

Reform the Criminal Justice System in Morocco

Strengthen Pre-trial Rights, Guarantees
and Procedures



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® **Reform the Criminal Justice System in Morocco**

Strengthen pre-trial rights, guarantees, and procedures

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Table of Contents

1. Grounds and Procedures for pre-trial Detention.....	7
i. Police custody (garde-à-vue).....	7
ii. Preventive Detention	13
a. Preventive detention ordered by the investigative judge.....	13
b. Detention ordered by the public prosecutor..	13
2. Rights to Challenge Lawfulness of Detention (Habeas Corpus).....	25
3. Right to assistance of counsel during <i>garde à vue</i> and pre-trial detention.....	33
i. Right to a lawyer during a garde-à-vue.....	33
ii. Right to counsel during questioning by the investigative judges and prosecutors	34
4. Pre-trial guarantees and the protection from human rights violations.....	44

The Morocco Constitution, adopted in July 2011, guarantees the right to security of person, to physical and moral integrity, to the presumption of innocence and to a fair trial. It also recognises that torture is a crime, and prohibits any other cruel, inhuman or degrading treatment.¹ Article 23 further provides that no one may be arrested, detained, prosecuted or condemned outside of the cases and the procedures provided for by law; and that arbitrary or secret detention and enforced ECHR disappearance are crimes of the utmost gravity.

Despite these constitutional guarantees, human rights violations continue to occur in Morocco, including cases of arbitrary detention and torture and other ill-treatment. United Nations (UN) human rights mechanisms have repeatedly raised serious concerns about such violations, including in relation to the laws and policies that facilitate them.² Following its visit to Morocco in December 2013, for instance, the UN Working Group on Arbitrary Detention (WGAD) reported on allegations of arbitrary detention, including cases of secret and incommunicado detention, as well as cases of detainees not being registered following arrest and held for weeks without being brought before a judge.³ The UN Special Rapporteur on torture pointed out, following his visit to Morocco, the existence of a “systematic pattern of acts of torture and ill-treatment during the detention and arrest process” in cases said to involve “terrorism or threats

¹ Articles 21, 22 and 23.

² See for example, Report of the Working Group on Arbitrary Detention, Mission to Morocco, 4 August 2014, UN Doc. A/HRC/27/48/Add.5 and CAT, Concluding observations on Morocco, UN Doc. CAT/C/MAR/CO/4, 21 December 2011.

³ Ibid paras 23-33, 74-75.

against national security.” The Special Rapporteur noted that “suspects are often not officially registered, that they are held for weeks without being brought before a judge and without judicial oversight, and that families are not notified until such time as the suspects are transferred to police custody in order to sign confessions.”⁴

Such practices violate Morocco’s obligations under international law, including as a State party to the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Under article 9 of the ICCPR, one aspect of the right to liberty is a prohibition of arbitrary arrest or detention, including any deprivation of liberty that is not in accordance with grounds and procedures established by law. As underlined by the UN Human Rights Committee (HRC) – the independent expert body established by the ICCPR to monitor its implementation by States parties – domestic laws setting out the grounds and procedures for detention must themselves comply with the ICCPR and other international human rights standards.⁵

National rules of criminal procedure are therefore fundamental to ensuring the right to liberty, to security of person, and to a fair trial, all of which are guaranteed under international law, in particular under articles 9 and

⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Morocco, A/HRC/22/53/Add.2 April 2103, para. 14 and 5.

⁵ Human Rights Committee, *A v. Australia*, UN Doc. CCPR/C/59/D/560/1993 (1997), para. 9.5.

14 of the ICCPR. Furthermore, the right to liberty is closely linked to the enjoyment of other human rights, including the rights to be free from torture and other cruel, inhuman or degrading treatment or punishment.⁶ Conversely, where national rules of criminal procedure are inconsistent with international human rights standards, individuals are at much greater risk of violations of their human rights.

In this regard, the International Commission of Jurists (ICJ) believes that the process of legislative reforms initiated by the Moroccan government following the adoption of the 2011 Constitution offers a key opportunity to break with decades of human rights violations by finally establishing effective safeguards.

While the ICJ welcomes recent initiatives by the government in this regard, including the introduction of a Draft Law amending the Code of Criminal Procedure (CPP) in 2015 (the 2015 Draft CCP), the ICJ is concerned such initiatives have so far fallen short of Morocco's obligations under international human rights law. The 2015 Draft CCP has failed, for example, to incorporate the right to challenge lawfulness of detention before a court of law (*habeas corpus*). It has also failed to improve the procedural safeguards in police custody and against the abusive use of pre-trial detention. The Draft Law was put on hold by the Moroccan authorities due to the legislative elections of October 2016.

This memorandum analyses certain aspects of the CCP provisions on pre-trial rights, guarantees, grounds and

⁶ Ibid., para. 2.

procedures in light of international human rights law and standards. It formulates recommendations for amendments and reform that, together with sufficient political will, may help inform the process of either amending the 2015 Draft CCP or developing a new draft CCP; enhance the effectiveness and fairness of the criminal justice system, and contribute to ensuring that Morocco fully complies with its obligations under international law, including those relating to the right to liberty, to security of person, to a fair trial, and to be free from torture and other ill-treatment.

1. Grounds and procedures for pre-trial detention

i. Police custody (garde-à-vue)

The CCP provides for police custody in all cases where a suspect has been apprehended *flagrante delicto*, and in all cases of felonies and misdemeanours punishable with a prison time.⁷ Judicial Police officers⁸ “can” place individuals in police custody (*garde-à-vue*) whenever it is deemed necessary for the investigation.⁹

In cases of *flagrante delicto*, the Office of Public Prosecutor (OPP) must be informed immediately if a suspect has been placed under *garde à vue*.¹⁰ In cases of felonies and misdemeanours punishable with a prison time, for the suspect to be held in *garde à vue*, the authorities must obtain authorization from the OPP.

In ordinary cases, the maximum initial length of *garde à vue* under article 66 of the CPP is 48 hours. In such cases where the investigation so requires, *garde à vue* can be extended for a further 24 hours if authorized in writing by the OPP. In “terrorism” cases, the maximum initial length

⁷ Respectively articles 66 and 80 of the CCP.

⁸ In accordance with article 18 of CCP, in addition to the Prosecutor General, Public Prosecutor and their deputies, and to the investigative judge, the judicial police includes: the officers of the judicial police, the officers of the judicial police in charge of minors, the assistants of the judicial police, and the employees and assistants who are entrusted by law with some of the competencies of the judicial police.

⁹ Respectively articles 66 and 80 of the CCP.

¹⁰ Article 66 of the CCP.

of *garde à vue* is 96 hours, renewable twice upon authorization from the OPP. In cases of “internal or external threats against national security,” the maximum initial length of the *garde à vue* is 96 hours, renewable once following a written authorization from the OPP.

Under the CPP, the OPP has also monitoring powers over places of *garde à vue*. In addition to carrying out visits to places where people are held, prosecutors are in charge of making sure that the procedures for arrest and detention, including the time limits on holding a person in police custody, are respected.

International standards relating to police custody derive from the right to liberty enshrined in article 3 of the UDHR, article 9 of the ICCPR, article 6 of the African Charter on Human and Peoples’ Rights (ACHPR), article 14 of the Arab Charter on Human Rights (Arab Charter)¹¹, and other international and regional instruments.¹² These standards prohibit arbitrary arrest or detention. Further, they explicitly prohibit the deprivation of anyone of their liberty except on grounds and according to procedures established by law, which must be consistent with international law.

¹¹ Morocco signed the Arab Charter on Human Rights on 27 December 2004, but has not ratified it yet. It is also not yet a Party to the African Charter on Human and Peoples’ Rights.

¹² For example, Universal Declaration of Human Rights, article 3; Migrant Workers Convention, article 16(1); African Commission on Human and Peoples’ Rights (“African Commission”), Principles on Fair Trial in Africa, Section M(1); African Commission, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines).

Indeed, an arrest or detention on grounds and in accordance with procedures established by domestic law may nonetheless be arbitrary. As explained by the HRC, 'arbitrariness' is not to be equated only with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability and due process of law.¹³ Arrest or detention that is permitted under domestic law may still be arbitrary under international standards, for instance, when the law includes vague and expansive concepts such as "public security" without precise definitions.¹⁴

Based on the above, the ICJ is very concerned that Morocco's legal framework on *garde à vue* is inconsistent with international human rights law and standards in many respects, and that it has contributed, consequently, to the particular history of serious human rights abuses committed in the context of police custody in Morocco.

First, the grounds for placing individuals under *garde à vue*, such as "whenever it is deemed necessary for the investigation" are broad. Because this phrase is not further elaborated upon through a definition or concrete examples of what might be deemed necessary for the investigation, it risks lacking the clarity and precision needed to give the concerned individuals notice of the conduct for which they may be placed under *garde à vue*. Ambiguity in describing the grounds for, and circumstances under which, a person may be placed

¹³ HRC General Comment No. 35, para. 12.

¹⁴ HRC's concluding observations: Bosnia and Herzegovina (CCPR/C/BIH/CO/1, 2006), para. 18.

under police custody create doubts and opportunities for arbitrariness and abuse of power.

Second, the length of the *garde à vue* is inconsistent with Morocco's obligations under article 9(3) of the ICCPR, which guarantees that any person who is arrested or detained in connection with a criminal charge is brought promptly before a judge or other officer authorized by law to exercise judicial power.¹⁵ This right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control without delay.¹⁶

In interpreting the promptness requirement, the HRC has stated that: "While the exact meaning of "promptly" may vary depending on objective circumstances of the individual case, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual from the place of arrest to a court and to prepare for the judicial hearing; any delay longer than forty-eight hours must remain absolutely exceptional and be justified under the circumstances of the particular case."¹⁷

Under the current framework, in ordinary cases of felonies and misdemeanours punishable with prison time, a person can be placed under *garde à vue* for up to 72

¹⁵ Article 14(5) of the Arab Charter on Human Rights and Section M(1) of the Principles on Fair Trial and Africa set out identical guarantees. See also Working Group on Arbitrary Detention, Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, Principle 11.

¹⁶ HRC General Comment No. 35, para. 32.

¹⁷ HRC General Comment No. 35, para. 33.

hours without being brought before a judge; for up to 192 hours in cases of “internal or external threats against national security”; and for up to 288 hours in cases of “terrorism”. Because of the relatively long periods of time they provide for and the fact they do not take into account the objective circumstances of individual cases, these *garde à vue* provisions appear to run counter to Morocco’s obligations under international law, including those relating to the right to liberty and to be brought promptly before a judge.¹⁸

Third, the fact that the authorization of a prosecutor is required to extend detention beyond 48 hours does not satisfy the requirement of article 9(3) of the ICCPR. The HRC has clarified that to constitute a “judge or other officer authorized by law to exercise judicial power” within the meaning of article 9(3), the authority has to be “independent, objective and impartial in relation to the issues dealt with”.¹⁹ Given the other roles played by prosecutors in criminal cases, the HRC has ruled out the possibility that a prosecutor could meet the requirements of article 9(3).²⁰

For the same reasons, oversight over, and monitoring of *garde à vue* facilities, periods and conditions should not be carried out by prosecutors alone; a system of visits by

¹⁸ See Human Rights Committee General Comment 35, para 38. See also, African Commission on Human and Peoples’ Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial, adopted in 2014, Principle 7.b.ii.

¹⁹ HRC General Comment No. 35, para. 32.

²⁰ HRC General Comment No. 35, para. 32. See also, European Court of Human Rights (ECtHR), *Moulin v. France*, Application No. 37104/06, Judgment of 23 November 2010, paras. 55 and 56.

judges or other independent and impartial expert inspectors that meet the requirements of independence, objectivity and impartiality should be in place, to protect the right to liberty and humane conditions and to prevent torture or other ill-treatment.

Additionally, even leaving aside the concern that a prosecutor cannot constitute a judicial authority within the meaning of article 9(3) ICCPR, because it does not expressly require that the arrested or detained individual be physically brought before the authority, the procedure on whether to renew police custody or release the detainee further falls short of international standards. The physical presence of the detained or arrested person before a judge gives the opportunity for inquiry into the treatment that he or she received in custody.²¹ It thus serves as a safeguard for the right to security of person and the prohibition against torture and other cruel, inhuman or degrading treatment.

In light of the above, the ICJ calls on the Moroccan authorities, including the Government, the Chamber of Deputies, and the Chamber of Counselors to amend the CCP with a view to reforming the *garde à vue* framework and ensuring its full compliance with international standards, including those relating to the right to liberty and security of person. To this end, the authorities should ensure that:

²¹ See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, approved by the General Assembly in its resolution 43/173, principle 37.

- i) **The grounds for placing individuals under *garde à vue* are more clearly and precisely defined in the law, and include elements of appropriateness, predictability and due process of law, and do not rely on vague and expansive phrases such as “requirements of the investigation”, without further definition;**
- ii) **Reduce the maximum amount of time during which a person can be held in *garde à vue* without being brought physically before a judge to the absolute minimum, in ordinary cases no longer than 48 hours, and that any possibility to hold a person longer than 48 hours must be based on absolutely exceptional grounds, and justified by the circumstances of the particular case (and not merely the character of the allegations against the person);**
- iii) **Remove the powers of prosecutors to extend *garde à vue*, and ensure that any decision on whether to renew police custody or release the detainee is taken by a judge or another judicial officer that meets the requirements of independence, impartiality and objectivity;**
- iv) **Ensure effective and independent judicial and/or other independent expert oversight over *garde à vue* facilities, periods and conditions.**

ii. Preventive detention

a. Preventive detention ordered by the investigative judge

The CCP specifies that “preventive detention” is an “exceptional measure” that can be ordered by

investigative judges in cases of felonies or misdemeanours punishable by a prison sentence.²² Detention orders can only be issued after the interrogation of the person.²³ The CCP allows for investigative judges to order that an individual be held in detention for up to one month in cases of misdemeanours, renewable up to two times in case of necessity; and two months in cases of felonies, renewable up to five times.²⁴ The renewal decisions are to be judicial orders based on reasoned OPP's submissions. The person must be released at the expiry of the maximum period; even if the investigative judge has not taken a decision to end the investigations, in both misdemeanours and felonies, the accused is to be automatically released while the investigation continues.

Articles 179 and 180 of the CPP provide for the detained person or his/her lawyer to submit a request for provisional release at any time. The investigative judge is to issue a reasoned decision with regards to the release request within a period of five days from receiving the request. In case the investigative judge does not respond to such request, the accused may submit the provisional release request to the misdemeanour chamber at the Appeal's Court, which must take a decision on the matter within 15 days.

Under the current CCP, at any time during the period of preventive detention, the investigative judge may order the individual to be released. The investigative judge

²² Article 159 of the CCP.

²³ Article 152 of the CCP.

²⁴ Respectively articles 179 and 180 of the CCP.

may *proprio motu* order the release under the condition that the accused appears before all the proceedings when necessary, and that he or she informs the investigative judge of all his or her movements and residence in a specific location.²⁵

b. Detention ordered by the public prosecutor

A public prosecutor can, following questioning, order the detention of a person caught *in flagrante delicto* committing a felony. The concerned person has the right to be assisted by a lawyer, either appointed or assigned, during the questioning. The lawyer can request that his/her client be subjected to a medical examination, and can submit all documents and evidence in defence of his or her client. If the prosecutor determines that the case is ready for trial, he or she orders the detention of the accused and refers him or her to the Criminal Chamber of the Court of Appeal within 15 days.²⁶

A public prosecutor can also order the detention of a person caught *in flagrante delicto* committing a misdemeanour punishable by a prison sentence if other measures would not be sufficient to ensure that he or she would attend voluntarily.²⁷ The concerned person has the right to be assisted by a lawyer, in the same conditions provided for in cases of *flagrante delicto* for felonies. Following the order of detention by the prosecutor, the

²⁵ Article 178 of the CCP.

²⁶ Article 73 of the CCP.

²⁷ Article 74 of the CCP.

case is referred to the Tribunal of First Instance for the first relevant session.²⁸

A public prosecutor may also in other cases order the detention of a suspect who confessed to acts constituting a crime punishable by a prison sentence, or in case of strong evidence of committing the crime, or if there is a fear of threat to public safety and order.²⁹

Recourse to preventive detention in criminal proceedings in Morocco is routine. On 30 March 2016, the Minister of Justice, who is also the head of the OPP, sent a memo to prosecutors before the Tribunals of First Instance and Courts of Appeal,³⁰ reiterating that “preventive detention” is an “exceptional measure” and urging them to take numerous considerations into account when issuing detention orders, including fear of obstructing the investigation; stopping the crime or preventing its recurrence; preserving evidence and preventing interference with the crime scene; carrying out investigations and inquiries that require the presence and participation of the suspect; preventing the suspect from absconding; preventing the exercise of any pressure on the witnesses or victims or their families or relatives; and preventing collusion or complicity between the suspect and the individuals that have contributed or participated in the crime. The 2015 Draft CPP provided for these criteria, among others.

²⁸ Article 47 of the CPP.

²⁹ Article 47 of the CPP.

³⁰ “Memo on Provisional Detention from the Minister of Justice to prosecutors”, 30 March 2016, available at: www.huffpostmaghreb.com/2016/04/27/detention-preventive-maroc-mustapha-ramid_n_9784514.html.

The Minister's memo also confirmed that pre-trial detainees represent more than 40% of the prison population (approximately 70,000), and that almost 4,000 pre-trial detainees are declared innocent each year.³¹

Indeed, the excessive use of pre-trial detention, whether ordered by investigative judges or prosecutors, is well-documented in the country. Among others, the UN Working Group on Arbitrary Detention and the National Institution for Human Rights have both documented cases of prisons where the number of pre-trial detainees largely exceeded the number of convicted detainees.³² Most of the time, convicted and pre-trial detainees are not kept separate. This situation has led to prison overcrowding, which, in turn, has led to serious human rights abuses, including inhumane conditions of detention, and cruel, inhuman or degrading treatment, as well as denial of or inadequate access to medical care, nutrition and sanitation.

Such practices run counter to Morocco's obligations under international law. The ICCPR requires that "[i]t shall not be the general rule that persons awaiting trial shall be

³¹ "Memo on Provisional Detention from the Minister of Justice to prosecutors", 30 March 2016, available at: www.huffpostmaghreb.com/2016/04/27/detention-preventive-maroc-mustapha-ramid_n_9784514.html.

³² See for example, Report of the Working Group on Arbitrary Detention, Mission to Morocco, 4 August 2014, UN Doc. A/HRC/27/48/Add.5, and "*Prisons' crisis: shared responsibility to protect prisoners' rights*," Report of the National Council of Human rights, October 2012, p.42. Available at: http://cndh.ma/sites/default/files/zm_lsjwn-_ltqryr_lkml.pdf.

detained in custody”.³³ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles on Fair Trial in Africa) adopted by the African Commission on Human and Peoples’ Rights, affirm that detention pending trial shall be used only as a measure of last resort,³⁴ and can only be ordered when “there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others.”³⁵ (See also the similar pronouncement by the Human Rights Committee, in relation to the ICCPR, described below).

The ICJ believes that the recourse to preventive detention has been abused in practice due to, among other reasons, the inadequacy of the CPP framework on pre-trial detention. In particular, while the CCP provides for preventive detention to be an “exceptional measure”, it fails to provide for clear and precise grounds and criteria for such a measure to be ordered by investigative judges and prosecutors. The introduction of some grounds for preventive detention in the 2015 Draft CPP, many of which were detailed in the above-mentioned Minister of Justice’s memo, is a positive development. However, it is essential for the CPP provisions allowing recourse to pre-trial detention to be amended with a view to ensuring full compliance with international law and

³³ See for example, ICCPR, article 9(3).

³⁴ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted in 2003, Principle M(1)(e).

³⁵ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted in 2003, Section M(1)(e).

standards, including by being sufficiently restrictive in setting out an exhaustive list of grounds for such detention, limited to those recognized by international law and standards; by ensuring that each case is to be considered separately and individually on the basis of evidence about the individual and the particular case; and allowing for its imposition only where there is clear evidence to indicate that such detention is necessary, proportionate and otherwise reasonable in the circumstances of the individual case.

In this regard, the ICJ is concerned that the CPP seems to provide for mandatory pre-trial detention in cases of felonies and misdemeanours punishable by a prison sentence, without giving any consideration to the circumstances of the individual case at hand. The Human Rights Committee has clarified that, to accord with the ICCPR, detention pending trial can be ordered only pursuant to an "individualized determination that it is reasonable and necessary in all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime,"³⁶ or "influencing victims."³⁷ The Human Rights Committee has further pointed out that: "pre-trial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Neither should pre-trial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity. Courts must examine whether alternatives to pre-trial detention, such

³⁶ HRC General Comment No. 35, para. 38.

³⁷ *Michael and Brian Hill v. Spain*, Human Rights Committee Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997), para 12.3.

as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.”³⁸

Furthermore, under international standards, the burden of proof is on the State to show that detention is lawful, necessary and proportionate in the circumstances of the particular case, and that release would create a risk that cannot be addressed by other means.³⁹ For example, when assessing the risk of absconding, the fact that a person does not have a fixed residence⁴⁰ or the fact that he or she is a foreigner and thus more likely to flee the country⁴¹ have not been considered sufficient reason to warrant pre-trial detention by the European Court of Human Rights and the HRC respectively. Further, the European Court of Human Rights found that the more complete the investigation is the less likely the accused might have the capacity to interfere with the proper administration of justice.⁴²

³⁸ Human Rights Committee, General Comment 35 on Article 9 of the ICCPR (Liberty and Security of the Person), UN Doc. CCPR/C/GC/35 (2014), para 38.

³⁹ Ibid., Rules 7-8, ECtHR, *Ilijkov v Bulgaria* (33977/96), judgment of the European Court of Human Rights (2001) paras 84-85; *Patsuria v Georgia*, (30779/04) judgment of the European Court of Human Rights (2007), paras 73-77; Special Rapporteur on human rights and counter-terrorism, Australia, UN Doc. A/HRC/4/26/Add.3 (2006) para 34; See WGAD: South Africa, UN Doc. E/CN.4/2006/7/Add.3 (2005) para 65.

⁴⁰ ECtHR, *Sulaoja v. Estonia*, Application No. 55939/00 Judgment of 15 February 2005, para. 64.

⁴¹ Human Rights Committee, *Michael and Brian Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997), para 12.3.

⁴² In the context of putting pressure on the witnesses and co accused: ECtHR, *Kemmache v. France*, Application no.12325/86 and 14992/89, Judgment of 27 November, para. 53 and 54.

In addition, the ICJ is deeply concerned by the sweeping powers of prosecutors to order detentions pending trial. Under the 1974 Statute for Judges, prosecutors are deemed to be judges. However, article 56 of the 1974 Statute for Judges provides that prosecutors are “under the authority of the Minister of Justice and under the control and direction of their superiors”. Because of their institutional subordination to the Minister of Justice, prosecutors do not meet the requirements of independence and impartiality required by article 9(3) of the ICCPR, as has been emphasized by the Human Rights Committee, which concluded that: “it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. Accordingly, a public prosecutor cannot be considered as an officer exercising judicial power under paragraph 3.”⁴³

While the new Statute for Judges, adopted in 2016 but yet to fully enter into force, ends the Minister of Justice authority over prosecutors, mainly by providing for the General Prosecutor at the Cassation Court to be the head of the OPP, the ICJ is still concerned that the framework governing the prosecutors’ detention powers falls short of international standards.

The Court also set out this principle in general: ECtHR, *Mitsha v. Poland*, Application No. 13425/02, Judgment of 4 May 2006, para.49.

⁴³ Human Rights Committee, 1547/2007, *Torobekov v. Kyrgyzstan*, para.6.2; 1278/2004, *Reshetnikov v. Russian Federation*, para.8.2; concluding observations: Tajikistan (CCPR/CO/84/TJK, 2005), para. 12.

Impartiality standards require that the authority ordering the detention be separate from the one carrying out the prosecution. Consequently, judges and prosecutors should have distinctly separate roles and be independent, not only from the executive and legislative branches, but from each other as well. One of the reasons why the OPP should be strictly separated from judicial functions is to ensure that the criminal justice system is fair for all and that the right to a fair trial is guaranteed in all circumstances. However, under the 2016 Statute for Judges, prosecutors and judges are part of the same judicial corps and exercise both prosecutorial and judicial functions. This seems to run counter to Morocco's obligations under international law, including those relating to fair trial rights. A key element for a trial to be fair is the equality of arms between the prosecution and the defence, in particular their ability to prepare and present cases under conditions of equality throughout the proceedings. Such equality is undermined when prosecutors and judges are part of the same corps.

In light of the above, the ICJ calls on the Moroccan authorities, including the Government, the Chamber of Deputies, and the Chamber of Counselors, to comprehensively reform the pre-trial detention framework, including by ensuring that resort to it is exceptional, and that such detention may be ordered only when it is determined on the basis of evidence that it is necessary, proportionate and reasonable in the circumstances of the individual case. To this end, the authorities must amend the CPP with a view to:

- i) **Providing for exhaustive, clear and precise grounds and criteria for pre-trial detention, in**

- accordance with international standards on appropriateness, predictability and due process of law, and to excluding vague and expansive standards such as the threat to “public safety” or the “public order”;**
- ii) In particular, ensuring that pre-trial detention can only be ordered when there is sufficient evidence that deems it necessary to prevent the arrested person from fleeing, interfering with evidence or witnesses, or posing a clear and serious risk to others, and that its impacts are not disproportionate to these aims;**
 - iii) Ensuring that pre-trial detention is not mandatory for all individuals charged with a particular category of felony or misdemeanour, or based on the potential sentences for the offences alleged, but rather on the factual circumstances of each individual case;**
 - iv) Ensuring, in making a determination about such circumstances, that:**
 - a. Pre-trial detention is based on one or more of the grounds recognized by international law, as well as on objective criteria and on clear evidence;**
 - b. Each case is individually assessed as to whether the request for detention is reasonable, proportionate and necessary;**
 - c. That where an individual alleges that such detention would violate Morocco’s obligations under international law, that the judicial authority is able to properly assess the claims;**
 - d. The case at hand cannot be addressed adequately by alternatives to pre-trial detention, such as bail, electronic bracelets or**

- other measures that would render detention unnecessary;**
- v) Ensuring that all persons subjected to pre-trial detention are held separately from people who have been convicted and sentenced; under conditions that protect their right to be presumed innocent, and are treated with humanity and with respect for the inherent dignity of the human person, including by providing them with adequate medical care and treatment, hygiene, food, and bedding;**
 - vi) Repealing the prosecutors' powers to order detention pending trial, and ensuring that such decisions are made by judges or other authorized officers that meet the requirements of judicial independence, impartiality, and objectivity;**
 - vii) Ensuring that the authority that orders pre-trial detention is separated from the authority that carries out the prosecution, and with a view to ensuring fair trial rights, including the right to equality of arms, make sure that the OPP is strictly separated from the functions of judging cases, and that judges and prosecutors are not part of the same judicial corps;**
 - viii) Ensuring the right of victims of unlawful arrest or detention to legally-enforceable reparation, including through accessible and simplified procedures.**

2. Right to challenge the lawfulness of detention (*habeas corpus*)

The CCP does not explicitly recognize, or provide for any procedures to guarantee, the right of persons placed under *garde à vue* to challenge the lawfulness of their deprivation of liberty (whether the initial decision to detain in *garde à vue* or any renewal of the *garde à vue*) before a court. A person could be deprived of liberty in *garde à vue* for up to twelve days (depending on the category of the allegations against the person, as described earlier).

With regards to the decision to place an individual under preventive detention, the CCP provides for a procedure to request release pending trial (the release request), to be introduced at any time by the accused, his or her lawyer or the representative of the prosecution.⁴⁴ The investigative judge examines and decides upon the release request.⁴⁵ If he/she does not rule on the case within 5 days, the accused can request the misdemeanours chamber in the Court of Appeal to rule on the matter. If a decision is not taken within 15 days, the detainee shall be released.⁴⁶

When a case is referred to trial, the court before which the trial is being held reviews any release request.⁴⁷ The court decides on the merits of the request after “listening

⁴⁴ Articles 179 and 180 of the CCP.

⁴⁵ Article 179 of the CCP.

⁴⁶ Article 179 of the CCP.

⁴⁷ Article 180 of the CCP.

to the public prosecution, the parties or their lawyers if they attend.”⁴⁸ In this regard, the decisions of the Felonies and Misdemeanours Chambers of the Appeal Courts are final and cannot be subjected to any review.

Under its international legal obligations, Morocco must establish or ensure the effective availability of a simple, accessible and expeditious procedure for the exercise by any person who is deprived of his/her liberty (or his or her lawyer or other persons acting on his or her behalf) of the right to take proceedings before a court, in order for the court to decide on the lawfulness of the individual’s detention and order his or her release if the detention is not lawful.

This right is enshrined in international human rights standards, including among others article 9(4) of the ICCPR, article 14(6) of the Arab Charter and Section M(4) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. Because it is a fundamental guarantee against serious human rights violations, including arbitrary detention, torture and other ill-treatment, and enforced disappearance, this right must be respected in all circumstances: no derogation is accepted, including in a situation of national emergency or in cases in which an individual is suspected or charged with terrorism-related crimes.⁴⁹

⁴⁸ Article 180 of the CCP.

⁴⁹ See Human Rights Committee, General Comment No. 29, para. 19; Working Group on Arbitrary Detention, Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, WGAD/CRP.1/2015, 29 April 2015, Principle 4; Principles on the Right to a Fair Trial and Legal Assistance in Africa, Section M(5)(e).

This right applies in any situation where a person is deprived of liberty⁵⁰, including police custody. Its object is the release, conditional or unconditional, of the detained individual, and thus requires the reviewing court to be independent, impartial, to have the power to exercise judicial functions,⁵¹ and to order that the individual be brought before the court, whether or not he or she has requested to appear in person before the court.⁵² The court must decide whether the detention is lawful without delay and if unlawful must release the individual.⁵³ The court must both have the legal authority to order release, and must in practice actually order release if it finds the deprivation of liberty to be unlawful or otherwise arbitrary.

The ICJ is deeply concerned that the CCP does not provide individuals under *garde à vue* with any right or procedure to challenge the lawfulness of their detention.

⁵⁰ Working Group on Arbitrary Detention, Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, Principle 3.

⁵¹ Human Rights Committee, General Comment No. 35 on article 9 of the ICCPR (Liberty and Security of person), UN Doc. CCPR/C/GC/35 (2014) para. 45. See also, Working Group on Arbitrary Detention, Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, Principle 6.

⁵² Human Rights Committee, General Comment No. 35 on article 9 of the ICCPR (Liberty and Security of person), UN Doc. CCPR/C/GC/35 (2014), paras. 41-42.

⁵³ Working Group on Arbitrary Detention, Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, Principles 8 and 15.

This is particularly problematic given the length of *garde à vue* under the Moroccan law and the fact that, in terrorism-related cases, for example, individuals can be placed under police custody for up to 12 days before being brought before a judge.

In addition, the ICJ is also concerned that the pre-trial detention orders by prosecutors are not subjected to any immediate judicial review, and that detainees can only challenge their detention before the relevant court when the case is referred to trial. For example, a referral takes place within 15 days from the time the prosecutor determines that a case is ready for trial before the Felonies Chambers at the Appeal Courts.

The ICJ is also concerned that under the current framework, preventive detention orders by investigative judges can only be challenged before the same judges who ordered them. International standards on this issue are clear: the challenge to detention has to be examined by an independent and impartial court that is different from the one that ordered the detention.⁵⁴ The procedure to challenge the lawfulness of the detention must itself be fair, adversarial and apply the principle of equality of arms. An investigative judge who made the decision to detain would lack the necessary impartiality to review the legality of his or her own previous decision.

Another source of concern is the fact that the decisions of the Felonies Chambers at the Appeal Courts on release

⁵⁴ Working Group on Arbitrary Detention, Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, Guideline 4, para. 69.

requests are final and cannot be subjected to any review. Under international standards, pre-trial detainees have a right to have an independent and impartial court or other judicial authority review the lawfulness of their detention at reasonable intervals. The Working Group on Arbitrary Detention has underscored that deprivation of liberty, even if initially lawful, can become arbitrary if it is not subject to periodic review.⁵⁵ International standards put the onus on the authorities to prove that detention is still necessary and proportionate and that they are conducting the investigation with diligence.⁵⁶ With a view to complying with these standards, the Moroccan authorities should ensure that the decisions of the Felonies Chambers at the Appeal Courts on release requests, as well as all the decisions relating to the lawfulness of detention, are subjected to independent, impartial, objective and periodic judicial review.

Furthermore, because of the inadequacy of the grounds of pre-trial detention under the CPP, as detailed above, the ICJ is concerned that the procedure on the “release request” falls short of international standards. The scope of this procedure is limited insofar it aims to determine whether the reasons for placing the person under pre-trial detention are still valid, and not on whether the detention itself is lawful. To meet international standards on *habeas corpus*, the review of the lawfulness of the

⁵⁵ Ali Saleh Kahlah Al-Marri v USA (Opinion 43/2006), WGAD, UN Doc. A/HRC/7/4/Add.1 (2008) pp. 29-37, paras. 36-37; See A v Australia, HRC, UN Doc. CCPR/C/59/D/560/1993 (1997), para. 9.4.

⁵⁶ European Court: Principe v Monaco (43376/06), (2009) paras. 73-88, Labita v Italy (26772/95), (2000) paras. 152-153; Jorge, José and Dante Peirano Basso v Uruguay (12.553, Report 86/09), Inter-American Commission (2009) paras. 104-105.

detention must include an assessment of whether the arrest and detention were carried out according to the procedures established by national law; whether the grounds for detention were authorized by national law, and whether the detention is not arbitrary or unlawful under international law and standards.

As the Human Rights Committee has affirmed, a court reviewing the “lawfulness” of detention, to meet the requirements of article 9(4) of the ICCPR, must consider not only whether the deprivation of liberty complies with the grounds and procedures established under national law, but must also consider whether the detention is consistent with the right to liberty or other rights guaranteed under the ICCPR, and this in turn includes “elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality”.⁵⁷

In light of the above, the ICJ calls on the Moroccan authorities, including the Government, the Chamber of Deputies, and the Chamber of Counselors, to amend the CCP with a view to fully guaranteeing the right to *habeas corpus* consistent with international standards, including by:

- i) Providing for a procedure through which all individuals deprived of their liberty can, from the**

⁵⁷ Human Rights Committee General Comment 35 on article 9 of the ICCPR (Liberty and Security of person), UN Doc. CCPR/C/GC/35 (2014) paras 44 and 12. See also Principle 14, para 42 of the Working Group on Arbitrary Detention, Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before the court (June 2015).

time of arrest and from the outset of the deprivation of their liberty, bring proceedings before an independent and impartial court able to determine, without delay, the lawfulness of their detention and order release if the detention is unlawful or arbitrary; and to this end:

- a. Ensure that individuals placed under *garde à vue*, as well as persons acting on their behalf, can challenge the lawfulness of their detention and of any renewals or extensions thereto before an independent and impartial court and through an expeditious proceeding;**
- b. Revoke the powers of prosecutors to place individuals under pre-trial detention, restricting this power to independent and impartial judicial officers or courts;**
- c. Ensure that pre-trial detainees are able to challenge the lawfulness of their detention before an independent and impartial court and through an expeditious proceeding;**
- d. Ensure that the procedure to challenge the lawfulness of detention is simple, accessible, expeditious, fair, adversarial and respects the principle of equality of arms;**
- e. Ensure that the judges authorized to review the lawfulness of the detention are independent, objective and impartial in relation to the issues dealt with, and, to this end, revoke the powers of investigative judges to review the orders of the detention issued by them;**
- f. Ensure that the judicial authorities authorized to review the lawfulness of the detention have the power to order individuals to be brought before the court irrespective of whether the individual has so requested, as well as the**

power to order the individual released immediately if the detention is unlawful or otherwise arbitrary under national or international law;

- g. Ensure that the decisions the Felonies and Misdemeanours Chambers at the Appeal Courts on pre-trial detention orders, as well as all the decisions relating to the lawfulness of detention, are subjected to independent, impartial, objective and periodic judicial review.**
- ii) Ensuring that the basis upon which a court decides on the lawfulness of any detention includes both the compliance of the detention with applicable procedures as required by national and international law, as well as an assessment of the factual basis for the detention and whether the factual and legal grounds asserted by the authorities to justify the detention are consistent with both national law and international law, including in relation to elements of inappropriateness, injustice, lack of predictability and due process of law, reasonableness, necessity and proportionality;**
- iii) Ensure that the person placed in *garde à vue* or pre-trial detention be granted the right to be present and to be heard at all stages of such proceedings, as well as the right to prompt and confidential access to an independent lawyer of the person's choosing (as elaborated below).**

3. Right to assistance of counsel during *garde à vue* and pre-trial detention

i. Right to a lawyer during garde à vue

The CCP includes provisions that require authorities to respect the right of individuals who have been arrested or otherwise deprived of their liberty to avail themselves of legal assistance, either by appointing a lawyer or requesting the appointment of a lawyer in the framework of legal assistance.

Under the CCP, a person placed under *garde à vue* has a right to communicate with a lawyer in the following conditions:⁵⁸

- In cases of *in flagrante delicto*, the detainee has a right to be assisted by a lawyer of his or her choosing, or by a lawyer assigned to him or her. The communication between the lawyer and the client can last for up to 30 minutes, following an authorization from the OPP, and in conditions that guarantee the confidentiality of the communication. In cases where it is not possible to obtain the OPP's authorization, the judicial police officer can "exceptionally" authorize the communication, and report immediately to the OPP on the matter.

The communication takes place before the end of half of the *garde à vue* period, and can be delayed by the OPP for another 12 hours in cases of felonies and when the investigation requires so. In "terrorism" cases, the communication takes place before the end of the period

⁵⁸ Articles 66, 73, 74 and 80 of the CCP.

of *garde à vue*. If the investigation requires so, the OPP can delay the communication for up to 48 after the end of the original period of *garde à vue* (96 hours).

- In cases of felonies and misdemeanours punishable with a prison time, the OPP is to authorize the communication with a lawyer starting from the first hour after the extension of the *garde à vue*. In “terrorism” cases, the OPP can delay the communication for up to 48 hours from the first renewal.

During the extension periods of *garde à vue*, the lawyer can submit documents or written observations to the Judicial Police or the Prosecution. However, the CCP prohibits lawyers from disclosing any information about the contact with the detained individual before the end of the period of police custody.⁵⁹

ii. Right to counsel during questioning by the investigative judges and prosecutors

Under article 134, the CCP requires that interrogations of the accused before the investigative judge take place in the presence of a lawyer, unless the accused has clearly waived his or her right to counsel.⁶⁰ In urgent situations, such as when there is a risk of the evidence being destroyed, the investigative judge can carry out the interrogation without the presence of a lawyer and other guarantees provided for in article 134.⁶¹

⁵⁹ Articles 66 and 80 of the CCP.

⁶⁰ Article 139 of the CCP.

⁶¹ Article 135 of the CCP.

The lawyer must be notified that the investigative judge will question his or her client two days before the interrogation. The CPP does not provide for any guarantees for the lawyer to meet his or her client before the questioning by the investigative judge. The lawyer is limited, under article 140 of the CPP, to asking questions during the questioning of the accused, during his or her confrontation with others, or when listening to the *partie civile*. Such questions can only be asked after authorization from the investigative judge. In case of refusal, the questions are included in the interrogation statements.

During interrogations by a public prosecutor in cases of a person caught *in flagrante delicto* committing a felony or a misdemeanour punishable by a prison sentence, the concerned person has the right, under articles 73 and 74 of the CCP, to be assisted by a lawyer, either appointed or assigned, during the questioning. The lawyer can request that his/her client be given a medical examination, and submit all documents and evidence in defence of his or her client. The CPP does not provide for any guarantees for the lawyer to meet his or her client before the interrogation by the prosecutor.

Statements made during *garde à vue* and before investigative judges and prosecutors can determine the accused's fate, irretrievably prejudice his or her defence and reduce the trial itself to a mere formality. It is therefore important to ensure that the right of the arrested or accused person to an effective legal counsel is fully respected.

In this regard, the ICJ is concerned that the framework governing the right of individuals under *garde à vue* to a legal counsel falls short of international standards.

Under international standards, “all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.”⁶²

A person arrested or detained should have access to a lawyer as soon as they are deprived of their liberty.⁶³ As a general rule, the European Court of Human Rights considers that the right to a fair trial requires an accused person to be allowed legal assistance as soon as they are placed in custody, including during the initial stages of police investigation, and before any questioning takes place.⁶⁴

Even where international standards may permit access to counsel to be delayed, this can only be in truly exceptional circumstances defined with sufficient precision by national laws that are consistent with international laws, and subject to some overall absolute

⁶² Basic Principles on the Role of Lawyers, Principle 8.

⁶³ See for example: Human Rights Council resolution 13/19, UN Doc. A/HRC/RES/13/19 (2010) §6, and the Human Rights Committee Concluding Observations on Jordan, UN Doc.CCPR/C/JOR/CO/4 (2010) para. 9.

⁶⁴ European Court of Human Rights: *Dayanan v Turkey* (7377/03), (2009) §§30-32; *Salduz v Turkey* (36391/02), Grand Chamber (2008) para. 54.

limit. The Special Rapporteur on torture has recommended, for example, that anyone who has been arrested “should be given access to legal counsel no later than 24 hours after the arrest”.⁶⁵ The UN Basic Principles on the Role of Lawyers provide that “all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention”.⁶⁶ The Luanda Guidelines specify that all persons detained in police custody enjoy “[a]ccess without delay to lawyers and other legal service providers, at the latest prior to and during any questioning by an authority, and thereafter throughout the criminal justice process.”⁶⁷

In terrorism-related cases, UN bodies and procedures have raised consistent and serious concerns about laws and practices allowing for delays in access to counsel to detained individuals. The Human Rights Committee has recommended that “anyone arrested or detained on a criminal charge, including persons suspected of terrorism, has immediate access to a lawyer.”⁶⁸

⁶⁵ See Special Rapporteur on torture: UN Doc. A/56/156 (2010) §39(f).

⁶⁶ Basic Principles on the Role of Lawyers, Principle 7.

⁶⁷ The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), adopted by the African Commission on Human and Peoples’ Rights (the Commission) during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014. Available at: http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf.

⁶⁸ Human Rights Committee Concluding Observations: United Kingdom, UN Doc. CCPR/C/GBR/CO/6 (2008) para. 19.

The fact that, in certain circumstances, the CCP allows for delaying access to lawyer for up to 144 hours is clearly inconsistent with Morocco's obligations under international law on the right to defence and to a fair trial.

Equally problematic is the form and length of the communication between the lawyer and the person placed under *garde à vue*. The wording of the CCP provision on the matter is ambiguous insofar it does not specify whether the communication requires the physical presence of the lawyer or a mere phone communication. Limiting the communication to 30 minutes is also problematic, because it does not take into account the circumstances and complexity of each individual case, thus undermining the right of the person placed under *garde à vue* to adequate time and facilities to prepare a defence as explicitly required by international standards.

In addition, the ICJ believes that making access to a lawyer conditional on prior authorization from the OPP, and empowering the OPP to delay access of the person placed under *garde à vue* to his or her lawyer, are both inconsistent with international standards on the right to an effective counsel, as well as on the principle of equality of arms, a key component of the right to a fair trial.

The ICJ is also concerned that the CCP framework on the right to a legal counsel during questioning by investigative judges and prosecutors falls short of international standards on fair trial rights, in particular the right to an effective counsel.

The fact that the CCP allows for the investigative judge to carry out, in urgent situations, the interrogation without

the presence of a lawyer runs counter to international standards. Under these standards, people suspected or accused of criminal offences who are being questioned have the right to the presence and assistance of a lawyer. The Moroccan authorities should ensure that this right is fully respected and protected during all stages of criminal proceedings and in all circumstances, including the urgent situations referred to in the CCP.

In addition, the right to the assistance of a lawyer during interrogation before investigative judges and prosecutors as provided for by the CCP does not include the possibility for the interrogated person to consult with his or her lawyer before the questioning. To guard against torture and other violations, as well as to give effect to the right not to be compelled to incriminate oneself, a person accused of an offence should be able to obtain effective legal consultation and advice before questioning.

In this regard, in a seminal 2008 judgment the European Court of Human Rights held that, "as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under article 6 The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a

conviction.”⁶⁹ In a subsequent case, the Court further confirmed “the importance of consultation between lawyer and client prior to the first appearance before the investigative judge, for it was on that occasion that crucial exchanges could take place, if only so that the lawyer could remind the client of his rights. Such a consultation had to be guaranteed unequivocally by the legislature.”⁷⁰ The Court has consistently underlined the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial.⁷¹

The Human Rights Committee and the Committee against Torture have also repeatedly called on States to ensure the right of all detainees to access counsel before questioning and to the presence of counsel during questioning.⁷²

Further, the assistance of a lawyer during interrogation before investigative judges is limited under the CCP provisions insofar the lawyer can only ask questions in certain specific situations and after the authorization of the investigative judge. The CCP does not allow for the lawyer to actively and effectively participate in the interrogation, including by, among other means,

⁶⁹ ECtHR (Grand Chamber), *Salduz v Turkey* (no. 36391/02), 2008, para. 55.

⁷⁰ ECtHR, *A.T. v. Luxembourg* (no. 30460/13), 2013.

⁷¹ See for example, ECtHR, *Can v. Austria*, no. 9300/81, Commission's report of 12 July 1984, para. 50, Series A no. 96.

⁷² HRC Concluding Observations: Ireland, UN Doc. CCPR/C/IRL/CO/3 (2008) para. 14, See CAT Concluding Observations: Turkey, UN Doc. CAT/C/TUR/CO/3 (2010) para. 11.

requesting clarifications or advising the client before answering specific questions. The fact that the very questions of the lawyer are subjected to a prior authorization from the investigative judge further undermines the right of the accused to an effective legal counsel.

In addition, while the ICJ welcomes the fact the CPP provides for the right of the pre-trial detainees to have a lawyer assigned, the ICJ encourages the Moroccan authorities to provide sufficient resources to ensure that an effective legal aid system is established and organized so that free assistance is available immediately following arrest to individuals unable to pay, and that the assigned lawyers are of experience and competence commensurate with the nature of the offence.

In light of the above, the ICJ calls on the Moroccan authorities, including the Government, the Chamber of Deputies, and the Chamber of Counselors, to amend the CCP with a view to ensuring full respect for the right to effective, competent legal counsel during all pre-trial proceedings, including by:

- i) Ensuring that anyone arrested or detained has immediate access to legal assistance as soon as they are placed in police custody and during the initial stages of police investigation;**
- ii) Ensuring that, if any scope is retained for the authorities to delay the access of anyone arrested or detained to his or her lawyer, such delay should be: strictly limited to exceptional circumstances prescribed in law with sufficient precision and consistent with international**

- standards, assessed on a case-by-case basis, decided upon by a judge, and of a length that does not exceed 24 hours from the time of arrest;**
- iii) Repealing any provisions of the CCP and other laws that would make the exercise of an individual's right to access to a lawyer conditional on prior authorization from any authority;**
 - iv) Repealing any provisions of the CCP and other laws that would allow the OPP to delay individual's access to a lawyer;**
 - v) Ensuring that everyone arrested or detained is provided with adequate time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality;**
 - vi) Removing from the CCP any limitations on the type, manner and length of communication of an individual placed under *garde à vue* with his or her lawyer, and ensuring that the length of such communication is adequate with the circumstances and complexity of each individual case;**
 - vii) Enhancing the guarantees of the right to effective legal assistance before and during questioning by investigative judges and prosecutors, in particular by:
 - a. Ensuring that anyone arrested or detained can be visited by, and to communicate with, his or her lawyer before questioning by the investigative judge or prosecutor, including with a view to preparing for the questioning and organizing his or her defence;**
 - b. Repealing or amending any provisions of the CCP and other laws that would allow the investigative judge to carry out questioning****

- without a lawyer in so-called “urgent situations”, to bring them in line with international standards;**
- c. Repealing any provisions of the CCP and other laws that require that the lawyer can only intervene or ask questions during the interrogation if the investigate judge has so authorized;**
 - d. Ensuring that during the questioning, the lawyer is able to actively and effectively participate in the interrogation, including by requesting clarifications and advising the client before answering specific questions.**
- viii) Establishing and organizing an effective legal aid system so that free assistance is available immediately following arrest to individuals unable to pay;**
- ix) Ensuring that the assigned lawyers are of experience and competence commensurate with the nature of the offences dealt with in each individual case.**

4. Pre-trial guarantees and the protection from human rights violations

In addition to the above-mentioned provisions relating to access to a lawyer during pre-trial detention and the right to be brought before a judge and to request release pending trial, the CCP provides for other guarantees that aim to protect detainees rights. For example, when a judicial officer places a suspect under police custody, the CCP requires that he or she write a report indicating the date and the circumstances of arrest.⁷³ It also requires the judicial officer to immediately inform the family of the detained person. The officer's report should include the name of the person informed, the date when he or she was informed and the means used to inform the person of the arrest. The report is added to the investigation case file.⁷⁴

In addition, the CCP provides that in each *garde à vue* facility, a register is to be kept with the names of the detainees, the reasons for placing them under *garde à vue*, the start and end time of *garde à vue*, the length of police questioning and break times, the physical and health condition of the detainees, and the food provided to them. The public prosecutor signs the register. Prosecutors have an overall oversight over *garde à vue*, and can order at any time its end or summon the detainees to be brought before them.⁷⁵

⁷³ Article 67 of the CCP.

⁷⁴ Article 67 of the CCP.

⁷⁵ Article 66 of the CPP.

The CCP also requires that the public prosecutor and/or the investigative judge must order a medical examination of the accused when they notice signs that warrant doing so.⁷⁶ The lawyer or accused may request such examination.

The ICJ believes that because of their inadequacy, the pre-trial rights, guarantees and procedures provided for by the CCP have not proven effective in contributing to prevent or eradicate human rights violations in *garde à vue* and other pre-trial detention in Morocco.

The Equity and Reconciliation Commission (*Instance équité et réconciliation*, IER), a Truth Commission established by the government in 2004, investigated the gross human rights violations committed between 1959 and 1999 in Morocco. Its report documented thousands of cases of arbitrary arrest and detention, including secret detention; enforced disappearances; unlawful killings, summary executions and torture and other-ill-treatment.⁷⁷

The ICJ has previously pointed out that while the IER were investigating decades of serious human rights violations, other gross human rights violations continued to occur in Morocco, in particular in the context of implementing counter-terrorism measures.⁷⁸ These

⁷⁶ Articles 88 and 134 of the CCP.

⁷⁷ Report of the Moroccan Truth Commission, *Instance Équité et Réconciliation*, available at: http://www.cndh.org.ma/sites/default/files/documents/rapport_final_mar_fr_.pdf.

⁷⁸ See ICJ submission to the Committee Against Torture on the examination of the fourth periodic report of the Kingdom Of Morocco, available at :

violations included secret detentions, enforced disappearances, and the widespread use of torture and ill-treatment. The cooperation of the Moroccan authorities with the United States and other governments in the so-called “war on terror” also resulted in many serious human rights violations, including torture and other ill-treatment, enforced disappearances, secret detention and secret renditions of terrorist suspects.

Various UN treaty bodies and special procedures have called on the Moroccan authorities to address these human rights violations and to ensure accountability and reparation for them. While noting that article 23 of the Constitution explicitly states that secret or arbitrary detention and forced disappearances are crimes of the utmost seriousness, the Special Rapporteur on Torture expressed his deep concerns “about past and present practices of incommunicado detention,”⁷⁹ calling on the Moroccan authorities to end “the practice of incommunicado and secret detention, in accordance with article 23 of the Constitution.”

Following its visit to the country, the UN Working Group on Arbitrary Detention has pointed out that Morocco “has served as a departure point, a transit country and a destination for illegal extraordinary renditions” in the context of the “war on terror,” and how such renditions “have been accompanied by incommunicado detention and/or detention in secret places, as well as acts of

http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MAR/INT_CAT_NGO_MAR_47_9554_E.pdf.

⁷⁹ Op.cit. para. 18.

torture and ill-treatment, particularly during the questioning of suspects.”⁸⁰

The Committee Against Torture has also expressed its concerns that “allegations of torture, despite their number and frequency, rarely give rise to investigations and prosecution and that a climate of impunity appears to have taken hold, given the failure to impose genuine disciplinary measures or to bring any significant number of criminal cases against State officials accused of committing acts specified in the Convention.”⁸¹

The ICJ believes that in addition to ensuring accountability for these violations, the full realization of the rights to liberty, security of person, and to be free from torture and other ill-treatment in Morocco requires a complete review of the relevant legislation that applies to persons deprived of liberty. Indeed, the legislative framework surrounding the treatment of detainees goes beyond the CCP: it includes the Constitution and in addition to the CPP a number of other laws, including Law no. 23-98 on the organization and functioning of detention facilities, Decree No. 2-00-485 of 2000 on the modalities of application of Law No. 23-98, and Dahir No. 1-08-49 of 2008 on the nomination of the delegate general of penitentiary administration and reintegration.

This framework should be amended with a view to enhancing the guarantees relating to police questioning and custody; questioning by investigative judges and

⁸⁰ Op.cit. para. 27.

⁸¹ CAT concluding observations: Morocco CAT/C/MAR/CO/4 (2011) para. 16.

prosecutors, pre-trial rights and procedures, and the fairness of the criminal proceedings.

Indeed, the ICJ believes that the manner in which investigative and pre-trial detention phases are conducted is determinant not only to the protection of the rights of those deprived of their liberty, but also to the fairness of the proceedings as a whole. In *Salduz v. Turkey*, for example, the European Court of Human Rights underlined the importance of the investigative stage for the preparation of the criminal proceedings, and recalled that:

“an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, (...) In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seeks to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.”⁸²

Safeguards must therefore be in place during questioning and detention to ensure the respect of the fundamental rights of suspects and detainees, including their right to humane treatment and the right not to be subjected to torture or other ill-treatment.⁸³ The UN Committee

⁸² *Salduz v. Turkey*, para. 54.

⁸³ All persons who are deprived of liberty, and all who go through an investigative process, must be treated humanely. Article 7 of the ICCPR provides that “No one shall be subjected to torture or to cruel,

against Torture has stated in relation to States' obligations under the CAT, for instance:

Certain basic guarantees apply to all persons deprived of their liberty. Some of these are specified in the Convention, and the Committee consistently calls upon States parties to use them. The Committee's recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, *inter alia*, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment

inhuman or degrading treatment or punishment", and article 10(1) that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Article 55(1)(b) of the Statute of the International Criminal Court also provides that a person under investigation shall "not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment". See also article 5 of the Universal Declaration; article 2 of the Convention against Torture; article 5 of the African Charter; article 8 of the Arab Charter; article 3 of the European Convention; Principles 1 and 6 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 1988; the *UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, initially adopted in 1955-1957, revised version adopted unanimously by the General Assembly, Resolution 70/175 (17 December 2015); article 4(a) of the *Guidelines on the Conditions of Arrest, Police Custody, Pre-Trial Detention in Africa*; Section M(7)(a) and (b) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; and the Robben Island Guidelines.

of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.⁸⁴

In relation to questioning, other safeguards must also be in place to ensure the right of individuals to an effective and competent counsel, the right to be presumed innocent, the right not to be compelled to incriminate oneself, and the right to remain silent. With regard to the individuals held in police custody and in detention, safeguards must be provided to protect their rights to humane conditions of detention, to be held only in officially-recognized places of detention and separately from convicted prisoners, to be free from torture and other ill-treatment, to be free from discrimination, and the right to health and to adequate time and facilities to prepare the defence, including the right to communicate confidentially with counsel.

Moreover, in accordance with international standards, a detained individual should have the right to a medical examination by an appropriately qualified independent doctor, including whenever they make allegations of torture or other ill-treatment or whenever there is reason to believe that these individuals have been subjected to such treatment. In accordance with the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, "examinations shall be conducted in private under the control of the medical expert and outside the

⁸⁴ Committee against Torture, General Comment no 2, UN Doc CAT/C/GC/2 (24 January 2008), para 13.

presence of security agents and other government officials” and the medical expert “shall promptly prepare an accurate report” which “shall be confidential and communicated to the subject or his or her nominated representative”. The report, when appropriate shall also be provided in writing to the authority responsible for investigating the allegations of torture or other ill-treatment.⁸⁵ A detainee should also be allowed “to be visited and treated by his or her own doctor or dentist if there are reasonable grounds for the application and he or she is able to pay any expenses incurred.”⁸⁶ Women in detention should generally have the right to be examined only by a female doctor, or where this is absolutely impossible due to medical emergency, with a woman staff member present.⁸⁷

With regard to the CCP, the ICJ wishes to underline the following considerations pertaining to the right to request an independent medical examination upon being taken into custody of the authorities. In addition to its role as a safeguard against torture and other abuse, and as a part of the general principle that prisoners, particularly untried prisoners, should retain all of their rights subject only to restrictions inherent to the fact of detention, the right to an independent medical examination is a component of the right to health, which entails that

⁸⁵ Principle 6. These Principles were adopted by the General Assembly in General Assembly, Resolution A/RES/55/89, 22 February 2001, Principle 6.

⁸⁶ UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), para 118.

⁸⁷ See e.g. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), General Assembly resolution 65/229 (2010), Rule 10(2).

everyone, including an individual in custody, has the right to the highest attainable standard of physical and mental health.⁸⁸

In this regard, the ICJ notes with concern that the provisions of the CCP are inconsistent with international standards insofar that they do not require the judicial police to ensure that medical examinations are either carried out or offered to those placed under *garde à vue*; and that neither the lawyer nor the accused are entitled under the CCP to request or require that the police ensure that such an examination is carried out. Thus, the CCP seriously limits the protection of the health of the detainee (such as identifying those who may require medication, medical care or treatment and the medication, treatment or care required) and the protection against torture and other ill-treatment that should be afforded to a person deprived of their liberty. The CCP does not ensure that a thorough medical examination is carried out by an appropriate professional on an individual placed under *garde à vue* whenever the individual, his or her lawyer, or a family member, requests it or alleges that the individual was subjected to torture or other ill-treatment.

The gaps in protection are particularly worrying in the context of Morocco where individuals have been denied medical examinations, which they requested and given the legacy of allegations of torture or other ill-treatment in police custody. In a case before the CAT, it was

⁸⁸ ICESCR, article 12; African Charter, article 16; Arab Charter, article 39. The right to health extends not only to timely and appropriate health care, but also to underlying determinants of health, such as adequate food, water and sanitation.

revealed that, notwithstanding the provisions of the Moroccan CCP according to which the public prosecutor and/or the investigative judge must order a medical examination of the accused when they observe that there are grounds for doing so, the complainant, who had alleged having been subjected to several days of ill-treatment, did not undergo a medical examination when he requested it (the examination was only undertaken more than a year after the alleged events).⁸⁹

International standards also affirm obligations of non-discrimination in treatment and conditions, and provide for a number of specific safeguards, for categories of detainees that tend to be particularly at risk of discrimination or other abuse, or who have special needs. Such groups include, but are not limited to: women, children, persons with disabilities, and non-nationals, as well as ethnic, religious or linguistic minorities, and groups at heightened risk by reason of their sexual orientation or gender identity.⁹⁰

⁸⁹ CAT, *Aarass v. Morocco*, Communication No. 477/2011, UN Doc. CAT/C/52/D/477/2011, 24 June 2014, para. 10.5.

⁹⁰ See for example, UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), including Rules 11, 62, 65, 66, 81, 109, and 110; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly resolution 45/113 (1990); the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), General Assembly resolution 65/229 (2010); Guidelines on the Conditions of Arrest, Police Custody, Pre-Trial Detention in Africa, Part 7; Convention on the Rights of Persons with Disabilities, article 14(2); Convention on the Rights of the Child, articles 37 and 40; Special Rapporteur on minority issues, Report on minorities in the criminal justice system, UN Doc A/70/212 (2015); Committee against Torture, General Comment no 2, UN Doc CAT/C/GC/2 (24 January 2008), paras. 21 and 22; Report of the Subcommittee on the Prevention of Torture; UN Doc CAT/C/57/4

A key measure for prevention of torture and other ill-treatment, which became a specific obligation for Morocco upon its ratification of the Optional Protocol to the CAT (OPCAT) in November 2014, is the establishment of an independent national preventive mechanism to carry out visits to all places of detention, including particularly police stations and other places where persons under criminal investigation or prosecution are deprived of liberty. The Moroccan authorities have yet to establish the National Prevention Mechanism (NPM). Pursuant to article 17 of the OPCAT, Morocco should have designated or established its NPM no later than 24 December 2015.

In this regard, the ICJ calls on the Moroccan authorities, including the Government, the Chamber of Deputies, and the Chamber of Counselors, to reform the pre-trial detention framework with a view to contributing to prevent human rights violations and to ensure accountability for such violations should they nevertheless occur and, to that end:

(22 March 2016), paras. 48 to 82; Reports of the UN Special Rapporteur on Torture, UN Doc A/56/156 (2001) and UN Doc HRC/31/57 (2016); Office of the High Commissioner for Human Rights, Report on Discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc A/HRC/29/23 (2015), para. 78(e)(f) and (g); European Court of Human Rights, *X v Turkey*, App no 24626/09 (2012), para. 42; See also the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, Principle 9.

- i) Take effective measures to end the practices of incommunicado detention and/or detention in secret places, as well as acts of torture and other ill-treatment;**
- ii) Ensure that interrogation take place only at official places of detention that are subjected to independent, regular judicial review and subject to visits, including without prior notice, by an independent and effective National Prevention Mechanism (NPM);**
- iii) Register all detainees, including by recording their identity; the date, time and place of their detention; the identity of the authority that detained and interrogated them; the grounds for their detention, and the date and time of their admission to the detention facility;**
- iv) Accept independent monitoring of detention facilities by allowing independent observers immediate access to detainees and prisoners, and establish, to that end and as a matter of urgency, a NPM, as provided for by the OPCAT;**
- v) Ensure that the NPM is fully independent and has the power to, among others, inspect every place of detention at any time without prior announcement; speak with any person including in the absence of the authorities; regularly examine the treatment of persons deprived of their liberty in the detention facilities; and make recommendations to the relevant authorities with the aim of improving the treatment and conditions of detainees and preventing torture and other-ill treatment;**
- vi) Provide for effective safeguards to ensure the right of individuals deprived of their liberty to an effective and competent counsel, to be presumed**

- innocent, to not be compelled to incriminate oneself, and to remain silent;**
- vii) Ensure that individuals, their lawyer or family members, have the right to request a medical examination and that such examination is conducted as promptly as possible following their arrest and throughout their detention, as well as when they allege, or there are reasonable grounds to believe, that they have been subjected to torture or other ill-treatment;**
 - viii) Ensure that the medical examination is carried out by an independent and suitably qualified medical practitioner, and by the practitioner of the individual's choice where appropriate;**
 - ix) Ensure that medical examinations take place in conditions that guarantee respect of the detainee's rights to privacy and dignity, and confidentiality, outside the hearing and, as a general rule, outside of the sight of any government official, including the judicial police;**
 - x) Ensure that the report of the medical examination is communicated first and foremost to the individual examined and, upon his or her authorization, to his or her lawyer;**
 - xi) Ensure that necessary health care and treatment is provided to people deprived of their liberty, free of charge;**
 - xii) Incorporate specific safeguards for categories of detainees that tend to be particularly at risk of discrimination or other abuse, or who have special needs, including, but are not limited to: women, children, persons with disabilities, and non-nationals, as well as ethnic, religious or linguistic minorities, and groups at heightened risk by**

- reason of their sexual orientation or gender identity;**
- xiii) Promptly, thoroughly and impartially investigate all allegations of human rights violations in the country, including those committed in the context of implementing anti-terrorism measures and in the so called “the war on terror”. Bring to justice through criminal investigations and prosecutions, those state officials, law enforcement officers, and any other person who carried out, ordered, facilitated or acquiesced in criminal violations of human rights. Persons found responsible for violations that do not necessarily constitute crimes under international or national law should also be held accountable, through means such as disciplinary or other administrative measures, civil penalties and liability, and public confirmation of the truth about their involvement.**

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