad, consistent standards of practice are recognized, applied and capable of being monitored for this expansion of AGO operations to be effective and well managed.

To service the prosecution requirements of Somaliland, the AGO will require a significant increase in qualified prosecutors, held to the professional standards of practice that the Manual is designed to implement, to ensure a consistent service in all prosecution offices and courts. The Manual is the bench mark that prosecutors will be expected to work to, and represents the consistency that should be evident across Somaliland in establishing the quality of decision making that is required of state prosecutors. This development is in conjunction with

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2 Article 12(2) of the Criminal Procedure Code provides:

*In Court proceedings, the Office of the Attorney General shall be represented by:*

- a) *the Attorney General or one of his Deputies before the Supreme Court and the Military Penal Sections of the Courts of Appeal and Regional Courts;*
- b) *the Attorney General or one of his Deputies or a Police Officer designated by the Attorney General before the Assize and General Sections of the Courts of Appeal and Regional Courts;*
- c) *the Officer commanding the Police or the Finance Guards within whose jurisdiction the Court is situated or another Police Officer designated by him, in conformity with the functions attributed to the latter by law, before the Criminal Section of a District Court.*

the AGO strategy for the development of a strategy to promote the professionalism of the AGO. The strategy will also include the implementation of a Prosecutors' Curriculum for those Law Graduates recruited by the AGO, as well as a statute to clearly define the function of the AGO. These projects are supported by the United Nations Office for Drugs and Crime (UNODC), as are related engagements with the Judiciary in the form of Sentencing Guidelines, the promulgation of a Litigants' Charter and Police training to improve the quality of evidence gathering.

## 1.5 Overview

The standards that the Manual is designed to set are an integral part of AGO planning to professionalize its activities, in terms of its overall strategic institutional development and professionalization. It also reflects the standard of delivery of sound prosecutions within the criminal justice system. Standardizing the core function of the office is a strong statement by the AGO of its' will to develop efficient professional processes, and to encourage transparency and responsibility for outcomes.

Alongside the Prosecutors' Curriculum, the Manual sets a clear quality level upon which the AGO is to be assessed. It allows prosecutors, and those dealing with prosecutors, to gauge their reasonable expectations of AGO performance. By providing guidance to achieve expected standards, the AGO can progress to confidently plan for growth.

Establishing a good and transparent standard is a significant step towards achieving the level of independence that a competent and responsible prosecution office requires to work effectively. It also communicates a message of professional standards to the public.

To maintain its independence, and to maintain a strategic direction, the AGO must show ownership of this process, and ensure that it is controlled, and responsive to changes, such as the impending Office of the Attorney General AGO Law, and other statutory developments, or amendments to practice that may be necessary.

## 2. Duties of the Office of the Attorney General

### 2.1 Prosecuting Criminal Cases

**Definition of Prosecutor:** "One who prosecutes, especially in a criminal court; ...law officer conducting criminal proceedings in public interest."<sup>3</sup>

This definition reflects the role of the prosecutor in Somaliland. The AGO prosecutor conducts proceedings in criminal cases against suspected offenders on behalf of the public, as a public official. The decision of the prosecutor to prosecute an individual is not a personal decision – it is a professional decision, and it is taken on behalf of the public at large – the Republic of Somaliland.

**Definition of prosecution:** “...Institution and carrying on of criminal charge before court; carrying on of legal proceedings against person.”<sup>4</sup>

This definition also represents the main function of the Somaliland prosecutor in accordance with **Article 69 of the Criminal Procedure Code (1963)(CPC)**, which provides:

#### *Duties of the Attorney General*

*Except as otherwise provided by law, the Attorney General shall initiate penal proceedings against an accused person.*<sup>5</sup>

*The fundamental role of the AGO prosecutor in Somaliland is therefore to institute and prosecute criminal cases with the authority of the AG. This function is currently expanded upon by a number legislative authorities.’*

## 2.2 The “Xeer-ilaalinta”

**Article 103 of the Constitution of the Republic of Somaliland (2001)** provides that: ‘*The “Xeer-ilaalinta” of the state shall consist of the Attorney General and his deputies.*’

This designation empowers the AGO to uphold and defend the laws of Somaliland. This includes a duty to prosecute those who are accused of breaking the laws so that, if found guilty by a court they may be punished according to the law. It is to be noted that prosecutors in this role also have other duties and functions to perform referred to in the paragraphs below.

## 2.3 Statutory Duties

A list of AGO responsibilities is contained in the **Law(s) on the Organization of the Judiciary (2008)(LOJ) at Article(s) 45/49**<sup>6</sup>:

#### *Roles and Responsibilities of the Attorney General*

1. *The Office of the Attorney General shall take care of and protect national laws, civil rights of orphans and poor people who cannot defend themselves before the courts.*
2. *Shall participate and represent the state in all criminal cases.*
3. *Order the investigation of criminal cases the police and its investigation departments.*

<sup>4</sup> The Concise Oxford Dictionary (Oxford University Press).

<sup>5</sup> This is read as the Attorney General being represented by the prosecutors in the AGO. That is the Deputy Attorney Generals, as provided for by Article 12(3) of the Criminal Procedure Code.

<sup>6</sup> There are currently two active Laws on the Organization of the Judiciary operative, both signed as Law in 2008. One contains 49 Articles, the other 60 Articles. Both statutes are recorded as Law number 24 of 2003. Many of the provisions are broadly duplicative. When cited in this Manual the Article in the 49 Article Law will be followed by the corresponding Article in the 60 Article version as follows – Article x/y of the Laws on the Organization of the Judiciary.

4. *For the sake of public interests he shall take part in civil litigations that obliged by the law and can appeal against the decisions of the court.*
5. *Shall monitor and supervise the living conditions, health and sanitation of the prisons and other detention centers and submit its findings to the relevant bodies and shall follow up to that end.*
6. *Shall prosecute the members of the House of Representatives and the House of Elders (GURTI) and Ministers after depriving their immunity.*
7. *Shall submit to the president of the republic the accusation of Ministers and Vice Ministers.*
8. *The office of attorney general shall have senior registrar responsible on information on criminal incidents in the country.*
9. *Shall guide the police in investigation of criminal cases.*
10. *Shall appoint the representatives of the attorney general office in all regions.*
11. *Shall recruit the necessary staff for the Office of the Attorney General in accordance with the civil servant law.<sup>7</sup>*

**Article 45/49(1) (LOJ)** above imposes a duty to protect national laws, and to represent vulnerable litigants by protecting the “...civil rights of orphans and poor people who cannot defend themselves before the courts.” This duty does not consider whether there could potentially be any “conflict of interest” in such an arrangement – for example, if an allegation of a breach of human rights affecting an orphan or poor person was alleged to be through the act or omission of the AGO. Nonetheless, the responsibility to provide such protection is placed on the AGO according to this law.

While **Article 45/49(2) (LOJ)** affirms the AGO responsibility for the prosecution of criminal charges before the courts, **Article 45/49(3) (LOJ)** further empowers the AGO to order police investigations. This responsibility should be tied in with provision of **Article 17 of the LOJ**:

***Authorities to whom Complaints and Reports regarding Offences shall be made***

*Information, complaints and reports of offences shall be made to a Judge, to the Office of the Attorney General or to any Police Officer.*

**Article 25 (1)(a) of the LOJ** requires a police officer on receipt of information relating to the commission of an offence to immediately “...notify the Office of the Attorney General and the competent court.” **Article 25(4) of the LOJ** requires that the AGO be informed of any warrants of arrest, search or seizure sought from a court by the investigating police officers at the time of an application for a warrant to the court. The AGO can therefore assume responsibility for directing investigations by police, and should in all cases be informed by the police of relevant information concerning the commission of offences.

<sup>7</sup> The text of Article 45 of the 49 Article LOJ does not include the **bold** text. This is text from Article 49 of the 60 Article LOJ, which is otherwise identical to the 49 Article version.

**Article 45/49(4) of the LOJ** gives to the AGO a duty to act in civil proceedings as required by law, while **Article 45/49(5) of the LOJ** makes the AGO responsible for inspecting and monitoring prisons with regard to health and sanitation standards. This duty is referred to in more detail later in the Manual. The duty and authority to be exercised by the AGO with regard to prisons and prisoners are further provided by **Article 14 of the Prison Law (1971)**.<sup>8</sup>

**Article 45/49(6) & (7) of the LOJ** refers to the AGO being the agency that deals with accusations made against appointed or elected officials, whether from the House of Representatives, House of Elders (Gurti) or where the accused are Ministers or the Vice President. This involves a constitutional process, as these categories of person have constitutional immunity from investigation and prosecution (under **Article 49 of the Constitution** for the House of Representatives, **Article 66 of the Constitution** for the House of Elders and **Article 94 of the Constitution** for the Council of Ministers).

**Article 45/49(8) of the LOJ** identifies the AGO as the formal Registry for records of “*criminal incidents*.” This gives the AGO responsibility for a substantial area of criminal intelligence, and for a potential source of antecedents concerning offending in Somaliland, and offenders, which may be essential to effective sentencing practice. This responsibility should be considered in conjunction with the provisions of **Article 260 of the CPC** that provides:

#### ***Criminal Records Office***

1. *There shall be one unified Criminal Records Office, which shall be a section of the Headquarters of the Police Force. It shall be under the immediate direction and supervision of the Attorney General.*
2. *In the Criminal Records Office, there shall be kept extracts of orders or other measures referred to in articles 261 and 262, given by a Court of the Somali republic, as well as by foreign Courts which have been recognized in accordance with law.*
3. *Extracts of orders or other measures concerning foreign or stateless persons shall be kept separately in the Criminal Records Office.*

According to the law the AGO therefore has a duty to manage and directly supervise a Criminal Records Office/Registry.

**Article 45/49 (10) and (11) of the LOJ** gives the AGO authority to appoint its own staff, assign prosecutors to the regional offices and to recruit support service staff. In terms of institutional independence prosecutors, or Deputy Attorney Generals (DAGs), are not under the ultimate authority of the AGO, or the AG in person. In accordance with **Article 108 of the Constitution** this is the responsibility of the “*Judicial Commission*”, chaired by the Chief Justice.

<sup>8</sup> A newly drafted Prison Law is currently with Parliament, and has been for some time. It is yet to be passed by the Parliament and signed by the President as legislation.

The AGO has a regulatory role in relation in the field of business in Somaliland. **Article 8(e) of the Companies Law of Somaliland (2004)** states that the “*Articles of Association*” of a company must be:

*‘Signed by each subscriber of the memorandum before the Attorney General in the presence of at least one witness who must attest the signature.’*

**Article 11(1) of the Companies Law 2004** states:

*The company’s memorandum and articles, if any, shall be delivered to the Registrar of Companies at the office of the Attorney General in Hargeisa.*

*The AGO is given a statutory to act as a Registrar of Companies. This is an active role requiring the witnessing of signatures to the Articles of Association of registered companies, and the archiving the legal records of these registered companies. The responsibility is specifically assigned to the AGO in the **Companies Law (2004)**, and not to the Ministry of Commerce or other business or finance government agency.*

### 3. Case Management

An integral part of the administrative function of the AGO is the ability to manage an effective framework to help the prosecution process to function effectively. This will involve an administrative structure that makes sure that case files are in the right place, and with the correct person when they need to be, so that they are available for review work, court proceedings, and any other part of the process. A Case Management System (CMS) that is capable of tracking the progress of cases, and locating files, as efficiently as possible is a necessary assistance to the administrative function of the AGO. CMS needs to be adaptable and flexible, but also robust and reliable in simply providing a mechanism to track and update the status of cases, and ensure that files are stored in a systemized way.

A second element of Case Management involves the ability to organize, in coordination with other criminal justice agencies, the listing and schedule for court hearings as effectively and constructively as possible. This may involve communication across a number of areas; court administration for the listing of cases; police authorities for the attendance at court of officers in the case; witnesses need to be informed to attend court when required; prison authorities need to ensure that detained defendants are produced to the court for proceedings and so on.

#### 3.1 The Case Management System (Files) CMS

There have been efforts to implement a CMS or the AGO, and the current system is being re-evaluated and revised. The basic system is not currently computerized, and relies on Manual records maintained by staff in the Case Registry, following files being allocated by the “*Chief Prosecutor*” (the senior DAG) in each Prosecution Office.

The CMS has concentrated on three of the seven nominated Regional Prosecution Offices<sup>9</sup> in Somaliland: Hargeisa, Borama and Burao. To date, implementation has been mixed, as a very basic system to track and account for prosecution files begins to emerge. The CMS as it stands, and despite being a relatively recent implementation, is already in need of radical reform – as such this section of the Manual should be updated as improvements are made, and the CMS updated.

### 3.2 File Registration

The **Laws on the Organization of the Judiciary Article 45/49(8)** requires that:

*‘The office of attorney general shall have senior registrar responsible on information on criminal incidents in the country.’*

At present the AGO also has the service of a Case Management Supervisor/Coordinator to assist in the registration of files and the operation of CMS.

On receipt of a case file from the Police, AGO Prosecution Office administrative staff in the AGO Registry, enter the details of the case in a Register or Registration Book. This is a formal process to acknowledge receipt of the documentation. Following this process the file is placed in a file jacket or cover that will contain details of the allegation and the name of the accused. The registration number assigned to the file by the police investigation unit is recorded as a part of this process, and is used by the AGO to ensure that there is consistency of case identification throughout the course of the investigation and subsequent review of the evidence by the prosecutor(s) involved.

The specific information recorded in the file register comprises the following:

- Personal details of the accused (name, address, age);
- Description of the offence alleged against the accused with the relevant time/date/location, and
- Any specific legal provisions that apply to the case in the view of the Police Officer in charge of the case.

In situations where there are multiple offenders, the registration process requires that all accused are dealt with in the same registration process, and that all suspects/defendants are allocated the same case reference. It is essential that the reference applies to the case and not to individual suspects/defendants. This will ensure that all accused in a case involving more than one suspect/defendant, are then registered, filed and retained together for the prosecution of that case, as hearings in that case will generally be heard by the courts against all defendants at the same hearing (the evidence of the incident applying to a single event involving multiple parties). The reference is allocated to “*the case*” and should not be considered as applying to individual parties involved.

9 The seven Regional Prosecution Offices are located in; Hargeisa, Boroma, Burao, Gabilay, Berbera, Las Anod and Erigavo.

- Similarly, if an allegation involves one suspect but numerous victims or injured parties, arising out of a single event, there will be one case registration detailing various allegations arising out of that single incident. The process will therefore deal with one event, and one case investigation and one case review by prosecutor. There needs to be only one registration for one file.
- In the event that a suspect has allegedly committed a number of separate offences, even if they are identical in nature, over a period of time, then a separate file will usually be required for each separate event, and each investigation. This does not mean that such cases cannot be joined together in due course if it is in the interests of justice to do so. However, as the investigations are separate, and the incidents are separate, the registration of the case file arising out of each incident and investigation may also be separate.<sup>10</sup>
- In addition to the Case Register, there also exists an “*Internal Register*”, containing a record of the information received by the AGO in relation to each registered case. The purpose of the Internal Register is to provide a reference for the acknowledgment of receipts, for the movement of the case file within the Prosecution Office, and the activities conducted on the case between the Prosecution Office, the Courts and the Police. The Internal Register provides both a very simple case tracking system, and a record of submissions of information for the case file, as it provides information such as when the file arrived with the AGO, the prosecutor that the case is assigned to, and records of the times when the case has been actively worked on, or taken to court (or elsewhere). If the data required by this register is completed as intended, it provides a “*life history*” of the case, which may help any future enquiries into conduct of the case.
- Following registration of the case it will be forwarded to the designated Head of the Prosecutors’ Office for allocation to an individual prosecutor, who will then have responsibility for the conduct of the case through review and prosecution.

### 3.3 File Content

The content of the file submitted to the AGO by the police is set out by **Article 23(3) of the CPC** that specifies the following information as having to be sent to the AGO on closure of the police investigation:

*A report by the senior Police Officer at the Police Station that has conducted the investigation containing:*

- a) *the facts of the case, and any surrounding circumstances which may affect the criminal proceedings;*
- b) *details of the evidence obtained;*
- c) *personal details or any other information useful in identifying:*
  - i. *the accused,*

<sup>10</sup> If the separate incident involves a series of events that form a part of the same investigation – then it may be that one registration is justified as this will involve the submission of one case file by the police arising out of a single investigation. However, separate incidents, individually investigated and amounting to separate allegations against the same suspect will generally result in separate case submissions, and therefore separate registrations. A defendant may plead Guilty to some allegations and not to others – which may result in separate trials.

- ii. *the injured party,*
- iii. *any person having information concerning the circumstance of the offence;*
- d) *the investigation diary;*<sup>11</sup>
- e) *the records relating to the investigation;*
- f) *materials objects seized in the course of the investigation.*

In addition to the statutory material above, a prosecutor may require further material on which to base prosecution decisions and make a “*case plan*.”<sup>12</sup> The information a prosecutor may consider requesting to build a case would include material such as the following;

- any other police orders and enquiries;
- any prosecution orders and reviews;
- any court orders and decisions;
- witness information and statements, and
- any additional reports, material evidence or other related documents.

It is strongly advisable that work is done to establish an order for the contents of a prosecution file. It would be most effective if the police put the file together in an agreed, logical order, and this order is checked by the AGO on receipt, and maintained through the process. This may require an agreed “*Standard Operating Procedure*” with the police authorities, but would allow consistency of practice, and make dealing with any cases a more familiar activity, as those needing to access files will know the order of papers, and will recognize where to locate what they are looking for, or note documents that are missing. This is not the case at present. There is no system that applies to file contents, and each file relies on those dealing with it to order the contents as they find appropriate, and not in a uniform, systemized way.

The review of the case file that will be conducted by the prosecutor will include decisions on whether a prosecution should proceed, and if so, on the strategy that will be used to prosecute. This may involve communication with the police to request further information, or clarification of material submitted with the file or for the submission of missing material. It may also involve directions to the police for further enquiries

<sup>11</sup> Article 25 of the CPC requires the completion of an Investigation Diary:

*The police Officer undertaking the investigation shall daily record the details of the investigation, in the appropriate diary, mentioning specifically:*

- a) *the date of the beginning and end of the investigation;*
- b) *the action taken during the investigation;*
- c) *the circumstances arising from the investigation;*
- d) *the evidence obtained.*

*Any warrants or orders received from any superior, a Court or the Office of the Attorney General, shall likewise be recorded.*

<sup>12</sup> See section on Case Review below for further guidance on case plans.

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and investigation to take place, as authorized under **Article 12(4) of the CPC**.<sup>13</sup> It would be good practice to ensure that the file is organized so that the documentation between the prosecutor and the police, as well as the prosecutor and the defense, or the courts, or any other entity connected to the case, is retained and accessible in an ordered manner, for example if such material was separated in a correspondence or case work area within the file.

The prosecutor will also bear in mind the duty owed to the defense in considering the evidence submitted by the police as a result of the investigation. For instance, there is a duty to inform the defense of exculpatory evidence as required by Article 10 of the CoC, which is discussed in paragraphs 133 and 134 above.

### 3.4 File Storage/Location

There is currently no established system for file storage, and there is no adequate tracking system to identify the location of a file at any specific time - beyond the fact that files are allocated to individual prosecutors who are likely to have them under their control, probably by their desks. This is despite the CMS trying to implement a system whereby:

- Files are received in a central registry at each Prosecution Office, where they are registered on receipt from the police by the AGO Registry (Administrative) staff in the Register Book, and also in the Internal Register (see above).
- Any additional material submitted after registration is processed through the Central Registry, and will have to be linked to the original file at some stage.
- The Regional Prosecution Offices are single offices in the main provincial centers where the prosecutors deal with the Regional and Appeal Courts. There is an opportunity for a well supervised, centralized file tracking and storage system that is simple and effective. However, any systemized method is yet to be implemented. A computerized system is yet to be devised.<sup>14</sup>

### 3.5 File Activity

The prosecutor assigned to a case is responsible for all activities with that file following its registration in the Regional Prosecutors' Office and subsequent allocation, and will be personally responsible for all review, disclosure, service of papers and court appearances – as well as interaction with the police, court and defense throughout the prosecution process. There is currently no significant case or file management system to control the file, and ensure that action is taken to prepare the file for court, or any other purpose. The process relies on the prosecutor, regardless of the number of cases allocated to any one individual.

If a case file is required for any purpose, it will be accessible through the assigned prosecutor. When there is a need for the file details to be updated by the central registry at the Regional Office, as new material or

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<sup>13</sup> Article 12(4) of the CPC states: *'The investigation and suppression of crimes shall be carried out by the Police under the direction of the Office of the Attorney General.'*

<sup>14</sup> The Regional Offices do have desk-top computers – but there has been no direction on what they are to be used for to date, and there is little on site IT expertise to systemize their use.

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evidence is received from the police, charges amended, disclosure made to the defense and so on, it is for the assigned prosecutor to ensure that the necessary interaction with the central registry takes place.

There is space available on the file jacket for entries to be made giving information of work carried out on the file, specifically the result of court hearings. In addition to the information arising out of court hearings there is an imperative for the prosecutor to accurately record review amendments, details of discussions with defense or witnesses or police, and any other information pertinent to the conduct of the prosecution. On the file jacket employed by the AGO this space is extremely limited, directed only to record the outcome of a court hearing in a very few words, practically limiting the information that can be recorded on the file jacket.

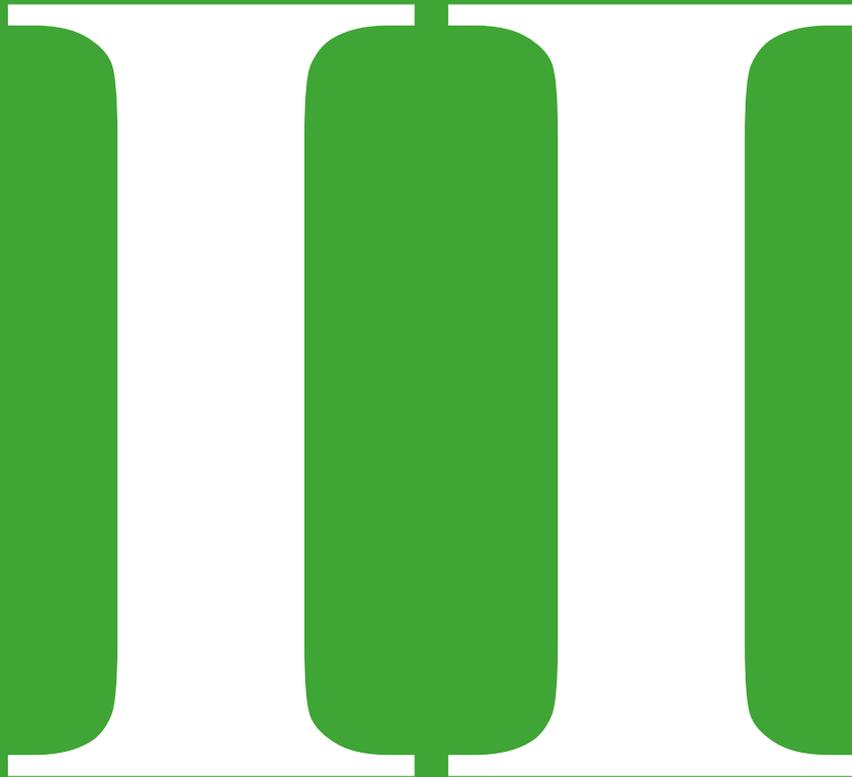
It is the responsibility of the assigned prosecutor to ensure that the file record is complete and up to date. If there is limited space on the area designated for information updates, the prosecutor may think it appropriate to use another area of the file, making sure that this is clearly marked for anyone who may need access to the file and the information.

It may be appropriate to write the comments on separate sheets of paper, which will need to be clearly marked, clearly attached to the file, and accessible.

In the event of appeals, or another prosecutor having to take over a case file for whatever reason, the case history is an important line of information that will assist the prosecution, and assist the justice of the case. It must be recorded clearly and efficiently and be an important part of the development of a better CMS.

The system essentially operates on the following basis:

- The file is allocated by the Senior Prosecutor to one of the DAGs in the Prosecution Office.
- That prosecutor then retains the file through the review and prosecution stage, taking personal responsibility for its maintenance, and returns the file to the Central Registry following completion of the case.
- Although the case has been allocated a file registration number at the outset (at the police investigation stage) there is no numerical filing or storage system currently in place – or facility/equipment from which an effective filing system can be developed.



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### 4. The Role of the Prosecutor

#### 4.1 The Criminal Prosecution Process

The main activity of the AGO is the prosecution of criminal cases on behalf of the state. This is broadly defined in **Article 103 of the Constitution of the Republic of Somaliland** that states:

##### *The Procuracy*

*The Procuracy of the state shall consist of the Attorney General and his deputies*

This function is more specifically drafted in the other principal legislation dealing with the AGO, notably the **Laws on the Organization of the Judiciary (LOC)**, the **CPC (1963)** and the **Penal Code (1962)(PC)**. Ethical and professional conduct guidance for prosecutors is detailed in the **Code of Conduct and Disciplinary Rules for Somaliland Judges and Prosecutors (CoC)**.

General authority for the functions of AGO prosecutors (and others who act on behalf of the AG, specifically the Police in the District Courts) is detailed in **Article 12 of the CPC** that provides as follows:

##### *The Office of the Attorney General*

1. *The Office of the Attorney General shall exercise the functions laid down in Article 8 of the Law on the Organization of the Judiciary<sup>15</sup> and any other functions conferred by law.*
2. *In Court proceedings, the Office of the Attorney General shall be represented by:*
  - a) *the Attorney General or one of his Deputies before the Supreme Court and the Military Penal Sections of the Courts of Appeal and Regional Courts;*
  - b) *the Attorney General or one of his Deputies or a Police Officer designated by the Attorney General before the Assize and General Sections of the Courts of Appeal and Regional Courts;*
  - c) *the Officer commanding the Police or the Finance Guards within whose jurisdiction the Court is situated or another Police Officer designated by him, in conformity with the functions attributed to the latter by law, before the Criminal Section of a District Court.*
3. *For the purposes of this Code, unless the context indicates otherwise, the term “Attorney General” shall mean the person representing the Office of the Attorney General in accordance with the preceding paragraph of this Article.*
4. *The investigation and suppression of crimes shall be carried out by the Police under the direction of the Office of the Attorney General.*
5. *When so considered necessary, the Attorney General may, at any stage of the proceedings, order that his own Office shall take over the investigation or the prosecution of any case.’*

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15 This reference is to the Law on the Organization of the Judiciary (1962) passed for Somalia, superseded by the current laws signed by the President of Somaliland in 2008.

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The AGO has statutory authority for the following functions under the provisions of the above legislation:

- a) Supreme Court Advocacy;
- b) Advocacy in the Courts of Appeal and the Regional Courts;
- c) Direction of the investigation and suppression of crime, and
- d) Taking over the investigation or prosecution of any case when considered necessary.

#### 4.2 File Review

The statutory duties of the AGO as outlined above in **Article 12 of the CPC** are focused on prosecuting cases in the General Section of the Regional and Appeal Courts (assisted by Police Prosecutors appointed by the AG), and the Military Penal Section of the Courts of Appeal and Regional Courts. The case file that is submitted to the AGO by the investigating police in such cases will, in accordance with **Article 25 of the CPC** be expected to contain the following material:

- the Diary of Investigation – a daily record of the details of the investigation, required under **Article 26(3)(a) of the CPC**.
- an accurate report required under **Article 26(2) of the CPC** containing:
  - a) the facts and circumstances of the case relevant to criminal proceedings;
  - b) details of the evidence, and
  - c) Personal details identifying:
    - i. the accused;
    - ii. the injured party, and
    - iii. any person with information;
- the records relating to the investigation, required under **Article 26(3)(b) of the CPC**.
- material objects seized in the course of the investigation, required under **Article 26(3)(c) of the CPC**.

The initial review of this material by the assigned prosecutor is an important stage in the prosecution process. It is an opportunity for the prosecutor to assess whether the material available represents evidence against an accused that is sufficient to justify criminal proceedings. The judgment of the prosecutor must determine if the evidence can satisfy a tribunal of judges in accordance with **Article 110 of the CPC** that provides that:

#### 4.3 Burden of Proof

The Attorney General shall have the burden of proof of establishing that:

- i. a crime was committed
- ii. the accused committed it.

However, the **CPC** also provides at **Article 163** the following:

***Burden on Prosecution***

*In criminal proceedings, the prosecution shall prove beyond reasonable doubt;*

- a) *that the alleged offence was in fact committed, and*
- b) *that the accused committed it.*

The “*burden of proof*” in this instance represents the standard of the evidence that the prosecution must provide to the judicial tribunal in order to secure a conviction. This means that at the end of the case, having heard both the evidence of the prosecution and defense, the prosecution must have provided sufficient evidence according to **Article 110 of the CPC** to enable the judge(s) to be satisfied that; firstly an offense has been committed, and; secondly that the accused committed that offence. However, applying **Article 163 of the CPC** the prosecution is required to satisfy the same objective, but to a higher standard – the case is to be proved “...*beyond reasonable doubt*...”. The law has operated for many years with these two standards legislated on this issue.

The assessment that the prosecutor must make, having considered the contents of a case file, is whether the material provides the evidence required to make the decision to the standard required on two issues; was a crime committed? Did the suspect on the file commit the crime?

If the prosecutor decides that there is no evidence, or insufficient evidence, to satisfy the court that a crime has been committed, then there will be no basis on which to bring a prosecution as the first test of the burden of proof, needed to prove the case in court, is not met. If the prosecution cannot prove that a crime has been committed, consequently the prosecution has nothing to accuse a suspect of. There are three main options available to the prosecutor;

- the decision may be made that there is no case against an accused, and the prosecution is not proceeded with.<sup>16</sup>
- the prosecutor may decide that there are lines of investigation that have not been taken (or taken properly), and that there are enquiries that can be made which may provide sufficient information to properly make the decision. The file can be returned to the police with instructions on what actions should be taken to complete the investigation, and provide any missing evidence.<sup>17</sup>
- as a matter of law, it may be that a prosecution against an accused is not permitted.<sup>18</sup>

It is advised that, as a matter of record this initial assessment is recorded on the case file, so that it is clear that on the date of the first review the prosecutor assigned to the case arrived at a decision to;

- prosecute the case on the evidence in the file submitted by police, as it is assessed that the evidence is sufficient to prove that a crime has been committed, and that the accused committed the crime; or

<sup>16</sup> See **Article 70(1)(b)(ii) of the CPC**.

<sup>17</sup> See **Article 70(1)(b)(i) of the CPC**.

<sup>18</sup> See **Article 70(2)(c), (d) & (e) of the CPC**.

- close the case, as there is insufficient evidence to show that a crime has been committed and/or that the accused committed any crime as alleged; or
- return the case to the police as there is insufficient evidence to properly make a decision on whether a crime has been committed and/or that the accused committed any crime as alleged, but there are further enquiries that must be made to complete the information available and allow an informed decision to be made. The further enquiries needed should be identified by the prosecutor, and directions given to assist in the completion of the investigation; or
- request that the competent court order that proceedings be terminated and any other necessary steps be taken, should the provisions contained in **Article 70(2)(c), (d) & (e) of the CPC**<sup>19</sup> arise.

It is advised that the record on the file detailing this decision be dated and signed by the prosecutor when made.

The authority that permits the prosecutor to return a case file to the police with directions for further action to be taken in an investigation is contained in **Article 12(4) of the CPC** cited above.

There are specific guidelines to assist the prosecutor in case of review as described at **Article 70 of the CPC**, which provides the following:

### ***Responsibilities of the Attorney General before a Trial***

1. *On receiving a report of Police investigation in the manner laid down in paragraph 3 of Article 26, the Attorney General;*
  - a) *if he is satisfied that the evidence collected provides a prima facie<sup>20</sup> case that an offence has been committed and that it was committed by the accused, shall;*
    - i. *frame a charge in accordance with the provisions of Article 71;*
    - ii. *present such charge before the competent Court;*
    - iii. *request the Court to fix a date for the trial and to take any other necessary steps for purposes of trial, except in the cases laid down in the following paragraph.*
  - b) *If he is satisfied that the evidence collected does not provide a prima facie case an offence has been committed and that it was the accused who committed it, may;*
    - i. *order further investigations to be made, if he considers that such investigations will bring more evidence to light, or*
    - ii. *otherwise proceed to close the case in accordance with the provisions of Article 72.*
2. *When it is evident that:*
  - a) *an offence was not committed;*

<sup>19</sup> See citation below.

<sup>20</sup> *Prima facie* is defined by the online Oxford Dictionary as: “based on the first impression; accepted as correct until proved otherwise.” In the context of **Article 70 of the CPC** it requires that the prosecutor be satisfied that, on the information presently, given there is sufficient evidence to prosecute the case.

- b) *the offence was not committed by the accused;*
- c) *the author of the crime is not liable;*
  - i. *because, in accordance with the provisions of Article 50 of the Penal Code, he was by reason of infirmity in a state of mind such as to preclude capacity of understanding and of volition;*
  - ii. *because, in accordance with the provisions of Article 59 of the Penal Code, he had not, at the time of committing the crime, attained 14 years of age;*
- d) *the offence has been extinguished:*
  - i. *by the death of the accused, under Article 143 of the Penal Code;*
  - ii. *by amnesty, in accordance with Article 144 of the Penal Code;*
  - iii. *when, in accordance with Article 145 of the Penal Code, in case of offences punishable on complaint of the injured party, the complaint has been withdrawn and the withdrawal has not been expressly rejected under the terms of Article 87 of the Penal Code, or the injured party has died;*
  - iv. *by the compounding of a contravention under the terms of Article 146 of the Penal Code;*
- e) *proceedings cannot be instituted against the accused:*
  - i. *because, in accordance with the provisions of Article 81 of the Penal Code, the offence concerned is one that may only be punishable upon complaint of an injured party and no such complaint has been made;*
  - ii. *because, under the terms of paragraph 5 of Article 13 of this Code, the necessary authorization to prosecute was not granted or was denied;*
  - iii. *because, in accordance with the provisions of Article 73 of this Code, penal action could not be initiated because of the expiration of the time limits laid down in the aforesaid article.*
  - iv. *because, in accordance with the provisions of Article 73 of this Code, penal action could not be initiated because of the expiration of the time limits laid down in the aforesaid article.*

Then the Attorney General, stating his reasons therefore and producing necessary evidence thereof, shall request the competent Court to order that proceedings be terminated and any other necessary steps be taken.

The above Article is long and complicated. It essentially sets out the following:

- The prosecutor will receive a formal Police Investigation File, and will decide on the contents of this whether there is a “*prima facie*” case established that can brought against an accused.
- If there is a *prima facie* case the prosecutor will frame a charge, lodge the charge with the competent court and request a hearing date.

- If further evidence is required to establish a *prima facie* case against the accused, the prosecutor will either;
  - a) order further appropriate investigation, or
  - b) close the case.
- The prosecutor will terminate any case in which there is a statutory requirement to do so, if:
  - a) the accused lacked the mental capacity to commit the alleged offence (**Article 50 of the PC**);
  - b) at the time of alleged commission of the offence the accused was less than 14 years old (**Article 59 of the PC**);
  - c) the accused is dead (**Article 143 of the PC**);
  - d) the offence is subject to an amnesty (**Article 144 of the PC**);
  - e) the complaint is formally withdrawn or the injured party has died (**Article 145 of the PC**);
  - f) the accused pays a sum of money compliant with **Article 146 of the PC** for an offence punishable solely by a fine;
  - g) it is required by law for the injured party to make complaint, and has not done so (**Article 81 of the PC**);
  - h) the accused has already been tried on the same facts, or there has been a lawful order not to proceed (**Article 13 of the CPC**);
  - i) necessary authorization to prosecute has not been given (**Article 13 of the CPC**);
  - j) relevant time limits have expired (**Article 73 of the CPC**).

The prosecutor with responsibility for the conduct of a file must take into account all the circumstances of the case when deciding on whether to prosecute. The prosecutor must ensure that there is no legal provision that prevents the case from being prosecuted, such as statutory time limits on offences being considered, or prior events that legally prohibit a prosecution, and ensure that the case review complies with **Article 70 of the CPC**.

The reviewing prosecutor will also have to be satisfied that the evidence submitted by the police amounts to a “*prima facie*” case against the accused. This means that the evidence that has been obtained in the investigation of the offence will sufficiently establish before a court that the accused did commit the alleged offence, unless other facts are made known that rebut, or contradict, that evidence.

It is necessary to make an assessment that the prosecution process is properly conducted, in compliance with provisions such as **Article 105 of the CPC** that allows the defendant to object to the prosecution as follows:

### *The Nature of the Objections*

1. *The accused, in accordance with the provisions of sub-paragraph a) of paragraph 1 of Article 104, may object to each count on the grounds that;*
  - a) *no proceedings can be brought against him, since;*

- i. *one of the circumstances included in sub-paragraph c), d (iii), d (iv) and e) of paragraph 2 of Article 70, is present in his case.*
  - ii. *when, in the case of an offence that can be prosecuted only on the complaint of an injured party, the right to make a complaint cannot be exercised under the terms of paragraph 2 of Article 21.*
- b) *the Court is not competent;*
- i. *because it lacks jurisdiction over the subject-matter, in accordance with Article 4 and 7.*
  - ii. *because it lacks territorial jurisdiction, in accordance with Articles 5 and 8.*
- c) *another charge is pending, on the same set of facts, before another Court;*
- d) *a member of the Bench is disqualified from taking part in the proceedings under the terms of Article 10;*
- e) *the charge does not comply, in form or content, with the requirements of this Code.*
2. *Furthermore, the accused may raise any other objection and submit any other request or petition that he deems useful for purposes of his defense.*

The prosecutor conducting the file review has the opportunity to confirm that such issues are considered, and managed so as not to terminate or impede the criminal process.

The reviewing prosecutor should ensure that the investigation has been thorough, and that information on all evidence gathered in the investigation is made available for assessment. This includes not only evidence that supports a potential conviction of the accused, but also any evidence that might lead to an acquittal and suggests that the accused should not be convicted. The prosecutor will then be able to decide whether the case remains an appropriate case for prosecution, and that the burden of proof can be satisfied.

The file review will enable the prosecutor to:

- Make an assessment that reflects the evidence in the case.
- Record that assessment and determine how the case will progress.
- Clearly apply and cite the relevant law in the record of review.
- Develop a strategy/Case Plan.

#### 4.4 The Case Plan

In cases where the evidence from the investigation is sufficient to prosecute, the assigned prosecutor will need to manage the case, and prepare for court. Having assessed the evidence, it is helpful to build a case plan, based on the review, by documenting the analysis of the case involved in concluding the review in the form of a strategic document. This gives a position from which to respond to any changes in the situation. Such changes may include the gathering of further evidence, which may help the prosecution case, or help the defense case. Changes may be caused by the willingness of witnesses to attend court and give evidence, the

discovery of new witnesses and so on. A case plan provides a point of reference for responses to developments, and allows the prosecutor to be strategic in dealing with them.

A useful structure for a case plan is as follows:

#### A. An analysis of the charges and the evidence that supports them

This should include the prosecutor addressing each individual element of the charge, and linking it to the evidence that is relied on to prove it. As an example, the offence of Theft contrary to **Article 480 of the PC** would be drafted as follows:

*The Accused, for the purpose of wrongful gain for himself or another, took movable property of another by depriving him of the possession thereof.*

The elements of the offence are:

1. Taking movable property belonging to another.
2. For the purpose of “*wrongful gain*” for himself or another.
3. Depriving the owner of that property.

Each of the three elements of the offence must be established to the standard of the burden of proof.<sup>21</sup> If the elements of the offence are not proved to the necessary standard, then the charge will not be proved and the accused will not be convicted of the offence of theft.

In drafting a case plan, the prosecutor demonstrates the basis upon which the evidence reviewed proves each of those elements. This process will be applied to each charge, with the evidence proving the elements of offence linked to them. When there are a number of witnesses to the same offence(s) the prosecutor will need to assess the consistency of the evidence that they give – if the evidence is contradictory it will not be capable of proving the case.

#### B. Develop a strategy to present the prosecution.

If there is one allegation, case presentation will be straightforward. In the case of the theft above, the strategy may be to prove each element in turn through calling the witness(es), which may only require the evidence of the alleged victim of the theft to give sufficient evidence to the court. If there are a number of offences, or a number of defendants, the strategy may need to be more sophisticated. The prosecutor will be required to plan how each element of each offence is to be proved against each defendant for each charge they are respectively accused of.

<sup>21</sup> See **Articles 110/163** of the CPC.

### C. Identify potential defenses and how to rebut them.

By making the decision to prosecute, the prosecutor will have considered the strengths and weaknesses of the case against the accused, and what defenses could be used to argue against the allegation(s). These defenses can be defined in the case plan, and the arguments against them prepared. Careful consideration needs to be given to defenses that question the integrity of prosecution evidence and how it was obtained. Attention may be required to comply with the provisions governing the arrest of the accused under **Articles 28-45 of the CPC**, the statutory requirements for search and seizure in compliance with **Articles 52-58 of the CPC**, or any other technical requirement of the investigation and prosecution process, such as those referred to in **Article 105 of the CPC**.

### D. Create a timetable for work to be done.

The prosecutor can begin working on what needs to be done to make the case trial ready. This will include making sure that any requests for further information from the police are acted on, that the duties that the prosecution has to the court and defense are complied with, and that the evidence that is relied on to prove the case, including the availability of witnesses, is organized for court in good time.

### E. Update the case plan to include any change in circumstances or new material in the case.

The case plan can be used to respond to changes in information concerning the main issues in the case. The prosecutor should update the review of the case as the situation is assessed to have changed, so that the plan is up to date, and any decisions on whether or how to continue the prosecution can be taken at the right time.

Circumstances can change, and new information on a case can change its direction. In this regard case review is an ongoing process that is usefully documented in a case plan. Accordingly, any update in information, change in review position, alteration of the prosecution case or the specific charges against the accused, or any other fundamental shift in the case, must be subject to a full and accurate record on the case file – specifying what the change is, how this affects the progress of the case, what the law requires, how this is to be dealt with and how the case will proceed as a result.

In instances when the prosecutor has taken the decision at review to return a file to the police for further investigation under the provisions of **Article 70(1)(b)(i) of the CPC** there is a clear need for the prosecutor to manage communication with the investigating officers, and to ensure that the further enquiries requested are performed. When this is ongoing it is important that a robust work plan, with agreed deadlines for responses to requests, exists between the prosecutor and investigators.

## 4.5 The Penal Code

In reviewing and considering evidence, a prosecutor will also consider the guidance contained in **Articles 1 to 183 of the PC (Book I - Part I to Part VII)**. The provisions contained in the **PC** represent statutory legal requirements in Somaliland, and are especially helpful at the review stage. They broadly deal with the following:

- **Part I (Articles 1 to 14)**: Jurisdiction;
- **Part II (Articles 15 to 46)**: Categories of Offences (including attempted offences, offending circumstances, lawful defenses etc.);
- **Part III (Articles 47 to 89)**: Character of the offender, multiple offenders, circumstance of the injured party, multiple injured parties;
- **Part IV (Articles 90 – 142)**: Punishments;
- **Part V (Articles 143 – 157)**: Conclusion or extinction of punishment;
- **Part VI (Articles 158 – 160)**: Civil Sanctions;
- **Part VII (Articles 161 – 183)**: Special measures for specific categories of offenders (mentally ill, those judged a danger to society etc.).

These provisions assist the reviewing prosecutor in many respects. There is guidance on offences that can be prosecuted in Somaliland courts, whether committed within the Somaliland or elsewhere. There is consideration of the mental capacity of the accused, the nature of attempts to commit crime, and a statutory regime for such to be dealt with. Defenses to criminal acts (such as necessity) are given statutory status, definitions of crimes involving numbers of parties, and the degrees in which they will be dealt with by law are also considered, and are as such helpful in reviewing the conduct of a case. The status of injured parties, of mentally ill or habitual offenders and the punishments available across a wide range of criminal conduct should all be considerations at the case review/case plan stage. Equally, these issues may need particular attention during the course of court proceedings, and as such must be addressed promptly.

If these issues are addressed at an early stage, the prosecution should be well prepared for an early trial date following the accused being formally charged.

## 4.6 Charging

**Article 69 of the CPC** states that: *‘Except as otherwise provided by law, the Attorney General shall initiate penal proceedings against an accused person.’*

It is for the AGO to decide whether or not to prosecute a case. If the decision is to do so, it is the prosecutor who will be required to initiate proceedings with the court against the accused.

Following review of the evidence on the file submitted to the AGO by the police following the investigation of alleged offence(s), a prosecutor will have decided whether there is sufficient evidence to prosecute the

suspect(s) in the case, and in judging that the evidence is sufficient to initiate penal proceedings, it is for the prosecutor to comply with **Article 70(1)(a) of the CPC**. The following activities are required:

- Frame a charge in accordance with the provisions of **Article 71 of the CPC**.
- Present the charge before the competent Court.
- Request that the Court fix a trial date.

The requirements on the form of a charge are subject to statutory provisions under **CPC Article 71** as follows:

### *Form of Charge*

1. *A charge shall be in duplicate and shall contain:*
  - a) *the name of the authority making the charge;*
  - b) *the date on which it is made;*
  - c) *the personal details of the accused or, if these are not known, other indications by which he can be identified with reasonable certainty;*
  - d) *the offence charged, together with a plain, concise statement of the acts constituting the offence, including the time and place of the commission of the offence, and the person against whom, or the thing in respect of which, the offence was committed;*
  - e) *the law, and the articles of the law, against which the offence is said to have been committed;*
  - f) *a statement of the aggravating circumstances, except for recidivism, and of circumstances which may warrant the application of security measures, with the indication of the articles of the law relating thereto;*
  - g) *the personal details of the injured party and of the person who appears to be acquainted with the circumstances of the offence;*
  - h) *the indication of whether the accused is held in custody;*
  - i) *the signature of the authority who makes the charge, and the seal of the office.*
2. *When;*
  - a) *the accused is charged with more than one offence:*
    - i. *the charges shall be consecutively numbered;*
    - ii. *the provisions of sub-paragraphs d, e), f) and g) of the previous paragraph shall apply to each charge;*
  - b) *two or more persons are jointly charged:*
    - i. *the charge shall show the offence or offences with which each accused is charged;*
    - ii. *the provisions of sub-paragraphs c), d), e), f), apply in the case of each accused.*

The format of the charge against an accused is proscribed and set by law. The charging prosecutor should be in no doubt of what is required, and has a duty to adhere to the statutory direction. The accused and

representatives of the accused will be aware of the processes to be followed, and of the information properly expected from the prosecuting authorities. The importance and benefit of a full and informed case review by the prosecutor in the case will be recognized in the obligation to serve a statement of the acts that constitute the offence(s) charged and the laws against which the offences are alleged to have been committed. The information required by **CPC Article 71** to lawfully present a charge against an accused person is a reflection of the information that the prosecutor would be advised to document in a full file review and case plan as detailed above.

- The charging process requires the prosecutor to draft an account of the acts constituting the alleged offence, as well as citing the articles of law against which the offence(s) may have been committed. The articles of law will make out the constituent “*elements*” of the alleged offence(s). The description of the alleged acts will be expected to link the conduct of the accused to all elements of the offence, and prove them to have been committed by the accused.
- As an example, for an allegation of theft contrary to **Article 480 of the PC** as used in the case plan outlined above, the statement of acts constituting the offence for **Article 71(1)(d)** will be expected to show an allegation that the accused took movable property belonging to another, that the accused did so for the purpose of wrongful gain for himself or another, and in doing so deprived the owner of that property. The additional information ordered for the purpose of a valid charge is: the time and place of the commission of the offence, and the person against whom, or the thing in respect of which, the offence was committed.
- A concise and well-considered case plan will assist the charging process.
- An important factor to have in mind in considering the initiation of criminal proceedings, is the fact that there are time limits that apply to categories of offences. The institution of charges outside of the time limits that apply to such offences cannot be permitted by the courts.
- On a procedural point, it must be recognized that certain categories of charges can be time barred if specific, statutory limits are not adhered to. **Article 73 of the CPC** provides the following:

#### ***Time-Limits For The Commencement Of Criminal Proceedings***

1. *For the purposes of this Code, unless the context indicates otherwise, criminal proceedings shall be considered to have commenced against a person as soon as that person becomes an accused under the terms of Article 13(1).*
2. *Criminal proceedings:*
  - a) *may be commenced at any time in cases in which the issue of a warrant of arrest is mandatory, in accordance with the provisions of Article 42;*
  - b) *shall not be commenced in any other case, subject to the provisions of the following paragraph, after the expiry of the following time-limits from the date of offence:*
    - i. *6 years, in the case of offences for which the maximum punishment is more than 5 years;*
    - ii. *4 years, in the case of offence for which the maximum punishment is more than 3 years;*
    - iii. *2 years, in the case of offences for which the maximum punishment is not more than 3 years;*

- iv. 6 months, in the case of offences punishable with fine only.
3. The time-limits prescribed in sub-paragraph b) of the preceding paragraph shall begin from;
- a) the day of the commission of the offence, in the case of offences described in Article 16 of the Penal Code as “Offences Committed”.
  - b) the day on which the act or omission on the part of the offender has ceased in the case of attempted offences.
  - c) from the day on which the offender ceased committing the offence in the case of permanent or continuing offences, provided that, in the case of offences committed by public officers in the course of their duty, the time-limit shall begin from the day of the termination of their service in such capacity.

#### 4.7 Insufficient Evidence

If a prosecutor reviews a file and determines that there is insufficient evidence to establish a *prima facie* case to bring before the court, he generally has two options. **Article 70(1)(b) of the CPC** states that if the prosecutor:

*‘...is satisfied that the evidence collected does not provide a prima facie case that an offence has been committed and that it was the accused who committed it, he may;*

- i. *order further investigations to be made, if he considers that such investigations will bring more evidence to light, or*
- ii. *otherwise proceed to close the case in accordance with the provisions of Article 72.’*

The first option requires the prosecutor to direct further investigations by the police, guiding the police towards further enquiries that may provide more evidence to be considered. This will require robust case management by the prosecutor in ensuring that directions on making further enquiries are understood, completed and the resulting reports submitted for further consideration of the case against the accused. In such circumstances a clear case plan is a useful method to monitor progress.

The second option closes the case due to lack of evidence. The prosecutor is certifying that there is insufficient evidence to prosecute an accused, and there are no additional lines of enquiry that merit further investigation. If this is the informed assessment made by a prosecutor, it is right that the case be closed and other cases worked on.

The procedure following a decision not to proceed with a case is covered by **Article 72 of the CPC** which provides:

### **Closing the Case**

1. *Whenever a decision regarding the closing of a case, as provided for by sub-paragraph b) ii) of paragraph 1 of Article 70 has not been taken by the Attorney General himself, such decision shall be confirmed by the Attorney General. For such purpose the authority which took the decision of closing the case shall forward a copy of the decision to the Attorney General who may call for the whole file concerning the case.*
2. *The Attorney General may, whenever he does not think it fit to confirm such decision, cancel it and order that;*
  - a) *proceedings be taken against the accused in accordance with the provisions of sub-paragraph a) of paragraph 1 of Article 70; or*
  - b) *further investigation be made in accordance with the provisions of sub-paragraph b) I) of paragraph 1 of Article 70.*
3. *After confirmation by the Attorney General that a case shall be closed, in cases where confirmation is required, such decision to close the case shall be;*
  - a) *sent to the competent Court which shall take the measures provided for in Article 76; and*
  - b) *notified to the accused.*
4. *Apart from the cases provided for in paragraph 2 of this Article and where no cause for the extinction of the offence has occurred, the Attorney General may cancel the decision to close the case when fresh evidence has been received and such fresh evidence, by itself or in conjunction with the previous evidence makes it clear that an offence was committed and that it was the accused who committed it.*

The above provision authorizes the AGO to decide on whether any prosecution, initiated by any authority, proceeds or is not proceeded with. It should be noted that a decision not to proceed with a case must be confirmed by a copy of the decision to the appropriate authority. This could be in the form of a case review, stating clearly the reasons not to proceed, in the same way that cases proceeded with are subject to the evidential case review and case plan as described above.

## **4.8 Advocacy**

The prosecutor assigned to a case is responsible for all activities with that file following its registration in the Regional Prosecutors' Office, and has the duty to prepare the case for all court hearings and presenting the case before the court. The accused may or may not be represented by private counsel during the course of proceedings. The **LOJ** contains a provision that counsel will be provided for those charged with offences regarded as serious, that is carrying a penalty of ten years imprisonment or more. It also provides for

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representation to cover those unable to pay the fees of a private lawyer.<sup>22</sup> This requirement is considered in the Practical Observation Section below.

For the purposes of examining the criminal trial process in this Manual, it is assumed that defense counsel is participating, so that the consideration of the examination of witnesses, and other technical functions in the process, are not confused by measures taken to assist the accused to conduct their own defense, with the assistance of private counsel. It is common that accused persons appear at court without representation, and the prosecutor will be aware of that.

## 4.9 The Conduct of the Case

### 4.9.1 The Case Plan Strategy

The drafting of a case plan from the first file review as outlined above, provides the prosecutor with an ongoing review of an individual case, and the development of a strategy for the conduct of the prosecution of that case. The prosecutor should have the benefit of the following:

- An analysis of the charges and the evidence that supports them, upon which the original prosecution decision was based.
- A strategy to present the prosecution, which has been developing from the initial review, as additional information may have been made available to the prosecutor from the police investigators, pre-trial hearings at the court and so on.
- Identified potential defenses, which have been considered and assessed in conjunction with the evidence available to the prosecutor, and rebuttal arguments in rebuttal of those identified defenses, also analyzed and outlined.
- A schedule of work to be done, compiled to ensure that the prosecution is ready to argue the prosecution position in court. If the case is not ready to proceed the information in the schedule will identify any outstanding information yet to be received, so that the prosecutor is able to support any pre-trial adjournment applications under **Article 101 of the CPC** for additional time for the case to be adequately prepared.<sup>23</sup>
- Before any court hearings, and in particular prior to a trial or sentencing, the case plan will have been updated to include any change in circumstances or new material in the case.

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<sup>22</sup> This provision is cited at **Article 4** in both the 49 Article and 60 Article versions of the **LOJ** currently in force.

<sup>23</sup> There are a number of issues that can require time to be ready for a court trial. An example is awaiting the analysis of forensic evidence, which may need to be tested and an expert opinion prepared before it can be admitted as formal evidence in a trial process, or for other reasons such as the non-availability of witnesses.

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#### 4.9.2 Disclosure to the Defense/Accused

The charge against the accused will, in accordance with **Article 70(1)(d), (e), (f) & (g) of the CPC** contain the following information;

- the offence charged, together with a plain, concise statement of the acts constituting the offence, including the time and place of the commission of the offence, and the person against who, or the thing in respect of which, the offence was committed;
- the law, and the articles of the law, against which the offence is said to have been committed;
- a statement of the aggravating circumstances, except for recidivism, and of circumstances which may warrant the application of security measures, with the indication of the articles of the law relating thereto;
- the personal details of the injured party and of the person who appears to be acquainted with the circumstances of the offence.
- This requirement represents the disclosure of the case against the accused, and allows the person charged to know the nature and details of the allegation that has been made. This disclosure is intended to assist the accused in assessing the prosecution case. Drafting the information will also have assisted the prosecutor in the process of preparing a case plan.

#### 4.9.3 Case/Trial Preparation

The prosecutor will be satisfied that there is a *prima facie* case of crime or crimes, as alleged in the charge(s) presented to the court, committed by the accused. The charge(s) will also, complying with **Article 71(1)(d) of the CPC**, indicate that the conduct of the accused that the prosecutor assesses supports this conclusion. The evidence will be available for the court hearing if required, and will generally involve the attendance at court of witnesses and of any exhibits that are relevant to the alleged offence(s). This is all important should the case go to trial, and the prosecution is required to prove the allegations in full. It is also important if the accused pleads Guilty, as the facts of the case will need to be given to the court, which may also require examination of exhibits before sentencing the accused.

The prosecutor will also have to consider which witnesses are needed to prove the case to the court, and the order in which witnesses will be called to give their evidence. The account of the offence presented in the charge will form the basis of the way in which the prosecutor presents the case against the accused to the court. The Case Plan should contain a strategy for the prosecution case, developed over the time since the initial file review. It should also have addressed potential lines of defense, so that these are rebutted to help establish the necessary burden of proof. This strategic approach will assist the prosecutor to prepare a robust case to open in front of the trial court.

#### 4.9.4 A Plea being Entered to the Charge(s)

Formal proceedings are opened by the court on the basis of **Article 103 of the CPC** which provides the following:

##### *Charging the accused:*

1. *The President of a Court;*
  - a) *having noted the presence of the accused and of the Attorney General, and*
  - b) *there having been appointed a defense Counsel for the accused when so required in accordance with the provisions of sub-paragraph b) of paragraph 2 of Article 14 of the Law on the Organization of the Judiciary, when the accused, for whatever cause, has no defense Counsel, shall read the charge to the accused.*
2. *When the charge has been read, the President of the Court shall:*
  - a) *explain to the accused, in a clear and comprehensible manner, the substance of each count of the charge;*
  - b) *inform the accused of the three answers which he may offer to each count in accordance with Article 104, briefly pointing out the meaning and consequences of each answer;*
  - c) *ask the accused whether, in respect of each count he wishes:*
    - i. *to raise any objection under the terms of Article 105.*
    - ii. *to plead guilty.*
    - iii. *to plead not guilty.*
3. *If there is more than one accused, the provisions of the preceding paragraph shall be observed separately with regard to each accused.*

The process is therefore that the charge(s) against the accused, drafted by the prosecutor as required by **Article 70 of the CPC**, are read to the accused by the President of the Court, who also plainly explains what each charge alleges against the accused, and asks the accused to indicate a plea, or raise an objection under the terms of **Article 105 of the CPC**. The options available to the accused are specified in **Article 104 of the CPC**, which states:

##### *The Plea of the Accused*

1. *An accused may, in respect of each count:*
  - a) *raise any of the objections listed in Article 105;*
  - b) *plead guilty;*
  - c) *plead not guilty.*

*A refusal to plead shall be considered as a plea of not guilty.*
2. *Except when a plea of guilty is entered, defense Counsel may enter a plea on behalf of the accused.*

#### 4.9.5 Objections under Article 105 of the CPC

As indicated above, the prosecutor should consider the objections cited in the Article at the time of the initial review. It would also be helpful if the assessment of this possibility was included in the Case Plan strategy. In doing so, the prosecutor will already be aware of the listed objections and have had the opportunity to ensure that any that arise are investigated and avoided. This should be evident for any save for **Article 70(1)(d)** and any under **Article 105(2)**. Under the provisions of **Article 106 of the CPC** there is the potential for these objections, if upheld by the court, to result in the termination of the case.

#### 4.9.6 Guilty Plea<sup>24</sup>

Should the accused plead guilty to the alleged offence, the case can be completed without the need for a trial, and the trial court may be able to move directly to sentencing the accused. The process to be followed is specified in **Article 108 of the CPC** which states:

##### *Consequences of a Plea of Guilty*

1. *When an accused pleads guilty to a charge, in accordance with the provisions of sub-paragraph b) of paragraph 1 of Article 104, the Court may;*
  - a) *if the maximum punishment for an offence is imprisonment for less than 10 years or a lesser punishment;*
    - i. *immediately pronounce judgment of conviction in accordance with Chapter IV of this Book, on the basis of the plea of guilty.*
    - ii. *order the trial to proceed in accordance with Chapter III of this Book, if it has reason to believe that the plea of guilty does not correspond to the truth.*
  - b) *if the maximum punishment for an offence is imprisonment for 10 years or more or a more serious punishment, order the trial to proceed in accordance with Chapter III of this Book.*

A plea of guilty may be withdrawn by an accused at any moment of the proceedings in a court of first instance before judgment is given, and a plea of not guilty entered instead.

The court may require information to assist with the sentencing decision, and the prosecutor should be in a position to assist with details of previous convictions of the accused. This information is currently not well recorded – but this is the duty of the police and AGO, and so should be available from the prosecutor.<sup>25</sup>

<sup>24</sup> There is no statutory provision for plea bargaining in Somaliland, nor are there currently sentencing guidelines to allow a discount in the sentence following a Guilty plea. Article 109 of the PC does allow the Judge discretionary powers in sentencing within the limits set by law for a specific offence.

<sup>25</sup> **Section II of the PC (Articles 61 to 70)** deals with “Recidivists, Habitual and Professional Offenders.” Previous criminal convictions of the accused may be something that the police would assist the prosecutor with, however **Article 45/49 of the Laws on the Organization of the Judiciary** requires that the AGO has a Senior Registrar – this information may therefore lawfully be required to be held by the AGO itself. Importantly **Article 260 of the CPC** provides for a “Criminal Records Office” to be maintained by the Police and supervised by the AGO.

There is no direct statutory provision for the prosecution to recommend a sentence to the court as being appropriate to the conviction. However, the prosecution may suggest, if appropriate, to the sentencing court the gravity of the offence being considered, and where in the range of available sentences the level of punishment should be.

#### 4.9.7 Contested Trials

A trial is required when the accused disputes the allegation, and pleads “*Not Guilty*” when the charge is read by the President of the Court.<sup>26</sup> The burden of proof, as specified in **Article 110 of the CPC**<sup>27</sup> is to be met by the evidence brought to the court by the prosecution. The prosecutor has framed the charge and set out the allegation as required by **Article 70 of the CPC**, and so it is the prosecutor who must prove to the court that an offence has been committed, and that the accused committed that offence.

In the Case Plan, the emphasis on analysis, strategy and consideration of potential lines of defense contribute to a process that supports the decision by the prosecutor to charge the accused, and provide a structure, and ensure preparation from the early stages of the prosecution process, to effectively conduct a trial. These elements will justify the decision by the prosecutor to initiate penal proceedings, and will provide an outline to help inform the court of the alleged commission of the offence(s) by the accused.

In bringing the case, the prosecution must start the process and make the allegation(s) clear to the court. **Article 114 of the CPC** provides:

#### *Action of the Prosecutor*<sup>28</sup>

*In the cases provided for in Article 110, the Prosecutor shall initiate the hearing of evidence, stating briefly:*

- a) *the nature and details of the offence charged.*
- b) *the evidence against the accused.*

The Court shall then hear the case for the prosecution.

The prosecutor will be helped to initiate proceedings by making a brief address to the court through reference to the “...*plain, concise statement of the acts constituting the offence.*” included in the form of a charge as a requirement of **Article 71(1)(d) of the CPC**, and include reference to a Case Plan, and specifically the analysis suggested at the start of the Case Plan process suggested above.

<sup>26</sup> As required by **Section 103 of the CPC**.

<sup>27</sup> The contradiction of this provision with **Article 163 of the CPC** is discussed above.

<sup>28</sup> The translation of the CPC refers to the “Attorney General”. This should clearly be a reference to those who act on the instruction of the Attorney General under the provisions of **Article 12 of the CPC**. The designation for this purpose has been altered to read “Prosecutor”.

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#### 4.9.8 Conduct of the Trial

In the trial process, evidence is mainly provided by witnesses and through exhibits (items allegedly related to the offence) that are identified to the court by a witness who can give evidence of its significance.

#### 4.9.9 Witnesses

Evidence in the trial process is given by witnesses, who may perform several, different purposes in giving evidence to the court. The alleged victim of the offence is generally an essential witness, who can give unique information concerning the allegation, for example, in an allegation of theft contrary to **Article 480 of the PC**, the victim is the witness who can give evidence to show that the movable property in question belonged to them, that the accused did not have permission to take it, and therefore took it unlawfully, and that in doing so the accused deprived the victim of it.

Other witnesses are more independent because they do not have such a tangible connection to the offence, but can give evidence of what they saw, heard etc. Additionally there are also witnesses who can give specialist evidence of processes, such as forensic examination (fingerprints and DNA etc), or handwriting experts and so on.

The prosecutor must make the decision on the order in which witnesses give evidence at the trial. The statement included in the form of a charge will outline the time and place of the alleged offence and the person or thing that the offence is said to have been committed against.<sup>29</sup> A Case Plan analysis will ensure that the evidence is ordered and linked to the constituent elements of the specific offences that need to be proved to establish the guilt of the accused.<sup>30</sup> An effective method of presenting all of the evidence to a trial court is to simply call the witnesses to give their testimony in the order that the events they give evidence about are said to have happened – in chronological order. This approach is effective because the prosecution allegation is explained in the order that events occurred. It is the simplest means of explaining what is alleged to have happened. The fact to be recognized is that witnesses give evidence one at a time, and the prosecutor must decide the order that they do so.

The prosecutor will aim to call the witnesses in an order that will effectively tell a story of how the alleged offence was committed.

#### 4.9.10 Examination of Witnesses

The way in which witnesses give evidence at trial is dictated by **Article 179 of the CPC** as follows:

***Except as otherwise provided by law, a witness shall be examined;***

- a) *orally in open Court,*
- b) *in the presence of the accused,*

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<sup>29</sup> **Article 71(1)(d) of the CPC.**

<sup>30</sup> See above for elements of offence.

c) *under oath or affirmation.*

The trial process is generally, therefore, one where evidence relating to an alleged offence is given directly by witnesses, in a court that is open to the general public, where the accused is present for the trial, and where the witness is under an obligation to tell the court the truth. The means by which evidence can be properly elicited from witnesses during the trial process is outlined as follows in **Article 187 of the CPC**:

***For the purposes of this Code, unless the context provides otherwise;***

- a) *the term “examination-in-chief” shall mean the examination of a witness by the party that calls him.*
- b) *the term “cross-examination” shall mean the examination of a witness by the party other than the party which calls him.*
- c) *the term “re-examination” shall mean the examination of a witness by the party who called him subsequent to the cross-examination;*
- d) *the term “leading question” shall mean any question put to a witness in such a way as to suggest a reply that the party putting the question wishes or expects to receive.*

#### 4.9.11 Examination-in-Chief

Having outlined the prosecution case to the court, in the presence of the accused, the prosecutor will begin to call witnesses to prove the case against the accused. It is recognized that the burden of proof is on the prosecution to prove, first that a crime was committed, and secondly that the crime was committed by the accused.<sup>31</sup> The prosecutor will call witnesses who have indicated in the investigation what information they can give, and the prosecutor assessed that their evidence will help to prove the guilt of the accused.

The process by which witnesses give evidence is specified in **Article 188 of the CPC** as follows:

##### ***Order of Examination***

1. *A witness shall first be examined-in-chief; then, if the other party so desires, the witness may be cross-examined; then if the party calling the witness so desires, the witness may be re-examined.*
2. *The examination-in-chief and the cross-examination shall relate to relevant facts but the cross-examination need not be confined to the facts which the witness testified to in his examination-in-chief.*
3. *The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is introduced, with the permission of the Court, in re-examination, the other party may further cross-examine upon that matter.*

<sup>31</sup> Refer to Articles 110 and 163 of the CPC.

It should be noted that a witness should not enter court and listen to any evidence given by any other witness prior to their evidence being given, or after their role as witness is completed. Doing so may unduly influence the evidence, and corrupt the trial process.

As it is the prosecution who bring the allegation against the accused before the court, it is the prosecution which has to establish that there is a case for the accused to defend, and so the proceedings begin with the prosecution case. The prosecutor calls the first witness, often the victim of the alleged crime, to give evidence. This witness will be “*examined in chief*” by the prosecutor.

In this part of the process the prosecutor will not be permitted to ask “leading questions” of the called witness to establish its case. A leading question is one that suggests in its content how it should be answered, influencing and prompting the response of the witness. An example of a leading question would be the prosecutor starting the examination-in-chief by asking the witness: “*Did you see the accused steal the property?*”

The suggestion in the question is that “*the property*” was subjected to being stolen by “*the accused*”. The way in which the question is asked heavily influences the answer that can be expected to be given, leading the witness to respond in that certain way. Such questions by the party that calls the witness are prohibited.

It is often said that leading questions will contain the answer within the question itself. For example: “*Your name is Abdul Qadir, isn’t it?*” This is a question that, in asking a person their name, gives the suggested answer – that their name is Abdul Qadir.

The appropriate conduct of examination-in-chief involves “*open questioning*” where there is no sense of the anticipated answer being provided. For example: “*What did you see?*”. As a first question in the theft example, this would allow the witness great scope in answering it.

It is for the witness then to introduce the factual content of the reply. Abdul Qadir would be asked, for example, “*what is your name?*”

The prohibition on leading questions in examination-in-chief (and in re-examination: see below) is contained in **Article 191 of the CPC** which provides the following:

### ***Prohibition on leading Questions***

1. *Leading questions shall not be asked in an examination-in-chief or in a re-examination except with the permission of the Court.*
2. *The Court may permit leading questions in examination-in-chief and re-examination only as to matters which are introductory or undisputed or which have, in its opinion, been already sufficiently proved.*

The purpose of the prohibition on leading questions relates to the need to be clear on the evidence given concerning facts that are disputed and in issue between the parties. When facts are not in dispute, or the difference on the issue has been adequately illustrated by earlier questions, the court may allow leading questions to be asked.

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The result of the process of examination-in-chief should be that the prosecutor, having called all prosecution witnesses, can close the prosecution case without having unduly influenced those who have given evidence. That same evidence can be challenged by the defense counsel, who may use direct, leading questions to do so during cross-examination of each witness in turn.

#### 4.9.12 Hostile Witnesses

It can happen that a witness, for whichever party in the case, when before the court, refuses to give evidence or answer the questions put by the party that called the witness. In such circumstances the advocate has difficulties, not least of all because of the prohibition on leading questions under **Article 191 of the CPC**. In this instance the court may use its discretion to permit the party to ask leading questions in examination-in-chief of the witness on issues that may be put in cross-examination. This would include leading questions relating to previous written statements made by the witness.

This would be an unsatisfactory situation for the advocate, whether prosecutor or defense, as they may have to rely on a witness who had decided to be unhelpful. However, declaring the witness as hostile and requesting that the court lift the prohibition of leading questions may allow the prior statement of that witness to be referred to in court.<sup>32</sup>

#### 4.9.13 Cross-Examination

When questioning witnesses called by the opposing party, leading questions are permitted. In this instance, the prosecution witnesses will each have been examined-in-chief by the prosecutor to enable the case to be established. The purpose of cross-examination is to allow the defense to challenge that evidence. Challenging the evidence can be effectively accomplished by directly arguing a direct alternative to what the witness has said in evidence. Prosecution witnesses can expect to have their evidence directly challenged by a defense version of the case. Similarly, defense witnesses can expect the Prosecutor to cross-examine them on the evidence that they give. This will expose inconsistencies in evidence, and contradictions in the defense version. It is an opportunity for the prosecution case to be strongly put to the defense witnesses as the version that is correct.

Cross-examination not only allows the parties to assert their version of the facts of the case, but also allows the advocates to test the credibility of the witnesses, challenging their commitment to the evidence that they have given. **Article 195 of the CPC** states:

##### ***Questions lawful in Cross-examination***

1. *When a witness is cross-examined, he may be asked any question which tends:*
  - a) *to test his veracity,*
  - b) *to discover who he is and what is his position in life,*

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<sup>32</sup> Refer to **Article 192 of the CPC**.

- c) *to shake his credit, although the answer to such question might tend directly or indirectly to expose him to penal proceedings or to civil action for damages.*
- 2. *If any such question as asked in accordance with the preceding paragraph relates to a matter relevant to the proceedings, or if the Court orders the witness to answer in accordance with the provisions of the following paragraph, the provisions of Article 200 shall apply.*
- 3. *If any such question relates to a matter not relevant to the proceedings and tends only to affect the credit of the witness, the Court shall decide whether or not the witness shall be compelled to answer it. In exercising its discretion, the Court shall have regard to the following considerations:*
  - a) *such questions are proper if they are of such nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;*
  - b) *such questions are improper if:*
    - i. *the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the creditability of the witness on the matter to which he testifies.*
    - ii. *there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.*

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

- 4. *No such question as is referred to in the preceding paragraph ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which is conveyed is well-founded.*
- 5. *A Court;*
  - a) *may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.*
  - b) *shall forbid any questions or inquiries which appear to it to be intended solely to insult or to annoy or which, though proper in themselves, appear to the Court needlessly offensive in form.*

The opportunity to cross-examine the prosecution witnesses allows the defense advocate an opportunity to challenge their version of events. This is a chance to emphasize any contradictions that emerge in the account given as evidence, and to undermine the credibility of the witness. The opportunity for the prosecutor to cross-examine defense witnesses likewise challenges, and potentially undermines, the defense case.

#### 4.9.14 Re-Examination

Following cross-examination of the prosecution witnesses by defense counsel, the prosecutor has an opportunity to clarify points that may have arisen during that cross-examination. As with examination-in-chief, leading questions are prohibited, unless expressly permitted by the court.<sup>33</sup>

#### 4.9.15 Judicial Assessment of Sufficiency of Evidence

At the conclusion of the prosecution evidence the court will consider, without requiring the defense to call any evidence as yet, whether the prosecution evidence has been sufficient to establish a case for the accused to answer. **Article 115 of the CPC** provides:

##### *Order that Proceedings be terminated for Lack of Evidence*

1. *When the case for the prosecution is concluded, the Court, if it considers that the evidence adduced, even if such evidence is uncontested, is insufficient to prove the guilt of the accused, shall, either at the request of the accused or on its own motion and having beforehand asked the Attorney General whether he intends to withdraw the charge in accordance with Article 112;*
  - a) *order, giving the reasons therefor, that the proceedings against the accused be terminated with respect to the offence for which guilt has not been proved, and*
  - b) *order any measures that may be required by Article 70.*
2. *An order that proceedings be terminated, given in accordance with this Article, shall be equivalent to a judgment for the purposes of paragraph 3 of Article 13.*

The decision that the court will consider at this stage of proceedings is whether the prosecution, on the evidence that has been provided to the court which has been tested by cross-examination, but uncontested by defense evidence being called to rebut it, establishes a *prima facie* case. If not – the accused has no case to answer.

As stated above, if the court decides that there is insufficient evidence, the proceedings are terminated by order of the court.

If a case has been established by the prosecution evidence, the case can proceed to the next stage, where the accused may produce evidence as a defense against the allegation.

#### 4.9.16 The Defense Case

Should the court accept that a case has been established against the accused, the next stage of the hearing concerns the opportunity for the accused to contest the allegation by calling evidence. The accused does not have to produce any evidence or make a statement in response to the invitation of the court to do so.

<sup>33</sup> See **Article 191 of the CPC**.

**Article 116 of the CPC** provides:

***Action of the Defense***

1. *Excepts in such cases as provided for in Article 115, the President of the Court shall inform the accused that he may:*
  - a) *produce evidence in his defense;*
  - b) *make a statement;*
    - i. *on oath.*
    - ii. *not on oath.*

*in answer to the charge.*

2. *After the provisions of the previous paragraph have been complied with, the accused may take up his defense briefly stating:*
  - a) *the general lines of his defense;*
  - b) *the nature of the evidence he proposes to produce in his defense.*

*The Court shall hear and examine the evidence for the defense.*

3. *If there is more than one accused, the Court shall establish the order in which each accused shall proceed with his defense.*

Should the defense call evidence following the closure of the prosecution case, and the accused gives evidence as a witness, defense counsel will be under the same prohibition as the prosecutor was previously against asking leading questions of the accused or any other defense witnesses. The prosecutor will then be permitted to ask direct, leading questions of all defense witnesses in cross-examination.

Defense counsel will then have the opportunity to re-examine each witness after the prosecutor's cross-examination, just as the prosecutor did when presenting the prosecution case.

#### 4.9.17 Evidence Called by the Court

Throughout the course of proceedings the court reserves a right to request any information that it considers necessary for a fair adjudication of the case. If the court forms a view that evidence exists that would assist their deliberations, then the court may order its production.

**Article 118 of the CPC** states:

***Evidence ordered by the Court on its own Motion***

*A Court may order, on its own motion, that evidence be produced which it considers proper and useful in order to ascertain the truth.*

#### 4.9.18 Withdrawal of the Charge(s)

The prosecutor will, in most circumstances throughout a trial, try to persuade the court that based on all the evidence, there is sufficient evidence for the accused to be properly convicted according to the law, reflecting the strategy and assessment contained in the Case Plan. However, if during the course of the trial the prosecution evidence given appears weaker than assessed, or is not so persuasive when challenged by the defense case, the prosecutor may conclude that some issues cannot be proved to the necessary standard, or that the case as a whole is no longer capable of proof. In such circumstances the prosecutor will consider whether it is appropriate to proceed to the conclusion of the trial, and will assess whether it is more appropriate to withdraw the charges.

In such circumstances the prosecutor may conclude that the appropriate course for the prosecution is the withdrawal of the charge(s), which is provided for by **Article 112 of the CPC**:

##### *Withdrawal of the Charge*

1. *With the consent of the Court, the Attorney General may withdraw the charge, in whole or in part, at any moment of the proceedings in the Court of first instance before judgement is given.*
2. *In the cases provided for in the previous paragraph, the Court shall order, giving the reasons therefore, that the proceedings be terminated for the offence in respect of which the charge has been withdrawn, and shall order any measures that may be required by Article 76.*
3. *An order that proceedings shall be terminated, given in accordance with this Article, shall be equivalent to a judgement for the purposes of paragraph 3 of Article 13.*

If the issue of withdrawal of the case is not relevant or appropriate, the next stage of the trial process is the closure of the hearing.

#### 4.9.19 Closure of the Hearing

Following the presentation of both the prosecution and defense cases, the parties have an opportunity to address the court and make comment prior to the adjudication on the case. This is according to **Article 119 of the CPC**:

##### *Summation and Closure of the Hearing*

1. *After all the evidence has been produced:*
  - a) *the Attorney General shall sum up his case, making such comments and observations as he considers necessary and expressing his opinion on matters of fact and of law, which in his view the Court should accept;*
  - b) *after the summation by the Attorney General, the defense shall sum up its case. If the accused is represented by more than one defense Counsel, each such Counsel shall confine his summation to particular arguments, objections or requests which have not been raised by other Counsels for the defense.*

2. *If there is more than one accused, the Court shall determine the order in which they shall address the Court.*
3. *Without the Court's consent, no further statement shall be allowed. Should he so request, the accused shall always be allowed to have the last word.*
4. *If the Attorney General, the accused or defense Counsel should abuse the right to address the Court, by introducing unnecessarily long speeches, irrelevancies or in any other way, and two successive warnings about this remain unheeded, the President of the Court shall withdraw the right to continue such address from any person so abusing such right.*
5. *The hearing shall be considered closed when the summations to the Court are finished.*

It is the prosecutor who has the opportunity to make the first speech following trial. This is a “*closing speech*” and can be a significant support for the prosecution allegation that was first outlined when the hearing was initiated at the start of the trial, delivered shortly before the court makes their decision. The prosecutor can use this “*summation*” to:

- Remind the court of the allegations, including the nature and details of the offence charged as well the evidence against the accused.
- During the trial process the prosecution evidence will have been given in court by the witnesses. The prosecutor can emphasize to the court how this evidence supports the original allegation outlined before the evidence was formally given to the court by the witnesses. The prosecutor will want to persuade the court that when the provisions of the law are applied to the evidence given by the prosecution witnesses, the court will be satisfied that a crime was committed by the accused, for which the accused should be convicted.
- The allegation may also have been challenged by witnesses called by the defense. The prosecutor may seek to minimize any doubt that this evidence puts on the prosecution case.
- The prosecutor will also have challenged the evidence of defense witnesses in cross-examination. The final speech will highlight any weaknesses in the defense case that the cross-examination exposed, and allow the prosecutor to tell the court why the defense evidence, when the law is applied to it, is not sufficient to alter the prosecution charge that a crime was committed by the accused, for which the accused should be convicted.
- The prosecutor has no direct role in sentencing the accused. That is the duty of the court. However, in addressing the court prior to its deliberations on the evidence, and the issue of guilt or innocence of the accused, it is appropriate that the prosecutor, in reminding the court of the nature of the alleged offence, also reminds it of the statutory sentencing options available. The Penal Code cites a sentencing range for each offence that it legislates, for example, for the crime of “*Hurt*” the sentencing range under the provisions of **Article 440(1) of the PC** is between three months and three years. If the injury is categorized as grievous a penalty of between three and seven years will be imposed. The prosecutor, in linking the law with the evidence in the case can properly make reference to where in the range of seriousness the offence before the court should be placed.

Following the prosecutor's presentation to the court, defense counsel will address the court on behalf of the accused, and will be expected to outline the defense evidence. The defense will take issue with the claim that the prosecution has proved the guilt of the accused, and will suggest that the burden of proof has not been achieved to the necessary standard.

There will be no further statements in the case, unless the court consents that there should be. The accused, however, can request to "*have the last word*" or make the final submission to the court before adjudication on the trial.

#### 4.9.20 The Court's Deliberation

The manner in which the trial court is required to make a decision on the outcome of the hearing is specified in **Article 86 of the CPC** as follows:

##### *Procedures for Decision-making*

1. *Unless the law provides otherwise:*
  - a) *the Court shall reach a decision in chambers without the intervention of the parties;*
  - b) *when a Court consists of more than one person;*
    - i. *deliberations shall be secret and findings shall be reached by majority vote.*
    - ii. *no member of the Court may abstain from voting.*
    - iii. *votes shall be taken by the President who shall vote last, voting beginning with the Judge lowest in grade or the Judge with the least seniority where more than one Judge is of the same grade. In Assize Courts, Assessors shall vote first, beginning with the youngest. In Military Penal Sections, the Assessor lowest in rank, or the assessor with the least seniority, where more than one assessor is of the same rank, shall vote first*
    - iv. *no mention shall be made in the decision of the way in which any individual vote was cast and, if such mention is made, then the decision shall become null and void.*
    - v. *if, in the Assize Section of the Court of Appeal, any difference of opinion arises over a decision matters reserved to the Judges, in accordance with the Article 12 of the Law on the Organization of the Judiciary, the President shall have the casting vote.*
2. *Unless the law provides otherwise, when a decision is not reserved to a specific section of a Court, the following Sections shall be competent:*
  - a) *the Criminal Section, in a District Court;*
  - b) *the General Section, in a Regional Court or Court of Appeal.*

The judges will have heard all the evidence called by both the prosecution and defense in the trial, have assessed the witnesses as they gave evidence in court, and have had the opportunity to ask any questions or

raise any issues during the trial process.<sup>34</sup> The process that is to be followed in arriving at a decision on the case is specified in **Article 120(2) of the CPC**:

*In its deliberations, the Court shall decide;*

- a) *preliminary questions,*
- b) *questions of fact and of law regarding the charge, and*
- c) *if necessary, questions regarding the application of the punishment and security measures.*

In accordance with **Article 86 of the CPC** cited above, the decision-making process is confidential, and the conclusion of individual judges involved in the case will not be made known to the parties. The result of the judges' deliberation, when it is concluded, is read in open court in the presence of the parties, confirming whether the accused has been acquitted or convicted as prescribed by **Article 121 of the CPC**.

It should be noted under **Article 124(1) of the CPC**:

***Relationship between the Judgment and the Charge***

*A Court may find an accused, on the same set of facts, guilty of an offence different from that contained in the original charge, and award a corresponding punishment, even though such punishment may be greater than that applicable to the offence originally charged, and apply security measures, provided that it has been found guilty. Otherwise, the Court shall proceed in accordance with the provisions of sub-paragraph c) 1) of paragraph 2 of Article 106.*

During the course of the trial the prosecutor will have presented the case against the accused on the basis of a specific charge, and linked the alleged actions of the accused to the law that applies to that crime. The discretion is, however, available to the court to make a finding that the evidence discloses a different, alternative offence, find the accused guilty of the alternative offence and sentence accordingly.

#### 4.9.21 Deciding on Sentence

In the event of a Guilty verdict, the finding is stated in open court. According to **Article 123 of the CPC**, details will also be read of any previous convictions of the accused, which the prosecutor must be able to prove, as the accused may contest them. In terms of getting the necessary information the CPC refers to the existence of a Central Records Office at **Article 260 of the CPC** to be maintained at the Police Headquarters and under the direct control of the AG. This information is essential to sentencing, especially in instances where the accused may be liable to a sentence in accordance with the PC as a recidivist, habitual or professional offender.<sup>35</sup>

<sup>34</sup> See **Article 118 of the CPC**

<sup>35</sup> A recidivist is a person who having been convicted of one offence, goes on to commit another of the same nature within five years (**Article 61 of the PC**). A habitual offender commits a third offence (**Article 65 of the PC**) and a professional offender a further offence again.

The sentence to be applied following a finding of guilt is a matter for the court, and not directly the duty of the prosecutor. However, it is right that the prosecutor in representations to the court during proceedings informs the court of the level of seriousness of the alleged offence as disclosed by the prosecution case. Further, in making closing remarks, or assisting the court with the details of any previous offences relating to the accused, the prosecutor is in a position to assist the tribunal by making reference to all the sentencing options appropriate to the case.

#### 4.10 Appeals

Either party may appeal against the court verdict. Additionally, “*other parties*” are permitted to appeal against the finding of the court under **Article 211 of the CPC**.<sup>36</sup> The means of appeal by the prosecutor is determined by **Article 210 of the CPC**:

##### *Appeals by the Attorney General*

1. *An appeal may be lodged by the Office of the Attorney General or by the person who has represented the Attorney General in the proceedings, in accordance with paragraph 2 of Article 12.*
2. *If the Attorney General or his Deputies, as well as his representative in the relevant proceedings, have lodged an appeal and one of the appeals is invalid, it will be validated by the validity of the other; and this shall also apply to the ground for the appeal. If there is any conflict between the appeals, the appeal lodged by the Attorney General or his Deputies shall prevail.*

The appeal may be lodged either by verbal notice or written notice<sup>37</sup> with notification of an appeal by the AG being with the accused within 30 days of it being lodged with the Registrar of the Court that delivered the judgment.<sup>38</sup> There is a time limit for lodging a Notice of Appeal:<sup>39</sup>

- 30 days for appeals against judgment (from the day judgment was pronounced);
- 15 days for appeals against any other judicial act.

Furthermore, the grounds of appeal must be based on the law, and be specific. If the details of the grounds of appeal were not included with the Notice of Appeal when that was notified to the court, for example because the court was notified of appeal verbally by the prosecutor at the conclusion of the trial hearing, then the grounds of appeal are required to be served in writing, signed by the person lodging the appeal, within the above time limits.

<sup>36</sup> “Other parties” would include classes of litigants such as injured parties with a claim to civil damages against the accused for example.

<sup>37</sup> See **Article 212 of the CPC**.

<sup>38</sup> See **Articles 213 & 215 of the CPC**.

<sup>39</sup> See **Article 214 of the CPC**.

The notice containing the grounds of appeal should therefore contain all relevant information to adequately explain to the court the basis on which an appeal is being pursued. The prosecutor submitting the notice should therefore ensure that the following information is included:

- The name of the case/accused.
- The court that delivered the decision/conducted the action appealed against.
- The date of the hearing subject to appeal.
- The offence subject to the proceedings.
- A description of the matter appealed against.

It is suggested that a Notice of Appeal should contain the following details:

### Notice of Appeal

Notice of Appeal in the Case against [the Accused], before the Wajaale Regional Court having been convicted of the offence of Attempted Murder and sentenced by the court on 31 February 2013.

The trial court, having considered the evidence at trial and convicted the accused for the offence of Attempting (under the provisions of **Article 17 of the Penal Code**) to commit an offence of Murder (an offence contrary to **Article 434 of the Penal Code**) sentenced the accused to a period of three years imprisonment for the offence as charged.

### Grounds of Appeal

The AGO appeals against the sentence imposed on the grounds that the sentence of three years imprisonment is wrong in law and fails to comply with the requirements of **Article 125 of the Penal Code** on the following basis:

**Article 17 of the Penal Code** states:

#### *Crimes Attempted*

*A crime shall be considered attempted where the act or omission on the part of the offender, unequivocally directed towards causing the event has not been entirely completed, or where the event has not resulted.*

The accused was tried and convicted of an attempt to commit murder contrary to **Article 434 of the Penal Code** which states the nature of the offence and penalty to be imposed as follows:

#### *Murder*

*Whoever commits murder shall be punished with death.*

**Article 125 of the Penal Code** requires that a conviction for attempting an offence for which the lawful penalty is death is as follows:

#### *Punishment for Attempted Crime*

*Whoever is guilty of attempted crime shall be punished:*

*a) with imprisonment from twenty to thirty years, where the law prescribes the punishment of death in respect of the committed crime [16 P.c.];...*

In sentencing the accused to imprisonment for a period of three years, the court has not complied with the requirements of the law as specified in **Article 125 of the Penal Code** where the sentence of imprisonment for the offence committed by the accused, and upon which the accused was sentenced by the court, must be for a period of between twenty to thirty years.

The grounds of appeal will be completed and signed by the prosecutor with the duty to make the appeal and lodge the notice, and the requirements complied with within the time limits laid down in **Article 214 of the CPC**.<sup>40</sup>

Appeals against judgments and orders made during the course of a trial are to be heard in public. Appeals against any other act or decision will be decided in chambers by the competent court.

The route of the appeal process is as follows;<sup>41</sup>

- Appeals from the District Courts, and from the Regional Courts are heard by the General Appellate Section of the Court of Appeal.
- Appeals from the Assize Section of the Regional Court<sup>42</sup> are heard by the Assize Section of the Court of Appeal.
- The Military Penal Section of a Regional Court is subject to appeal to the Military Penal Appellate Section.

The procedure for an appeal hearing before the Court of Appeal is provided for in **Article 230 of the CPC** as follows:

***Procedure of Court of first instance to apply to Court of Appeal.***

*Preliminaries to Hearing of Appeal*

1. *Insofar as applicable, the provisions relating to the hearing of a case in a Court of first instance shall be followed in the hearing of an appeal.*
2. *When an appeal has to be heard, the President of a Court of Appeal shall;*
  - a) *fix the date of the hearing.*
  - b) *order the appearance*
    - i. *of the accused who appeals, and*
    - ii. *of an accused who has not appealed, if the appeal has been made by the Attorney General or is made with regard to one of the cases provided for in Article 217.*

<sup>40</sup> The technical requirements required by the appeal procedure are provided for in **Articles 208-226 of the CPC**. The prosecutor must take the provision of all the provisions into account when going through the process.

<sup>41</sup> Refer to **Article 228 of the CPC**.

<sup>42</sup> The Criminal Courts of the Regional Court are divided into two sections. The General Section deals with allegations that carry a penalty of less than ten years imprisonment. Offences carrying a penalty of ten years or more are dealt with by the Assize Section. Refer to **Article 12/7 of the LOJ**.

- c) *appoint Counsel for the accused in the cases provided for in sub-paragraph b) of paragraph 2 of Article 14 of the Law on the Organization of the Judiciary<sup>43</sup>, when the accused is without Counsel. The Court shall arrange to inform the accused and his Counsel of such appointment.*
- d) *order that the injured party be summoned to appear before the Court, if the injured party or the accused has appealed against the judgment concerning civil damages.*
- e) *order that the Attorney General be duly notified.*
3. *The date of the hearing shall be notified to the accused and wrote to the notice of this Counsel and of the Attorney General at least 15 days before the hearing.*
4. *Insofar as applicable, the provisions of paragraph 5 Article 80 and of Article 89 shall be observed.*

The appeal hearing is adversarial between the parties, where issues in dispute concerning the grounds of appeal are subject to representations to the court by both parties. **Article 231 of the CPC** gives the order for the appeal hearing:

### *Hearing of the Appeal*

1. *After the opening of the hearing of the appeal, first the appellant shall explain the grounds for his appeal, then the other party shall be given the opportunity to reply. Both parties may make comments and observations, raising objections and presenting requests and petitions which they deem pertinent, and expressing their views on the points of fact and law, which in their opinion the Courts should accept. The right to reply shall be exercised only with the consent of the Court. If an appeal has been made in the same case by both the accused and the Attorney General, the appeal of the accused shall be heard last.*

*Insofar as applicable, the provisions of Article 119 shall apply.*

2. *If the appeal is against a conviction or an acquittal and the Court does not consider itself able to reach a decision upon the available evidence, the Court may, even on its own motion, order:*
  - a) *the re-hearing before it, in whole or in part, of the trial;*
  - b) *the examination of witnesses heard in the trial of first instance, who may testify even with respect to matters not previously considered;*
  - c) *the taking of new evidence;*
  - d) *the re-hearing of expert witnesses.*
3. *If the appeal is against an order that the proceedings be terminated and the Court of Appeal considers that there are valid grounds for the appeal, the Court of Appeal shall set aside the impugned order and shall either try the case itself, in accordance with the provisions of Book Two of this Code, or remand the case for trial to the Court which passed the impugned order.*

<sup>43</sup> This provision refers to the earlier, Somali LOJ. State provision for Counsel is covered by **Article 14/8** of the current versions of the **LOJ** with reference to representation for serious offences (those carrying a penalty of ten years imprisonment or greater).

In drafting the grounds of appeal, or in considering the basis of an appeal by defense, the prosecutor will effectively be updating the case plan that was prepared in relation to the initial file review. The prosecutor will once again:

- Analyze the evidence – this time in so far as necessary to meet the subject matter of the appeal.
- Develop a strategy to present the prosecution case – putting forward arguments in relation to the issue raised in the Notice of Appeal.
- Identify the defense position, and consider how to rebut any defense case.
- Adopt an effective timetable in preparation for the hearing date for the appeal.
- Update the circumstances on the case file – to include the appeal process.

This will assist the prosecutor to present the appeal, or to resist the appeal presented by defense counsel, as appropriate. It is important that in preparing for the appeal hearing, that the focus of the preparation involved is on the issues raised in the Notice of Appeal, and not so much on the case as a whole. It will be an advantage to have a good knowledge of the law, facts and issues arising in the overall case. This is an advantage of having an ongoing, strategic case plan. However, the appeal will be decided on the grounds that are cited in the Notice of Appeal, and this is what must be well prepared.

Following the decision of the Appellate Court, there remains one more level of appeal, which is to the Supreme Court. The Supreme Court is the highest judicial authority in the justice system, and the basis of appeals permitted to be brought before it are set out in **Article 232 of the CPC** which provides:

### *Appeals to the Supreme Court*

*Matters against which Appeal may be made to the Supreme Court*

1. *In addition to cases established by special provision, and subject to the provisions of Chapter 1 of this Part, an appeal may be lodged with the Supreme Court;*
  - a) *by the parties specified in paragraph 2 of Article 227 against any acts and decisions referred to therein when handed down by a Court of second instance.*
  - b) *by the accused or by the Attorney General against any other decision handed down in an appellate proceedings, or against any other decision concerning which appeal to the Court of Appeal is not permissible.*
2. *An appeal shall be admissible only on the following questions of law;*
  - a) *lack of jurisdiction or incompetence of the lower Court;*
  - b) *violation or erroneous application of legal provisions;*
  - c) *nullity of the judgment or the proceedings;*
  - d) *omission, insufficiency or contradiction in the grounds on which the judgment is based, relating to a material point raised by either party or by the Court on its own motion.*

The process for hearing appeals before the Supreme Court is on the same basis as before the Court of Appeal, and so the prosecutor should prepare in a similar way. This will involve;

- updating the case plan analysis to meet the grounds for this new appeal;
- continuing to similarly amend and adapt the strategy;
- ensuring that the defense position is identified and arguments in rebuttal prepared;
- timetabling activities to be ready and effective for the appeal hearing;
- updating the case records to ensure that all information is at hand to assist, focusing on the stated issues for the Supreme Court.

The means available to the Supreme Court for the disposal of cases are specified in **Article 233 of the CPC** and comprise the following:

If the appeal is against a judgment:

- Reject the appeal, correcting any errors in law found in the judgment, if the errors are not assessed as having adversely influenced the resulting judgment (**Article 233(1)(a)(i)**).
- Set aside the judgment and refer the case back to the competent court (**Article 233(1)(a)(ii)**).
- Set aside the judgment in cases where the basis of proceedings could not properly result in conviction (**Article 233(1)(a)(iii)**).
- Where no further evidence needs to be called to resolve any outstanding issue, but it is right to set a judgment aside, remand the case to the court that made the judgment appealed against.

If the appeal lies against a court order issued during trial terminating proceedings:

- Reject the appeal (**Article 233(1)(b)(i)**).
- Set aside the order (**Article 233(1)(b)(ii)**).
- In all other matters the court will, having heard representations from the parties in open court, retire and deliberate in chambers (**Article 233(1)(c)**),

It is to be noted that when the Supreme Court orders that a case be referred back to a competent court, the parties have a right to appeal on issues that arise out of the renewed hearing. However there is no right to appeal on issues that have previously been the subject of referral to the Supreme Court in the previous proceedings. The provisions in relation to cases referred back to the competent court by the Supreme Court are found at **Article 235 of the CPC**.

It is also to be recognized that the Supreme Court is the highest tribunal in Somaliland. **Article 236 of the CPC** confirms that there is no route of appeal on the findings of the Supreme Court. There is no tribunal that can overrule Supreme Court decisions.

#### 4.11 Practical Observations on Defense Representatives in Cases

- The chronology of a criminal case outlined above, through initial review, preparation for trial, trial sentence and the appeal process, assumes that important provisions in the legislation that applies to criminal proceedings are available. It should be noted that in the current circumstances this is not always

the case. An example of an important element in the process that may not be available is the allocation of defense counsel (**Article 4 of the LOJ**).<sup>44</sup>

- Legal Aid provision is available to those who have committed serious criminal offences, carrying a penalty of ten years imprisonment or more. This currently appears to be provided in most cases. There is also legislation to assist those who cannot afford to pay for the private lawyer, so that they are provided with access to Counsel by the state, and may be exempted from the court fee for civil cases. This statutory provision is not widely available in practice, and appears to vary depending on whether funding is available to the offices dealing with representation of this kind, or simply whether there is any person at court qualified to fulfill the role.<sup>45</sup> Prosecutors informally suggest that around 50% of the cases not in the serious category have private lawyers representing the accused, although attendance at court would suggest less.
- The method that replaces representation by a lawyer involves the President of the court asking the accused the essential points. In a trial situation, this is unlikely to help with techniques of questioning and the interrogation of witnesses.

## 5. Ethics, Professional Conduct & the Disciplinary Process

### 5.1 Introduction

**Definition of Ethics:** the “...science of morals...moral principles, rules of conduct...conforming to a recognized standard.”<sup>46</sup>

Much of the work of a prosecutor concerns issues of ethics and morality at a broad level. The role of the prosecutor should have a strong ethical and moral foundation, based on fairness, justice and the protection of victims and the vulnerable. Such standards need to be described in clear guidance to assist the conduct of the right processes properly and fairly, and to ensure a consistent, uniform system of practice. This gives prosecutors an insight into what is expected of them as they deal with allegations of crime by members of society.

The basic Somaliland guidance for prosecutors on standards and professional conduct is the **Code of Conduct and Disciplinary Rules for Judges and Prosecutors (2011) (CoC)**. The CoC applies to the conduct of judges and prosecutors, reflecting the roles of both as agents of public justice, but at the same time combining two separate functions and disciplines in the criminal justice system. Although joined in one set of rules, prosecutors and judges are dealt with independently of each other within the CoC. This maintains some sense of independence from each other, if not representing distinct duties and roles through distinct regulatory documents. The fact is that **the CoC** provides the rules and guidance for both.

<sup>44</sup> This provision is cited at **Article 4** in both the 49 Article and 60 Article versions of the **LOJ** currently in force.

<sup>45</sup> Funding for the University of Hargeisa Legal Aid Clinic is reported not to be constant, and the service may therefore not be consistent. There is little other evidence of any provision of legal assistance without payment.

<sup>46</sup> The Concise Oxford Dictionary (Oxford University Press).

While **the CoC** provides prosecutors (and judges) with guidance and direction on the standard of professional conduct that they will be required to live up to, the means of enforcing those standards lies with a different set of legislation, mainly the **Constitution of the Republic of Somaliland (the Constitution)** and the **Laws on the Organization of the Judiciary (LOJ)**. These represent the major elements of the Republic of Somaliland ethics and professional conduct material. There are also international values and priorities that inform and support the professional standards of prosecutors, and which are to be taken notice of by the Somaliland authorities.<sup>47</sup>

## 5.2 The Code of Conduct and Disciplinary Rules for Judges and Prosecutors (2011) (CoC).

As indicated above, **the CoC** is a document that amalgamates judges and prosecutors under the heading of the "judiciary". As a general principle, to avoid a conflict of interest in the conduct of government, there are measures in place to ensure a separation of functions between the judicial role and the executive role, which includes the prosecution. In many countries this is reflected by completely separate agencies for the judiciary and prosecutors in order to protect the respective offices from potential conflicts of interest, or the appearance of one state element in the justice system having an influence over the other. It is fundamental that the function of the prosecutor, and the prosecuting authority, to assess evidence and make the decisions on what cases are brought before the court, is a professional decision made by the prosecutor, and is not compromised by any other authority.

The judiciary and the prosecution work in the same courtroom environment, in their respective roles for the conduct of trials. To be effective and transparent, each must be clearly seen to operate independently.

Including prosecutors in the Code of Conduct for the judiciary may give the impression that these functions can be thought of as inter-connected. However, both judges and prosecutors are, in terms of their specific roles in the criminal justice process, separately considered in the document. **Articles 7 – 10 of the CoC** specifically refer to the professional values and conduct to be expected of prosecutors.<sup>48</sup>

**Article 7 of the CoC** addresses the personal qualities of the prosecutor:

- Commitment and honesty;
- Good, up to date legal knowledge;
- Defender of Human Rights;
- Acts in the Public Interest;
- Direct, independent and unbiased.
- Disciplined and polite;
- Diligent, and up to date on the duties of prosecutors;

<sup>47</sup> The Constitution at Article 10 gives recognition to the Charter of the United Nations, to International Law and the Universal Declaration of Human Right.

<sup>48</sup> **Articles 5 & 6 of the CoC** refer to the broad values and standards expected of judges.

- Respectful and well presented.

These are all intended to represent the professional values and conduct of a committed, professional prosecutor.

The CoC also requires prosecutors to function independently (**Article 8**), be unbiased and neutral (**Article 9**), in addition to setting out the role of the prosecutor in the administration of justice in **Article 10**, which states:<sup>49</sup>

1. *The prosecutors shall perform his functions in speed and fairness and straightness and in particular shall be:*
  - a) *Perform his functions in confidence and diligence in accordance with the law and the good conduct required from prosecutors.*
  - b) *Respect the schedules provided by the procedural law administration of judiciary functions and always act speedily in cases and consider their priority and time of entry.*
  - c) *When the law obliges him to assist the criminal investigation processes he shall perform with diligence, neutrality and professional traits that enables him to ensure always the criminal investigation department respect and adhere to principles of legality and fundamental human rights.*
  - d) *Without prejudice to the rights of accused persons and the victim, consider if it is permitted by the law to consider not to prosecute the accused person and it is possible to suspend the prosecution with or without condition, or to divert from the formal justice system or not take to the court.*
  - e) *Prosecute a case by ensuring that there is reliable evidence acceptable by the law, and not prosecute the case in the absence of such evidence.*
  - f) *During hearings and the adjudication processes, shall take part fairly, diligently and as a responsible person.*
2. *The prosecutors;*
  - a) *Shall respect confidentiality of prosecution.*
  - b) *Shall refrain from contacting the media or public or making unnecessary comment on the criminal cases at the trial or criminal cases pending decision of appeal.*
  - c) *Shall consider the lawful rights of the victim and witnesses where it may affect the interests of the victim or witnesses and shall ensure that they are aware of all the rights that the victim and witnesses have, and particularly make able the accused person is compensated and the availability of witnesses protection.*
  - d) *Unless it is contrary to the public interest or the rights of other persons such as the victim, a witness or the accused person, disclose the reason why the prosecutor has used a discretionary power to any interested person who requests it.*

<sup>49</sup> The Article as cited has been partially edited to assist the reader, as the translation itself is not clear in English.

- e) *When children are involved in the case as a victim or witness, shall ensure consideration of the best interests of the child.*
- f) *When children are involved in the case as a victim or witness, shall ensure consideration of the best interests of the child.*
- g) *Shall respect the rights of the accused person and protect these rights in accordance with the law and necessary international human rights standards in to order to have fair trial.*
- h) *Shall inform accused persons of information related to the accusation, or in favor of them, in accordance with the law, so as to ensure a fair trial.*
- i) *Ensure that all evidence in the case is obtained in a lawful manner or in accordance with the constitution.*
- j) *Shall reject all evidence obtained in an unlawful manner, and contrary to the rights of the accused person, particularly evidence obtained by torture, and take legal action against any person who does unlawful acts to obtain evidence.*
- k) *Where they become aware of the existence of other offenses during the pre trial process or in the trial, they shall submit a detailed written report of any new offence to the police as soon as possible.*

The provisions in **Article 10 of the CoC** are clearly intended to provide a professional framework within which the prosecutors' duties must be conducted. These are provisions to ensure clarity in what the prosecutor is required to do, and transparency in how those duties are conducted.

Allegations that a prosecutor has not maintained the above standards will be assessed in accordance with **Article 12 of the CoC** to establish whether the complaint represents an alleged "grave disciplinary measure" or "simple disciplinary measure". **Article 12 of the CoC** states the following:<sup>50</sup>

#### ***Reasons for Disciplinary Measures of Attorney General***

*The cause of action for disciplinary matters for prosecutors are:*

1. *Grave disciplinary measures.*
2. *Simple disciplinary measures.*

*12(1): The following acts constitute grave disciplinary measures*

- a) *If a prosecutor requests or takes a bribe.*
- b) *If a prosecutor is biased for his personal benefits or for the interests of others.*
- c) *If a prosecutor creates false documents to gain personal benefits or benefits for others.*
- d) *If a prosecutor borrows money from any person concerned in a case or engages in conduct that may affect his performance or his obligations in carrying out his duties.*

<sup>50</sup> The Article as cited has been partially edited to assist the reader, as the translation itself is not clear in English.

- e) *If a prosecutor, either intentionally or negligently, conceals or fails to inform or present information or his knowledge which leads to an unjust judgment.*
- f) *If a prosecutor willfully fails to perform his duty of prosecution without good reason.*
- g) *If a prosecutor is absent from work without authorization or without an acceptable reason.*
- h) *If a prosecutor, during working hours, acts contrary to custom or good social conduct.*
- i) *If a prosecutor, intentionally or negligently, damages official property.*
- j) *If a prosecutor refuses to perform either written or oral instructions given by his superior, or the Attorney General in accordance with the law, without having reasonable legal grounds for doing so.*
- k) *If a prosecutor presents evidence to the court which is not admissible in law, and knows, or should have known know that it has been illegally obtained, particularly through torture, or has failed to take legal action against a person responsible for illegally acquiring evidence in contravention of the Constitution.*
- l) *If a prosecutor becomes a member of a political party or organization, or campaigns publicly in support of a political party.*
- m) *If a prosecutor intentionally undermines justice by not applying the relevant legal provisions, supported by evidence, in the prosecution of the alleged offence.*
- n) *If a prosecutor discriminates in favour of any party in a case on grounds related to tribe, nationality, social status or religion.*
- o) *If the prosecutor, during a trial, assaults or attempts to assault, one of the judges, judiciary staff, police officers or other side of the case.*
- p) *Any other acts which are deemed to be misconduct equal to the above mentioned acts.*

**12(2):** *The following acts shall be considered as a cause for simple disciplinary measures against the prosecutors:*

- a) *If a prosecutor fails to work diligently and in responsible manner.*
- b) *If a prosecutor fails to perform his duty or fails to support and work with staff of the stakeholders.*
- c) *If a prosecutor borrows money from a person who has direct or indirect interest in a case in which the prosecutor is involved.*
- d) *If a prosecutor discloses or shares information related to the adjudication processes, or any confidential information, to parties other than those who are authorized by law or where there is a lawful order from his superior to do so.*
- e) *If a prosecutor conduct any act that may be considered as a simple disciplinary measure.*

f) *It is noted that some “grave disciplinary measures” and “simple disciplinary measures” are very similar. It is suggested that the issue that will be considered as one of degree of offence. As an example, **Article 12(1)(d)** involves the prosecutor borrowing money from parties with an interest in a case, defining that conduct as a “grave disciplinary measure”. **Article 12(2)(c)** defines borrowing money from a party with an interest in a case as a “simple disciplinary measure”. Whether it is a grave or a simple measure may therefore depend on the specific circumstances.*

The above applies to the professional conduct of prosecutors in the conduct of cases. A Deputy Attorney General (DAG) with administrative responsibility for AGO Regional Offices may also be liable for management failings under the provisions of **Article 13 of the CoC**. Administrative breaches include:

- Improperly influencing judges.
- Failure to direct operations to the detriment of proceedings.
- Failure to report information of judicial misconduct.
- Failure to implement legal directions issued by superiors.

### 5.3 The Disciplinary Investigation

**Articles 14 to 20 of the CoC** also provide the structure of the investigation process. The process begins by **Article 14(2)** establishing the right of any person with a complaint against the conduct of a prosecutor to do so in writing to the DAG who has management responsibility for the prosecutor. Alternatively the complaint may be made directly to the Attorney General (AG) or to the Judicial Commission.<sup>51</sup>

Following the complaint being made in writing through one of the assigned offices, the DAG responsible for the prosecutor is obliged to start disciplinary proceeding under the provisions of **Article 14(3) of the CoC**.

The obligation to investigate the complaint begins with a preliminary investigation as outlined in **Article 15 of the CoC**, where the DAG obliged to investigate the complaint has authority to examine the registrars, physical file and any other relevant documents. The DAG has both an obligation, and clear authority to investigate the conduct of the prosecutor in question on the subject of the written complaint. Under **Article 18(3) and (4)** the DAG responsible for the preliminary investigation must complete this within ten days of the complaint being received, and submit a full report of the findings of the investigation to the AG and to the Judicial Commission. Under **Article 17(1) of the CoC** the prosecutor subject to the complaint is served with a copy of the allegation. If the DAG considers that the evidence does not support the complaint, the DAG will also confirm this in writing to the person who made the complaint in compliance with **Articles 16(b)(1)(b)**

<sup>51</sup> **The CoC refers** to a “Judiciary Council” throughout. However **Articles 107 & 108 of the Constitution** establishes a “Judicial Commission” for the same purpose. This Manual will use the Constitutional denomination. The Judicial Commission is established under **Article 107 of the Constitution** as a body chaired by the chairman of the Supreme Court (or Chief Justice) and comprised of senior justice sector officers, including the AG, with two selected representatives from the House of Elders and two members of the public. **Article 108 of the Constitution** gives the Commission authority for “... the appointment, removal from office, promotion, demotion, transfer and discipline of the judges of the lower courts (the Appeal, Regional and District Courts), and the Deputy Attorney Generals.”

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**& 17(2)**. However **Article 16(b)(4)** ensures that a finding by the DAG that the complaint is not substantiated, which is subject to the agreement of the AG that this is correct, is not an end to the matter. The complaint and any related reports and evidence are then passed in any event to the Judicial Commission, who must then refer the material to the “*Inspection and Supervision Committee*” of the Judicial Commission, which will comprise of three members (one Chairperson and two others), for further investigation.

Investigation of the complaint by the Inspection and Supervision Committee is conducted in accordance with the provisions of **Article 19 of the CoC**, which allows the committee powers to access the register, file and any other documents relevant to the complaint, and to interview the prosecutor concerned, or any other relevant person, taking the action necessary to complete the investigation (**Article 19(4)**). The committee is required to submit a full report, including all findings, signed by all three members, no later than 30 days from the instruction to investigate the matter (**Article 20 of the CoC**).

#### 5.4 The Disciplinary Enforcement Mechanism

The responsibility for disciplining prosecutors lies with the Judicial Commission under **Article 108 of the Constitution**. The disciplinary process is contained in **Articles 21 to 24 of the CoC**, and will be scheduled as follows:

- The Judicial Commission will pass the report from the Inspection and Supervision Committee to the AG for presentation of the complaint within seven days of receipt (**Article 21(1)**).
- The AG will then present the accusation within seven days of receipt and request that the Judicial Commission commence hearing of the case (**Article 21(2)**).
- The Judicial Commission is then required to hear the case within the following 30 days (**Article 21(3)**).
- The Judicial Commission must notify the prosecutor of the accusation in writing, and nominate a date for the prosecutor to answer the allegation(s) (**Article 22(1)**), the prosecutor being allowed self-representation, or representation by another person (**Article 22(2)**). If the prosecutor does not attend the matter be proved in absence (**Article 22(3)**).
- Having heard representations and discussed the case, the Judicial Commission will decide whether to dismiss the case if the evidence does not show misconduct by the prosecutor, or impose disciplinary measures if misconduct is proved. The judgment will be delivered in writing, and take into consideration factors such as the prosecutor’s educational status, length of service and reputation as well as the nature and circumstances of the misconduct (**Article 23**).
- The decision of the Judicial Commission is not subject to appeal, but there is a right to have the decision reviewed by the Judicial Commission once again under the provisions of **Article 24 of the CoC**. The prosecutor has the right to request review of the finding within 15 days of notification of the outcome, which should be requested in writing with details of the reasons for review. The Judicial Commission will complete the review deliberations within ten days of receipt of the request, and inform the prosecutor accordingly. This decision is final, and there is no right of appeal.

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## 5.5 Disciplinary Measures

**Article 25 of the CoC** states that the objective of disciplinary measures is to correct a wrong, and to act as a deterrent, through their imposition on those who fail to meet professional standards. It is also emphasized that a finding of fault in the above process may not prevent further criminal proceedings and punishment.

The disposals that are available to the Judicial Commission following a finding of guilt, are specified in **Article 26(2) of the CoC** as follows:

- Oral or written warning.
- Fine of not more than one month's salary.
- Fine of two to three months' salary.
- One step demotion.
- Dismissal.

For findings of simple misconduct, the punishment will be, for a first offence, an oral or written warning. A second finding will result in a fine of one month's pay. If the subsequent disciplinary findings concern grave misconduct, then the second offence carries a fine of two months' pay, and a third dismissal (**Articles 27(1) & 28(2)**). Grave misconducts carry a fine of two to three months' pay for the first offence, a fine of two months' pay and a one step demotion for a second, and a third warrants dismissal.

If the Judicial Commission concludes that the prosecutor is not suitable for this post, then dismissal can be considered in any event, and is mandatory for misconduct contrary to **Article 12(1)(a)** (taking a bribe), **Article 12(1)(b)** (improperly gains personal benefit or benefit for others), **Article 12(1)(c)** (falsifies a document to gain personal benefit or benefit for others), **Article 12(1)(e)** (knowingly permits a wrongful conviction) or **Article 12(1)(f)** (willfully undermines the prosecution process).

Disposal of cases against DAGs responsible for the administration of Regional Offices are dealt with under the provisions of **Articles 31 & 32 of the CoC**.

It is important to note that the authority of the Judicial Commission in determining issues concerning the administration and disciplining of prosecutors is a constitutional duty under **Article 108(1) & (3) of the Constitution**.

## 5.6 Other Provisions

There are statutory provisions that deal with ethical integrity and professional conduct in the **Laws on the Organization of the Judiciary (LOJ)**, and these outline the same provisions that are contained in the CoC. The legislation identifies and repeats the professional standards required of prosecutors, as well as emphasizing the role of the Judicial Commission.

**The Constitution**, in defining the range and scope of citizen’s rights, highlights ethical issues that prosecutors must take account of, and are professionally obliged to address. The areas in question include:

- Equality before the Law (**Article 6**).
- Abuse of Human Rights (**Article 24(4)**).
- The Right to Liberty (**Article 25**).
- The Imposition of Punishment will be Prescribed by Law (**Article 26**).
- The Rights of Persons Deprived of their Liberty (**Article 27**).
- The Sanctity of the Home (**Article 29**).

The overarching requirements of **the Constitution** as outlined above, guide and direct the prosecutor in setting broad standards for the engagement of the Criminal Justice System with the people of Somaliland. The principles that are declared in **the Constitution** are very much involved in the work of the prosecutor. Those above have the following implications:

- The prosecutor is expected to conduct proceedings in accordance with the law, without displaying prejudice, favoritism, bias or discrimination.
- The prosecutor will respect and protect the dignity and rights of those who come into contact with the Criminal Justice System.
- The prosecutor will seek and support the detention of persons only in accordance with the law, and will not become involved in arbitrary or unlawful deprivation of liberty. The prosecutor has a duty to ensure that issues of detention, and the use of bail as an alternative, are properly addressed and considered by the court.<sup>52</sup>
- The prosecutor will play an important role in ensuring that the punishment imposed following conviction complies with the provisions of the law, and with current sentencing guidelines.<sup>53</sup>
- The prosecutor has a duty to inspect and monitor prisons to ensure that the rights of detained persons are met, and that the authorities responsible for the condition and management of detention facilities and prisons meet their obligations. The LOJ<sup>54</sup> states that prosecutors ‘*Shall monitor and supervise the living conditions, health and sanitation of the prisons and other detention centers and submit its findings to the relevant bodies and shall follow up to that end.*’ Article 14 of the Prison Law 1971 also requires the following of prosecutors:

- A. *To visit all and every prison so as to supervise living and health conditions of the prison inmates.*
- B. *To inspect/monitor prisons, rehabilitation centers and prisoners, and if found necessary to interview prison inmates.*

<sup>52</sup> This element is important with regard not only to the prosecutor's role in making representations on detention and bail to a court, but also in consideration of the AGO's duties in Prison Inspection and Monitoring.

<sup>53</sup> In partnership with the Chief Justice and the Supreme Court, UNODC has published a Sentencing Policy and Guidelines for Judges.

<sup>54</sup> The provision appears at Article 45 of the LOJ comprising 49 Articles, and at Article 49 of that containing 62 Articles respectively.

- The prosecutor will ensure the admissibility of evidence, paying attention to the manner in which evidence is obtained, and compliance with the law in the conduct of investigation. This will include the need to inform the court and apply for search warrants in order to lawfully gain access to homes for the purpose of obtaining evidence.

**The Constitution** also provides an important provision with regard to the application of international standards in the Somaliland Justice System. Although Somaliland is not a signatory to International Conventions, **Article 10(2)** states that the Republic of Somaliland undertakes to act in accordance with the United Nations Charter, and with international law, and makes a commitment to respect the Universal Declaration of Human Rights. This Article acknowledges Somaliland's sense of international standards as represented through international agreements.

### 5.7 The United Nations Guidelines on the Role of Prosecutors

**The United Nations Guidelines on the Role of Prosecutors (UN Guidelines)** represent general, fundamental standards that are considered to be relevant for all prosecutors. **The UN Guidelines** are the product of the Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba in 1990.<sup>55</sup> They specifically refer to the following issues:

- The Qualifications, Selection and Training of Prosecutors (**Articles 1 & 2**).
- Status and Conditions of Service (**Articles 3 to 7**).
- Freedom of Expression and Association (**Articles 8 & 9**).
- Role in Criminal Proceedings (**Articles 10 to 16**).
- Discretionary Functions (**Article 17**).
- Alternatives to Prosecution (**Articles 18 & 19**).
- Relations with other Government Agencies or Institutions (**Article 20**).
- Disciplinary Proceedings (**Articles 21 & 22**).
- Observance of the Guidelines (**Articles 23 & 24**).

The areas addressed by **the Guidelines** concern not only the conduct of the individual prosecutor, but equally refer to the obligation that the state has in support of the prosecutor. The prosecutor can reasonably expect a degree of freedom, and should be given protection from interference, in addition to fair treatment and equality of opportunity.<sup>56</sup>

<sup>55</sup> Somaliland is not a signatory. Its lack of recognition as an independent state means that it does not have the international standing required. However, Somaliland does recognize international provisions (as indicated by **Article 10(2) of the Constitution**). In any event, such provisions should be considered as a persuasive influence, containing a statement of standards of universal application.

<sup>56</sup> **Articles 1 – 7 of the United Nations Guidelines on the Role of Prosecutors**

**The Guidelines** also refer to principles that would require some consideration in terms of practice in Somaliland. An example of this occurs with **Article 10**, which states: *‘The office of prosecutors shall be strictly separated from judicial functions.’*

This principle needs to be accommodated in Somaliland, where the judiciary is in most respects considered to include both judges and prosecutors, and both are under disciplinary authority exercised by the Judicial Commission, which is chaired by the Chief Justice.<sup>57</sup> The doctrine of the “*separation of powers*”, which prescribes a separation of the three principal branches of government, requires that the executive function of the prosecutor is independent of, and separate from, the distinct role of the judges.<sup>58</sup> There is therefore a challenge in Somaliland to ensure that the prosecution and judiciary are independent in the performance of their separate functions.

Another issue with the **UN Guidelines** arises with the provisions of **Article 21**, which sets out the need for disciplinary proceedings against prosecutors to be expeditious and fair. It also stipulates the need for such decisions to be “...*subject to independent review.*” The review of the decisions of the Judicial Commission, under **Article 24 of the CoC**, is conducted by the Commission itself, and is not, therefore, effectively independent. This is something that may need to be considered and formally amended if Somaliland is to fully meet international standards, and enhance the degree of transparency in the disciplinary process.

The basic requirement of prosecutors, as specified in the **Article 13 of the UN Guidelines**, is:

In the performance of their duties, prosecutors shall:

- Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
- Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
- Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>59</sup>

<sup>57</sup> **Article 108 of the Constitution** refers. It is also noted that the CoC applies to both prosecutors and judges.

<sup>58</sup> The doctrine of the separation of powers was promoted in societies in Ancient Greece, where the roles of the legislature (Parliament), executive (public office and civil service – often headed by the head of state) and the judiciary operated independently of each other

<sup>59</sup> The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was passed by the UN General Assembly on 29 November 1985.

The above conditions are not inconsistent with the general rights and constitutional protection in the Constitution. They are in line with the stated standards of the Republic of Somaliland, and are therefore relevant to prosecutors as universal standards to be adhered to.

### 5.8 The International Association of Prosecutors (IAP)

The IAP was established in 1995 as a coordination forum for prosecutors from around the world, with a capability to initiate events to discuss common issues and interests and to share experience, expertise and problems. **The Constitution of the IAP**<sup>60</sup> includes objectives such as:

- Promotion of effective, fair, impartial and efficient prosecution of criminal offences.
- Protection of human rights as laid down in the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948.
- Promotion of high standards and principles in the administration of criminal justice, including procedures to guard against or address miscarriages, in support of the rule of law.
- Promoting and enhancing those standards and principles which are generally recognized internationally as necessary for the proper and independent prosecution of offences.
- Assisting the prosecution of organized crime, or other crime, through speedy and efficient international cooperation in gathering and providing evidence and information for tracking and seizing the proceeds of crime, and locating and apprehending fugitive criminals.
- Promoting measures for the elimination of corruption in public administration.
- Promoting the professional interests of prosecutors, and enhancing their crucial role in achieving criminal justice.

The objectives of the IAP support the principles of the **UN Guidelines** and help to identify universal standards for prosecutors from all jurisdictions and traditions. This is further emphasized in more practical guidance contained in the **IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors**. The statement, first published in 1999 provides a consistent template of standards, rights and duties that relate to the proper function of the state prosecutor.

The IAP standards seek to address the level at which prosecutors should expect to carry out their function, specifying six specific areas:

- a) **Professional Conduct:** *This area addresses the personal and professional integrity required of the prosecutor, emphasizing a commitment to justice and fairness in proceedings.*
- b) **Independence:** *This area identifies the need for clarity and professional confidence in exercising discretion in the function of prosecution. The need to be free from undue influence and political interference, as well as transparent, consistent and in accordance with prevailing guidelines.*

<sup>60</sup> Reference to **Article 1(3) of the Constitution of the IAP (2011)**.

- c) **Impartiality:** *This area promotes the need for prosecutors to be unaffected by sectional, partisan or biased interests whether political, social or prompted by any other source outside of the evidence and the law.*
- d) **Role in Criminal Proceedings:** *This area provides practical guidance on the values and ethics for prosecutors to be aware of, and apply, in conducting criminal proceedings. There is specific guidance concerning the principles to maintain in seeking fairness, justice and the truth in criminal proceedings.*
- e) **Co-operation:** *This area highlights the duty on the prosecutor to co-operate with the other justice agencies in fulfilling their mutually dependent roles to achieve fair and just outcomes.*
- f) **Empowerment:** *This area looks at the required level of support needed by prosecutors to fulfill the function required of them effectively. This includes appropriate conditions of service (salary, working conditions, career prospects and so on). It also includes protection from harassment and undue influence for the prosecutors themselves and their families, and a fair and transparent system to deal with complaints, including allegations improper or negligent professional conduct.*

The IAP Standards are not binding on prosecutors, but are influential as they represent a broad agreement on the important principles to be applied to the work of prosecutors. As an organization the IAP is the only international body that seeks to unify and inform prosecutors from a large variety of independent nations, and to provide a forum for member states to inform and influence each other.

The IAP is in the process, with UNODC, of drafting a Prosecutors' Manual so that a uniform practice reference will be available. When completed this should be used to inform this Manual, and be appended to it for reference.

## 6. The Role of the Police

The relationship between the police and prosecutors is the most important working partnership involved in delivering justice and suppressing crime. Regardless of the exact role that each entity has in conducting investigations or presenting cases before a court, there comes a point when both have to integrate their efforts to conduct the prosecution process. It is the police who conduct an arrest. It is the police who execute warrants for search and seizure and who collect evidence. It is the police who are the first to deal with the suspect following the alleged offence. Police officers are professional witnesses in the criminal justice process, giving details of what they saw, what processes were applied to the investigation, how the suspect behaved and reacted to the allegation and so on. This is an unavoidable partnership.

## 6.1 Duties of the Police

**Definition of Police:** “Civil force responsible for maintaining public order.”<sup>61</sup>

The responsibility of the Somaliland Police is set out in **Article 124(1) of the Constitution**, which provides: *‘The Police Force shall be responsible for protecting the peace and for enforcing the law, and its structure and duties shall be set out by law.’*

Concerning the investigation of crime **Article 23 of the CPC** provides the following:

### *Definitions*

1. *For the purposes of this code, unless the context indicates otherwise, the term Police shall include:*
  - a) *the Police Force;*
  - b) *the Finance Guards;*
  - c) *any other military or para-military Service and any civil organ of the State which is required by law to collect information about, and to enquire into, specified types of offences and to provide the proof necessary for the application of the penal law.*
2. *For the purpose of this Code, unless the context indicates otherwise:*
  - a) *The term “Police Station” shall include a territorial or special unit of one of the Forces or Services referred to in paragraph 1 of this Article;*
  - b) *The term “Police Officer” shall mean every member of the Forces or Services referred to in paragraph 1 of this Article.*

In April 2010 the Somaliland Police issued a Declaration that contained the mandate of the Police as follows:

*“We, the Somaliland police must be the backbone of internal security. We must:*

- i. *preserve peace and security;*
- ii. *uphold and enforce national laws;*
- iii. *prevent, detect and investigate crime.”*

The broad remit of the Somaliland Police is therefore to maintain order through enforcement of the laws of the state and the prevention, detection and investigation of crime. In doing so it is fundamental that the Somaliland Police will be directed by the appropriate laws, and will work in accordance with the laws, alongside partners in the criminal justice system – including prosecutors and the AGO.<sup>62</sup>

In noting the relationship that must exist between the Republic of Somaliland Police and the AGO, attention is drawn to the provisions of **Article 12 (4) and (5) of the CPC**:

<sup>61</sup> The Concise Oxford Dictionary (Oxford University Press).

<sup>62</sup> The provisions of **Article 12(4) and (5) of the CPC** (see below) are to be noted.

4. *The investigation and suppression of crimes shall be carried out by the Police under the direction of the Office of the Attorney General.*
5. *When so considered necessary, the Attorney General may, at any stage of the proceedings, order that his own Office shall take over the investigation or the prosecution of any case.*

When considering the relationship between the two institutions, it is the responsibility of the prosecutor to bring a case to trial. In doing so, the prosecutor is required to assess the evidence that has been obtained in the investigation of an alleged crime, make the decisions on whether suspects are charged, and what any suspects are charged with, and conduct the prosecution before a court. The prosecutor is responsible for these functions which require information from the police. To be effective, the prosecutor must engage effectively with the police, and as provided under **Article 12(4) of the CPC** above, direct the police to ensure that all relevant and available evidence is gathered to allow a fair and just decision to be made in pursuing a prosecution, and if appropriate conducting a trial.

By having the ultimate decision on whether an investigation is complete<sup>63</sup>, with the option of taking over the investigation, the prosecutor is in a position to have effective control of the investigation process. The prosecutor, with statutory authority, has significant responsibility for the outcome of the investigation, and must make sure that the process is properly conducted before an accused is charged with an offence and a case is brought before the court, if necessary by directing and taking full responsibility for the investigation process.

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<sup>63</sup> The prosecutor is responsible for charging the accused at court, and therefore decides whether there is sufficient evidence to bring the case to court for a prosecution. If required, the prosecutor may, for example, require the police to take further action to obtain necessary evidence.

## 6.2 Police Investigations

The provisions that apply to the police conduct of criminal investigations are provided by **Article 24 of the CPC**:

### *Investigation*

1. *A Police Officer in charge of a Police Station who receives, in the manner provided in the previous section<sup>64</sup> or in any other way, information relating to the commission of an offence shall immediately:*
  - a) *notify the Office of the Attorney General and the competent Court;*
  - b) *conduct, either personally or through his subordinates, such investigation of the alleged offence as he shall consider*
2. *The Police Officer who undertakes the investigation may:*
  - a) *examine any person whom he believes to be acquainted with any of the circumstances of the case; and*
  - b) *record, in accordance with the provisions of sub-paragraph b) of Article 22, any statement made by any person so examined.*
3. *No statement recorded during the course of the investigation shall be used in any criminal proceedings against the person making the statement unless it falls within the meaning of a confession<sup>65</sup> as provided in this Code.*
4. *When, during the course of investigation, it appears necessary to obtain a warrant of arrest or search or seizure, the Police Officer undertaking the investigation shall apply to the competent Court for such warrant, at the same time informing the Office of the Attorney General.*
5. *In case of urgent necessity the Police Officer undertaking the investigation may, without a warrant:*
  - a) *arrest a person suspected of committing a crime, in accordance with Article 38;*
  - b) *undertake a search or seizure, in accordance with Article 58.*

In conducting investigations as required by **Article 24 of the CPC** there is a duty and responsibility placed on the officers involved to notify the AGO of the circumstances that started the investigation, and also to inform the AGO of any applications to a relevant court for a warrant arising out of the investigation, at the time that

64 **Articles 17 to 22 of the CPC** deal with, in turn;

- (17) *The authorities to which complaints should be made;*
- (18) *The duty of Public Officers to report offences;*
- (19) *The duty of medical practitioners to report offences;*
- (20) *Reports by members of the public;*
- (21) *The rights of injured persons to make a complaint;*
- (22) *The form in which complaints are recorded.*

65 This provision protects an accused from self-incrimination. **Article 68 of the CPC** requires a “confession” to be made before a judge, who if convinced that the confession is voluntarily made by the accused, can certify it. The confession will be written down and signed by the accused and the judge to confirm this process.

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such an application is made (**Article 24(1)(a) and 24 (4)** respectively). It is suggested that such information should be routinely submitted to the AGO in written form, and that these documents are attached to the case file, and are therefore available throughout the active life of the case. By conducting these procedures properly, the integrity of the investigation, and any following prosecution is seen to be both transparent and fair.

Police investigators will also possess other important documentation that will represent important information regarding the conduct of an investigation. This will include:

- the Diary of Investigation – a daily record of the details of the investigation, required under **Article 25 of the CPC**.
- an accurate report required under **Article 26(2) of the CPC** to contain;
  - a) the facts and circumstances of the case relevant to criminal proceedings.
  - b) details of the evidence.
  - c) personal details identifying;
    - i. the accused;
    - ii. the injured party;
    - iii. any person with information;
- the records relating to the investigation, required under **Article 26(3)(b) of the CPC**.
- material objects seized in the course of the investigation, required under **Article 26(3)(c) of the CPC**.

### 6.3 Arrest

The general powers of arrest are set out between **Articles 28 to 33 of the CPC**. There is a requirement that at the time of arrest the person arrested will be informed of the fact of arrest and the reasons for the arrest (**Article 29 of the CPC**). **Article 33 of the CPC** requires that the AGO is informed immediately following arrest that an arrest has taken place.

An arrest without a warrant is lawful in the event that the accused is alleged to have been captured “*in flagrante delicto*” (**Articles 36 and 37 of the CPC refer**)<sup>66</sup>. As indicated above, **Article 33 of the CPC** requires that the AGO is informed by the police immediately following arrest.

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<sup>66</sup> **Article 37 of the CPC** defines the term “*in flagrante delicto*” as referring to a person who is caught in the act of committing an offence, is immediately pursued and is captured.

In other circumstances a warrant may need to be obtained from a competent court to arrest a person accused of committing a crime.<sup>67</sup> In order to obtain a warrant, the provisions of **Article 40 of the CPC** require the investigating officer to comply with the following:

***Condition Required for the Issue of a Warrant of Arrest and Authorities Empowered to Issue such Warrant***

1. *A warrant of arrest may be issued when there are grounds to believe that:*
  - a) *an offence has been committed;*
  - b) *the offence was committed by the accused person.*<sup>68</sup>
2. *A warrant of arrest may only be issued by:*
  - a) *the competent Judge, up to the time of the commencement of the trial in a Court of first instance;*
  - b) *the President of the competent Court, at any other state of the proceedings.*

The police remain under a duty to inform the prosecutor of the warrant being issued under the provisions of **Article 24(4) of the CPC**, and of the arrest being made under **Article 33 of the CPC**.

Following the issue of a warrant, there is a duty on the police officer in possession of the warrant to execute it “...*as soon as possible...*” (see **Article 44(1) of the CPC**). Equally, following arrest where bail is not given, there is a duty to bring the arrested person before a court “...*without unnecessary delay...*” (**Article 45(1) of the CPC** applies).

There is also a constitutional requirement relating to those deprived of their liberty on suspicion of committing a crime. **Article 27(2) of the Constitution** provides: ‘*Any person who is deprived of his liberty because of alleged criminal offences shall have the right to be brought before a court within 48 (forty eight) hours of his arrest.*’

It is important to recognize that the Republic of Somaliland, through **Article 10 of the Constitution**, adopts international standards, and specifically the Universal Declaration of Human Rights (UDHR). **Article 10(2) of the Constitution** states that: ‘*The Republic of Somaliland recognizes and shall act in conformity with the United Nations Charter and with international law, and shall respect the Universal Declaration of Human Rights.*’

Given this undertaking in the Constitution the conduct of the police in investigating crime, executing warrants and arresting suspects and detaining individuals accused of criminal offences must take into account the human rights, and individual freedoms of those with whom they are involved. Prosecutors reviewing the evidence of cases assigned to them for prosecution will also account for the provisions of the UDHR in

<sup>67</sup> Such as where the accused is not arrested “*in flagrante delicto*” but is identified as a result of investigation and/or information received.

<sup>68</sup> It is to be noted that the grounds for the issue of a warrant is consistent with the burden of proof on the prosecution under **Article 110 of the CPC**.

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assessing the lawfulness of the investigation, and whether all aspects of it can be relied upon in a court of law having considered the human rights perspective.

#### 6.4 Juveniles

There is also particular care to be taken in dealing with the more vulnerable groups in Somaliland society, and those for which the culture and values of Somaliland place particular emphasis on, specifically referring to children and young persons.

**The Juvenile Justice Law (2007)** is legislation that provides for a particular approach to child offenders, including the provision of specialist courts for young people, with the planned provision of social probation for young offenders, and ensuring that juvenile offenders are not subject to capital punishment or life imprisonment. It recognizes a need to treat young persons in conflict with the law differently from adult offenders.

An important element that police should recognize in dealing with the arrest/detention/charging of a young suspect/offender is that this law sets the age of criminal responsibility at 15 years of age. A child below that age cannot, under the provisions of the law, be lawfully prosecuted for a criminal offence.

#### 7. The Defense

The technical role and function of defense representatives is addressed in detail in the previous section when dealing with the role of the prosecutor in the court process. This section will focus on the basis of the right of the accused to representation and advice from a qualified defense counsel in Somaliland.

Representation by a legally qualified counsel not only allows the accused the benefit of legal expertise and know-how being applied to the defense of the case brought by the prosecution, but it also allows the prosecutor to proceed in the knowledge that the rights of the accused are being protected by a competent legal specialist. That person will be a professional adviser to the accused who can explain the prosecution process to the client, and advise accordingly. When an accused person is legally represented, there is an environment of professional competence and responsibility in proceedings that will allow for a clear definition of duties during the course of the process, and more efficient conduct of the case. When the accused is not represented, there is a risk that the process is not fully understood, and that justice will not be best administered if the defendant is required to conduct the case without professional help. The accused will, in most circumstances, have to speak for themselves on technical and/or legal issues in court if a legal representative is not appointed on their behalf.<sup>69</sup>

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<sup>69</sup> It is noted that legal representation, as provided by legal aid practitioners, is dependent on external funding and that that funding is not always forthcoming. However, as a matter of law, representation should be available as outlined in this section. If defense representation is absent or inadequate, it is suggested that the court needs to act to ensure that proceedings are fair, and outcomes are just, notwithstanding a constitutional failure by the state. It is always open to the accused to pay for representation should he/she be able to do so.

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## 7.1 Constitutional Right to Defense

**The Constitution** deals with rights of the accused who is detained in custody in **Article 27**, which states the following:

### *The Rights of Persons Deprived of their Liberty*

1. *Any person who is deprived of his liberty has a right to meet as soon as possible his legal representative, relatives or any other persons he asks for.*
2. *Any person who is deprived of his liberty because of alleged criminal offences shall have the right to be brought before a court within 48 (forty eight) hours of his arrest...*

**The Constitution** gives every person the right to meet a legal representative as soon as possible following detention (arrest).

The provision that the accused must be given the opportunity to meet a legal representative at the earliest opportunity is an important safeguard to the rights of the accused, and allows for the defense to be properly conducted from the outset. It is also to be noted that **Article 28** provides the following with reference to an individual's right to access the courts, and in order to do so, to access and rely upon professional representation if that is required:

### *Right to Sue and Defend*

1. *Every person shall have the right to institute proceedings in a competent court in accordance with the law.*
2. *Every person shall have the right to defend himself in a court.*
3. *The state shall provide free legal defense in matters which are determined by the law, and court fees may be waived for the indigent.*

**The Constitution** requires that the state provide free legal defense when this is a provision of law, with no court fees levied against indigent parties. The Constitution protects the rights of the citizens to this degree, and it is for the state to comply with direct constitutional duties.

The statutory definition for the appointment of defense counsel is contained in Article 15 of the Criminal Procedure Code, which gives the following provisions:

### *The Defense*

1. *The accused may be defended by one or more defense Counsels.*
2. *In the cases indicated in sub-paragraph (b) of paragraph 2 of Article 14 of the Law on the Organization of the Judiciary,<sup>70</sup> the court shall appoint an ex officio defense Counsel for the accused whenever the accused has not appointed his own defense Counsel.*
3. *The appointment of an ex officio defense Counsel shall not be refused without reasonable justification.*
4. *Where there is no conflict of interest, two or more accused may be represented by a single defense Counsel.*
5. *An accused who has been arrested shall have the right to confer freely with his defense Counsel at all stages of the proceedings.*

**Article 15 of the CPC** above goes further than simply allowing state provision of counsel for those unable to pay for it. In **Article 15(3)**, there is a requirement that refusal of the appointment of counsel must be explained and justified. This provision needs to be considered alongside the right of an accused to provide their own representation, which is allowed for under the superior law of **the Constitution at Article 28(2)**. The constitutional position is reaffirmed through more recent legislation, in **the LOJ Article 4<sup>71</sup>** providing the following:

### *Rights of the Defence*

*As it is provided under Article 28 of the constitution:*

70 This citation refers to the Law on the Organization of the Judiciary (1962) for the Republic of Somalia, and not to specific Somaliland legislation. Article 14 provides:

#### *Representation by Counsel in Proceedings*

1. *The parties may be represented by an attorney in any proceedings, in any court.*
2. *The parties shall be represented by counsel;*
  - a) *In administrative and accounting proceedings before the Supreme Court.*
  - b) *In criminal proceedings where the accused is charged with an offence punishable by death, imprisonment for life or imprisonment for more than twenty years.*

*In the aforesaid cases where a party does not have his own counsel, the court shall appoint a counsel.*

*Where necessary a qualified person who is not on the rolls of practicing attorneys may be appointed in such capacity.*

*Where a party is poor, the court appointed counsel, when he is not a civil servant, shall be entitled to remuneration, to be paid by the State.*

71 There are two versions of the Laws on the Organization of the Judiciary currently in force (see footnote 6), one containing 49 Articles and the other 60 Articles. This citation is from the 49 Article version, which is identical save for paragraph 5, which in the 60 Article version reads as follows;

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

1. *Every person shall have the right to submit a case to the court with jurisdiction in accordance with the law.*
2. *Every person shall have the right to defend himself before the court for the case submitted against him.*
3. *The state shall provide a defense counsel for a person accused for serious crimes and the law obliged for the accused person who cannot afford to pay for the private lawyer and may be exempted from the court fee for civil cases.*
4. *The chairperson of the court shall determine the person in need of the legal aid and court fee exemption.*
5. *In order to avoid misuse of sub article 3 & 4 of this article to escape from tax and at the same time to save the right of indigent people for access to fee exemption the chairperson, who must evaluate fee exemption requests, has the obligation to make his decision based on reasons and evidences used for these decisions.*

As indicated in the opening of this section of the Manual, the process benefits from the accused having access to legal representation. This will assist the court as Counsel for the accused will be professionally trained, and therefore have the expertise required in;

- Explaining the process to the accused.
- Advising the accused on the potential outcomes that may come about, and the options available to the accused.
- Challenging the prosecution case against the accused, within the rules of the court procedure.
- Presenting the case for the accused as strongly as possible, within the rules of the court procedure.
- Ensuring that the trial process is proper, and that the accused receives a fair and just trial.
- Considering and advising the accused on the option to appeal, or on any other post trial process.

**It may happen that the constitutional duty to provide the accused with counsel is not fulfilled, often due to there being no defense practitioners available. This is most likely to happen in the regions, away from Hargeisa. As a result, the courts are not able to meet this constitutional requirement.**

Prosecutors are required to conduct cases against those accused of crime “*fairly and diligently*” as detailed in the section of this Manual that deals with Ethics and Professional Conduct. In order to achieve fairness in the trial process, the prosecutor will be in a position to ensure that the case meets the standards of fairness and diligence required, and that the accused receives a just hearing. The judges, who have the constitutional duty to ensure that the accused is appropriately represented, will have the greater influence on the fairness of the trial, but the prosecutor can ensure that the interests of justice in presenting the case are a priority, as a demonstration of proper fairness in the prosecution process.

## 7.2 Duties of Defense Counsel

Where represented by counsel, **Article 16 of the LOJ** specifies the duties of counsel to the accused. This is designed to provide further protection to the defendant, ensuring the commitment of defense counsel to act in the best interests of the accused, for the duration of the proceedings. It provides the following:

### *Duties of the Defense Counsel towards the Accused*

1. *A defense Counsel shall not, without reasonable cause, abandon his duties as a defense Counsel nor absent himself from hearings in Court in such a way that the accused is deprived of legal assistance.*
2. *If any defense Counsel violates the provision of paragraph 1 of this Article, the Court may order that he:*
  - *pay a sum of money not exceeding Sh. So. 5,000/- to the accused as compensation; and*
  - *pay a sum of money, not exceeding Sh. So. 2,000/- to the State Treasury; or*
  - *be suspended from practicing his profession for a period not exceeding one year.*
3. *The abandonment of his duties by a legal Counsel for an injured party shall not in any case prevent the proceedings from continuing.*

In addition to the above provisions, the **Somaliland Advocates Law (2004 – amended and consolidated in September 2013)** is also influential with regard to defense representation. This Law provides the professional standards for defense advocates, establishing an “*Admission and Disciplinary Council.*” This council was previously appointed by the Minister of Justice to license independent counsel and provide a mechanism to deal with licensing of advocates and adjudicating on allegations of breach of professional standards. Following amendments implemented in 2013, the council now composes officers elected by Advocates Associations, with appointees from the Ministry of Justice and both parliamentary houses.<sup>72</sup>

The “*Somaliland Lawyers Association*” (SOLLA) is the principal Advocates’ Association working with defence lawyers and general counsel in Somaliland. In addition to providing a forum for advocates in Somaliland, SOLLA sets the standards and measures of professional conduct that independent counsel are expected to achieve.

## 7.3 Litigants’ Charter

A Litigants’ Charter has been developed, that seeks to make available to the public of Somaliland guidance and instruction on the means by which access to justice is available. The Litigants’ Charter seeks to explain to the public the rights that they have to representation, legal protection and professional advice. It will also explain the roles played by the judiciary, the police and the prosecutor in addition to the access that the people have to defense services, and the standards that can reasonably be expected.

<sup>72</sup> There is currently no English translation of this law available.

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The Litigants' Charter will increasingly be used as a document that helps the general public in Somaliland to understand. The prosecutor should also be aware of the standards that are highlighted in the Litigants Charter, and the expectations that the public are therefore likely to have of the role of the prosecutor within the Criminal Justice System, as well as the quality of work required by the other agencies involved.

## 8. The Court System

The Somaliland Court system combines the roles of deliberation on the facts and the application of the law in a criminal case. The judicial tribunal is led by a senior judge. The judge is joined by a number of associates who together fulfill these functions. The tribunal is assisted by a Registrar who is charged with the duty of noting the evidence as it is given to the court.

The trial process is dealt with in detail in the section of this Manual dealing with the Role of the Prosecutor.<sup>73</sup> This section will discuss areas of general process, jurisdiction and conflict of interest.

### 8.1 The Court Process

The function of the Court consists of a broad range of duties, including:

- Managing the Criminal Trial so that the evidence is clearly understood and considered.
- Interpreting and applying the law throughout the process. This includes commenting on and correcting the parties, prosecution and defense, in their presentation of their cases, and making judicial orders when required.
- Assessment of the evidence, both in terms of general credibility, and in terms of legal admissibility.
- Consequently the role of applying the burden of proof is placed on the tribunal of judges, as adjudicators in the process. If the admissible evidence proves the guilt of the defendant beyond a reasonable doubt<sup>74</sup> following consideration of the offences alleged, and a proper application of the law, it will be the duty of the bench to find the defendant guilty of any appropriately proved charges before the court. If that standard is not met, the duty of the bench will be to acquit the defendant of the relevant charges.
- Should the proceedings result in the conviction of the defendant for any charge, it is the function of the bench to agree and administer an appropriate sentence of punishment on the accused, in accordance with the law and any applicable sentencing guidelines.

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<sup>73</sup> Refer to Section 4 of this Manual.

<sup>74</sup> The requirement that a case be proved "beyond a reasonable doubt" simply means that the judicial tribunal needs to be sure in its finding that the defendant committed the alleged crime before making a finding of guilt. If the evidence in the case provides a doubt as to the guilt of the defendant, and that doubt is reasonable in the circumstances, then the benefit of the doubt is given to the defendant. Even if the evidence of guilt on other issues is strong, or it appears more likely than not that the accused committed the alleged offence, that is not enough. The tribunal must be sure – beyond a reasonable doubt. If a doubt is raised in evidence, but it is fanciful, or unlikely, then the tribunal can properly convict.

## 8.2 Jurisdiction

The general scope and definition of the courts is set out in **Articles 1 and 2 of the CPC**, which provide the following:

### *Article 1*

#### *Criminal Jurisdiction*

*Criminal Jurisdiction shall be exercised in accordance with the provisions of the Constitution and of the Law on the Organization of the judiciary by:*

- a) *District Courts;*
- b) *Regional Courts;*
- c) *Courts of Appeal;*
- d) *The Supreme Court.*

### *Article 2*

#### *Jurisdiction and Composition of the Courts*

1. *Except as otherwise provided by this Code, the criminal jurisdiction and composition of the Courts both in regard to the subject matter and territory shall be determined in accordance with the Law on the Organization of the Judiciary.*
2. *Notwithstanding anything contained in paragraph 4 of Article 2 of the Law on the Organization of the Judiciary, and except as otherwise provided in any special law, the Criminal Section of the District Courts shall have jurisdiction over all offences punishable with imprisonment up to three years or fine up to Sh. So. 3,000 or both.*

Both the District Courts and the Regional Courts are courts of first instance.<sup>75</sup> The threshold for District Court jurisdiction is stated in **Article 2(2) of the CPC** above, with the Regional Court responsible for jurisdiction on matters carrying greater penalty than that cited for the District Court. The Appellate Courts have appellate jurisdiction over the decisions of the first instance courts, both the District Court and Regional Court.<sup>76</sup>

## 8.3 Subject Matter Jurisdiction and Territorial Jurisdiction

The issue of which court shall have jurisdiction over specific offences or subject matter is dealt with by **Article 4 of the CPC**, which states the following:

<sup>75</sup> Courts of first instance are courts where proceedings are initiated, and the allegation is first put to the accused for a plea of guilty or not guilty.

<sup>76</sup> Article 11/8 of the Laws on the Organization of the Judiciary (49 Article version/60 Article version) refer.

### ***Subject Matter Jurisdiction***<sup>77</sup>

1. *To determine whether the Court has jurisdiction over the subject matter, regard shall be had to the maximum punishment established by law for each offence for which a charge has been brought, taking into account any aggravating circumstances, but excluding the effects of recidivism.*
2. *Whenever any Court considers that it does not have jurisdiction over the subject matter of an offence, it shall make a ruling to the effect at the request of the prosecution or the defense, or on its motion.*
3. *Non-compliance with the provisions regarding jurisdiction over the subject matter shall render the proceedings void and a declaration to the effect may be made by Court, also on its motion, at any stage of the proceedings-that is, trial or appeal or revision.*

Whether initiated through a request by one of the parties to the case, prosecution or defense, or whether of its own motion, it is for the court to be satisfied that it has jurisdiction to deal with the subject matter before it.

With regard to “*territorial jurisdiction*” **Article 5 of the CPC** provides for the following:

### ***Territorial Jurisdiction***

1. *The place where the offence was committed shall determine the territorial jurisdiction.*

*In cases of;*

- a) *“continuing offence”<sup>78</sup>, or*
- b) *“permanent offence”<sup>79</sup>,*

*the place where the last act or omission in continuing or permanent offences occurs shall determine the Court at which the offence shall be tried.*

2. *When:*

- a) *it is not possible to determine the Court which has jurisdiction in accordance with the paragraph 1 of this Article, or*
- b) *the alleged offence was committed outside the territory of the Somali Republic,*  
*the Supreme Court shall designate the Court which shall try the case.*

3. *Objections as to territorial jurisdiction shall be raised in the Court which is alleged not to have such jurisdiction, by the prosecution or the defense, as soon as the fact of such alleged lack of jurisdiction comes to the notice of the parties concerned. Or the Court on its motion may declare itself incompetent.*

<sup>77</sup> Subject matter jurisdiction is cited in **Article 2(2) of the CPC** where the District Court has jurisdiction only over matters carrying a penalty of less than three years imprisonment or a fine of less than Sh.So. 3,000 or both. The Regional Court has subject matter jurisdiction for offences carrying any greater penalties.

<sup>78</sup> This is an offence that is ongoing, and can therefore be committed across a number of different jurisdictions – for example trafficking offences usually require the illegal movement of a commodity (drugs/arms/persons etc).

<sup>79</sup> This type of offence is committed at one place at one time – however, the same person can commit a number of offences, over a period of time in different places – for example a number of bank robberies.

Non-compliance with the provisions regarding territorial jurisdiction shall only render the proceedings null and void, if timely objection was made in the manner described in the preceding paragraph and as a result of such lack of jurisdiction the rights of the accused were prejudiced.

The above provisions determine the venue for court proceedings based on territorial jurisdiction, which will be the Court with jurisdiction over the place where the last act or omission contributing to any alleged offence was committed. Location of the appropriate court for proceedings will therefore be as follows:

- If a single, permanent offence, such as affray, contrary to **Article 444(1) of the Penal Code**, is alleged to have been committed in Berbera – then the proceedings should be conducted in the appropriate subject matter court for Berbera. In this instance, the District Court should be the court of first instance, as the maximum penalty available for this offence on conviction is less than imprisonment of up to three years or a fine of up to Sh. So. 3,000 or both.<sup>80</sup>
- If a continuing offence, such as acts consistent with trafficking persons in contravention of **Article 455 of the Penal Code** by forcing a person into slavery, and the reduction of the alleged victim into slavery was first effected in Boroma, but continued when the victim was moved to Erigavo and then to Hargeisa where the crime was detected – then the proceedings should be conducted in the appropriate subject matter court for Hargeisa, as this is where the last criminal allegation arises. The case should also be before the Hargeisa Regional Court, as the maximum penalty for the alleged offence exceeds imprisonment of up to three years or a fine of up to Sh. So. 3,000 or both.<sup>81</sup>
- If it is not possible to identify the place where the relevant act in the commission of an alleged offence took place, or the act took place outside of the country, then the Supreme court is the authority responsible to designate the court with jurisdiction to try the matter.

#### 8.4 Jurisdiction and Joinder

Issues of joinder arise where there are a number of offences alleged against an accused, or where there are a number of accused persons. This can be complicated when the alleged offences are said to have been committed in different jurisdictions. Additional issues concern circumstances where allegations are made against juveniles as co-accused with adults.

When offences are alleged against a number of accused persons, and to have been committed at one location, there will be no obvious issue concerning territorial jurisdiction. However, the court will need to consider whether it is appropriate to try all the accused together, or to try each suspect individually. The decision to be made is whether the alleged activities and offences, when considered together, form a connected course of action or joint enterprise.

<sup>80</sup> In compliance with **Article 2(2) of the CPC**.

<sup>81</sup> In compliance with **Article 2(2) of the CPC**.

The general options are:

- Where an offence, or number of offences are alleged against several adults, and the allegation(s) have a common purpose or link, so that the illegal activity by all accused is connected and committed in a single place, then the case will properly be heard by the court with the appropriate subject matter and territorial jurisdiction as outlined above.
- If other, unrelated allegations are made individually made against accused persons, then these should be heard separately, in the court(s) with the appropriate subject matter and territorial jurisdiction, as outlined above.
- Where an offence, or number of offences are alleged against several adults, and the offending activities by each is connected to the others and have been committed within the jurisdiction of more than one relevant court, then the case would properly be heard in the relevant court with the higher powers of maximum sentence. If the offending has occurred in a number of territorial jurisdictions, the appropriate court will be that representing the jurisdiction in which the most serious allegations arises, or should offences be assessed as being of equal seriousness, where the greater number of offences has been committed. Should it not be possible to designate on the above criteria, the Court of Appeal will nominate a relevant court. If the allegations arise within the jurisdiction of more than one Court of Appeal, then the Supreme Court will decide on venue.

The above provisions are in compliance with **Articles 6, 7 and 8 of the CPC**, which state the following:

### **Article 6**

#### *Joinder of Accused or Offences*

1. *There is joinder when:*
  - a) *more than one person is alleged to have taken part in the commission of the same offence, or*
  - b) *one person is charged with more than one offence.*
2. *The competent Court, within the meaning of Articles 7 and 8, may, upon request of the prosecution or the defence or on its own motion, order that the persons or offences be tried separately for reasons of conveniences.*

### **Article 7**

#### *Effects of Joinder on Subject Matter Jurisdiction Over the Offences*

1. *When there is joinder within the meaning of Article 6 and;*
  - a) *some of the offences come under the jurisdiction of the Assize Section of the Regional Court, while other offences come under the jurisdiction of the General Section of the Regional Court, or of the Criminal Section of the District Court, all the offences shall be tried by the Assize Section of the Regional Court;*
  - b) *some of the offences come under the jurisdiction of the General Section of the Regional Court, while other offences come under the jurisdiction of the Criminal Section of the District Court, all the offences shall be tried by the General Section of the Regional Court;*

- c) *some of the offences come under the jurisdiction of the Military Penal Section of the Regional Court, while other offences come under the jurisdiction of another Section of the Regional Court or of the Criminal Section of the District Court, all offences committed by members of the Armed Forces even if they have ceased to be such members after commission of the offence, shall be tried by the Military Penal Section of the Regional Court. The jurisdiction regarding offences committed by a person not belonging to the Armed Forces shall be determined within the meaning of sub-paragraphs a) and b) of this paragraph.*
2. *The non-observance of the above provisions regarding the effect of joinder with respect to jurisdiction over subject matter shall render the proceedings null and void, and such determination may be made also by the Court on its own motion at any stage of the proceedings.*

### **Article 8**

#### *Effect of Joinder on Territorial Jurisdiction*

1. *When there is joinder within the meaning of Article 6 and when two or more Courts have territorial jurisdiction, then all offences shall be tried;*
  - a) *by the Court within whose jurisdiction the most serious offence was committed, or*
  - b) *when a number of offences of equal gravity were committed, by the Court in whose territory the largest number of the offences was committed.*
2. *When it is not possible to determine the competent Court in accordance with the preceding paragraph of this Article, the Court of Appeal shall designate the Court which shall try the case; or the Supreme Court shall designate the Court which shall try the case when the Courts are located within the territorial jurisdiction of different Courts of Appeal.*
3. *Failure to observe the provisions regarding the effects of joinder with regard to territorial jurisdiction shall only render the proceedings null and void, if timely objection is made in accordance with paragraph 3 of Article 5, and as a result the right of the accused were prejudiced.*

The need to join cases, whether the connected allegations concern one accused who is said to have committed a number of connected offences, or whether there are a number of accused alleged to have committed offences together, is an important provision for case management. If trials are conducted for each separate offence committed during a series of linked offences, it is likely that the same witness(es) may have to give evidence in each trial. It is probable that each party will have to make the same arguments during each trial. In the interests of consistency and to avoid duplication, it would be right to try connected matters together wherever possible. Joinder is an important consideration in all such cases.

Should matters that are joined be considered by either party to be inappropriately listed and considered to be inappropriately joined, then it is open to any party to proceedings to apply to the court for severance of that matter, to be dealt with separately, on the basis that trying matters or defendants together is non-compliant with **Article 6 of the CPC**.

One important issue concerning joinder of defendants arises when allegations against a juvenile also concern an alleged adult offender. Where an alleged offender is found to be over 15 years of age, but less than 18 years of age, and is charged with an adult, the juvenile should be processed in the ‘Children’s Court’, separately from the adult, unless the interests of justice require them to be tried together. A joint trial should take place in the Children’s Court. **Article 81 of the Juvenile Justice Act (2007)** states the following:

#### *Hearing of Trials Involving Children and Adults*

1. *Where a child and adult are alleged to have committed the same offence, they are to be tried separately unless it is in the interest of justice.*
2. *The Children Court may upon request of the prosecution or the defense council or on its own motion order for joint trials.*
3. *The joint trial shall be held at the Children Court.*

### 8.5 Conflict of Interest

A conflict of interest may emerge and affect proceedings when a party, specifically the judge in the case, has an interest that may prejudice participation in the process, or be seen as potentially doing so. **Articles 10 and 11 of the CPC** state the following to provide a clear definition of what will amount to a conflict of interest:

#### *Article 10*

##### *Disqualification of the judge*

1. *A Judge may not take part in a judicial capacity in any criminal proceedings if;*
  - a) *he participated in the same proceedings, as a judge in another Court;*
  - b) *he acted in the same proceedings as;*
    - i. *a prosecutor.*
    - ii. *a defense Counsel.*
    - iii. *a representative of any party.*
    - iv. *a witness.*
    - v. *an expert or technical consultant.*
  - c) *he is the party on whose report, complaint or request the proceedings were started.*
  - d) *he has any personal interest in the proceedings.*
  - e) *he is married to, is an ((ascendant)) or ((descendant)) of, is a brother or sister of, married to an ((ascendant)) or ((descendant)) or married to a brother or sister of any person who is taking part in the proceedings in any of the following capacities;*
    - i. *Judge.*
    - ii. *Prosecutor.*
    - iii. *Defense Counsel.*

- iv. *a representative of any party.*
  - v. *or any person who has any personal interest in the case.*
  - f) *he has given advice or expressed his opinion on the subject of the case outside the exercise of his duties as a judge.*
2. *A judge shall disqualify himself as soon as he becomes aware of the existence of any of the cases enumerated in paragraph 1 of this Article, and he shall refer the matter, through the President of the Court, to the higher Court which shall pass the necessary orders as provided in paragraph 3 of Article 11.*
  3. *The provisions of paragraph 1 of this Article apply also to assessors. An assessor shall disqualify himself as soon as he becomes aware of the existence of any one of the causes enumerated in paragraph 1 of this Article; and such assessor shall refer the matter to the President of the Court who shall arrange to replace him with another assessor, according to the assessor's roll.*
  4. *Any violation of the provisions of this Article shall render the proceedings null and void, and the Court may also so determine on its own motion at any stage of the proceedings.*

## **Article 11**

### **Transfer of Proceedings**

1. *When considered necessary in the interest of justice or public order;*
  - a) *the Supreme Court may transfer the proceedings upon request of the Attorney General or of the accused;*
    - i. *from one Court of first instance to another Court of first instance having equal subject matter jurisdiction.*
    - ii. *from one Court of Appeal to another Court of Appeal.*
2. *the Court of Appeal may transfer the case, within the limits of its jurisdiction, upon request of the Office of the Attorney General or of the accused, from the Criminal Section of a District Court to the General Section of a Regional Court.*
3. *When a judge of the competent Court;*
  - a) *is himself the defendant, or*
  - b) *is the injured party,*

*the higher Court, upon the request of the Attorney General or of the accused or also on its own motion, shall transfer the case to another lower Court having equal subject matter jurisdiction.*
4. *When a Judge of the competent Court is disqualified from taking part in a case for the reason stated in paragraph 2 of Article 10, the higher Court may:*
  - a) *order that the trial be held in the competent Court without the participation of the Judge so affected, or*
  - b) *transfer the case to another lower Court having equal subject matter jurisdiction.*

The provisions above allow for a conflict of interest to be dealt with in a transparent manner, through the supervision of the independent, superior courts.

## 9. Prison Monitoring and Inspection Duties

The AGO has a statutory duty to monitor and assess conditions in the prisons of Somaliland under the provisions of **Article 45/49 of the LOJ**. Paragraph 5 of the provision<sup>82</sup> states that the AGO: *‘Shall monitor and supervise the living conditions, health and sanitations of the prisons and other detention centers and submit its findings to the relevant bodies and shall follow up to that end.’*

Equally, under **Article 14 of the Prison Law (1971)** the AGO is required:

- A. *To visit all and every prison so as to supervise living and health conditions of the prison inmates.*
- B. *To inspect/monitor prisons, rehabilitation centers and prisoners, and if found necessary to interview prison inmates.*

There is currently no system in place to regulate AGO duties to inspect and report on the conditions of prisons. A system that includes a reporting/recording mechanism is necessary in order for monitoring to be evaluated, and any remedial actions taken by the prison authorities following inspection to be assessed. If this information is not available to be acted upon, then the AGO cannot quantify or validate any activities involving prison inspection.

A form that records the finding of an inspection visit is a basic necessity for recording the findings of a prosecutor assigned to visit and assess a prison. The simple purpose of such an approach is to ensure that the process of AGO inspection of prisons, rehabilitation centers and prisoners is consistent. Adopting, and using, an agreed form for the record of information is the first step in meaningfully conducting this statutory duty.

The suggested form requires the following information to be recorded for each and every inspection by the AGO:

- Date of inspection.
- Name of Prosecutor conducting the Inspection.
- Name of Prison/Detention Center/Rehabilitation Center.
- Prisoner Capacity.
- Number of Prisoners at time of inspection.
- Categories of Prisoners:
  - Male.
  - Female.
  - Juvenile.

<sup>82</sup> It is 45(5) in the 49 Article version, and 49(5) in the 60 Article version of the LOJ. See footnote 6 above.

- Remand Prisoners (Male/Female/Juvenile).
- Post-Conviction Prisoners (Male/Female/Juvenile).
- Detention for purposes of protective/safe custody (Male/Female/Juvenile).
- Number of Cells.
- Capacity of Cells.
- Medical facilities:
  - Qualification of Medical Staff.
  - Availability of Medical Examination on admission.
  - Processes in place to administer treatment.
- Provision of food to prisoners:
  - Food Budget (per prisoner per day).
  - Number of meals provided by the institution per day.
  - Reliance on family and visitors for food.
  - Availability of drinking water.
- Work Opportunities in Prison:
  - Work In Kitchen/Bakery.
  - Work on maintenance/building projects etc.
- Hygiene Facilities (Shower/Toilet availability).
- Exercise Facilities (Exercise Yard/Exercise Equipment).
- Visiting arrangements.
- Access to Media (Television/Publications etc).
- Contact with outside agencies (NGOs/Civil Society Organizations/Legal representatives etc).
- The final section of the form requires a report on the “*Inspection Findings.*” This should be a narrative assessment of the condition and practices observed during the inspection.

The above covers a wide range of issues – but there may be many more areas that require the attention of an inspecting prosecutor, which will need to be incorporated. The assessment contained within the Inspection Findings section of the form provides the opportunity for the inspecting prosecutor to highlight good practice at the facility, and also to identify areas that need to be improved – the prosecutor must, wherever possible, make recommendations of any improvements to be made, and set a deadline for the recommendations to be implemented. This will then assist further inspections to monitor and evaluate any remedial actions taken by the institution.

In addition to establishing a reporting system, the AGO will need to formalize how the material generated by this activity is managed and conducted in a uniform and consistent manner. The activity should be centralized,

with Prison Inspection Reports being processed through a central unit nominated for this purpose, with the capacity to access, analyze and update the records.<sup>83</sup> Prosecutors should be assigned to this work, as a part of their general work, and a schedule of visits to detention facilities should be incorporated into their regular workload.

The AG and the senior DAGs in supervising the Regional Offices will need to establish and manage a process to carry out the statutory inspections in conjunction with the Custodial Corps, so that there is an agreed system and framework to regulate AGO inspections of prison facilities. This will include the following:

- An agreed process for the AGO to notify the individual prison authorities of intended inspection. It would be appropriate for there to be a minimum period of notice for such notice to be given. It is suggested that there be a minimum of 24 hours notice.<sup>84</sup>
- In giving notice to the prison authorities, the AGO will be required to give specific information to the prison authorities. In doing so, the AGO will be able to inform the prison authorities of the data needed to complete the Prison Inspection Form. This information would also include;
- The number of personnel in the delegation, with their names and functional titles;
  - the period of time required in the correction facility;
  - any specific areas of the prison that the delegation require to visit;
  - requests for access to prisoners or others in the facility, to hear comments concerning conditions and standards.
- The use of the Prison Inspection Form for each assessment will ensure that there is a consistent, regularized process to conduct the inspections. This process will encourage;
- The completion of structured reports concerning prison inspections;
  - a process for the inspection assessments to be raised between the AGO and the Custodial Corps to identify areas that require attention;
  - a reporting hierarchy to ensure systemic implementation of recommendations, and follow-up, remedial action plans.

There is a need for the AGO to develop an administrative system to maintain records and organize material generated by the inspection process. The AGO Registry should be responsible for ensuring that all material outputs are properly archived, and therefore available as required.

The AGO will be in a position to demonstrate compliance with the statutory requirement for prison monitoring and inspection by issuing Annual Reports, and circulating these reports to the relevant agencies and authorities. The Annual Report should be compiled by the senior prosecutors involved in the inspection

<sup>83</sup> Although Prison Inspections are, according to prosecutors, taking place, there is no record available of any such inspection, of the purpose or findings of any inspection, or of any remedial action or follow up as a result of any such inspection. There is no record of this statutory duty of the AGO having been conducted.

<sup>84</sup> In certain circumstances it may be appropriate to conduct inspections unannounced. However, there should be a means of giving notice – if the need arises there can be provision for unannounced inspections.

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process, assisted by the staff maintaining the data collected in the AGO Registry. The purpose of the Annual Report would be;

- to confirm and report to all concerned that this function has been conducted;
- to provide a product from the activity so that the findings are distributed to those agencies and authorities responsible for the condition and standard of correction facilities;
- to build a coherent body of findings that will allow a strategic approach to improving correction facilities, and to develop prison policy in a structured and informed manner. As the number of Annual Reports increase, these can become an important reference for policy discussions for the correctional authorities;
- to publicize progress in ensuring the rights and condition of prisoners and detainees.

The AGO will initiate a strategic process to conduct monitoring and inspection of correction facilities, and will work with the prison authorities and Custodial Corps to extend this strategic approach to implementing change where needed. This function is a statutory duty of the AGO, and it is therefore important that the AGO is able to demonstrate that it has been performed.



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