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MOROCCO**

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*The International Commission of Jurists (ICJ) is a non-governmental organisation founded in 1952, in consultative status with the Economic and Social Council since 1957. The ICJ is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. It takes an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law. It provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level.*

ICJ submission to the Universal Periodic Review of Morocco

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## ICJ submission to the Universal Periodic Review of Morocco

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Human Rights Council's Universal Periodic Review (UPR) of Morocco. In this submission, the ICJ brings to the attention of the Human Rights Council's Working Group on the UPR (Working Group) and to the Human Rights Council (Council) issues concerning: (1) the lack of implementation of the Convention Against Torture; (2) the proliferation of torture during the United States proclaimed "war on terror"; and (3) international human rights instruments and mechanisms. Many of these issues are taken from the ICJ's submission to the Committee against Torture (CAT) in its recent consideration of Morocco's fourth periodic report.<sup>i</sup>

### IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE

2. On 14 February 2006, the Moroccan Criminal Code was amended by Law No. 43-04, with a view to bringing the Criminal Code's definition of torture into compliance with the definition in the Convention against Torture and Other Forms of Inhuman or Degrading Treatment or Punishment (the Convention).<sup>ii</sup> The definition, codified in Article 231-1 of the Criminal Code, covers acts that cause severe physical or mental pain or suffering intentionally inflicted for the purpose of intimidation, obtaining information, obtaining a confession, punishing, or other objectives based on discrimination. 'The purpose', as opposed to 'such purposes', implies that the list is exhaustive, which is not the intent of the Convention definition.

3. Law No. 43-04 specifies that the act must be carried out by a public agent, or upon his instigation, or with his express or tacit consent. Article 224 of the Criminal Code defines 'public agents' too narrowly.<sup>iii</sup> The definition omits persons exercising State power or authority, even though they may not directly work for one of the included public institutions or agencies. Under the international law governing State responsibility, the State is responsible for the conduct of otherwise private persons when they act under the instructions, direction or control of the State, or when they are empowered by the State to exercise elements of governmental authority. It is therefore incumbent upon States parties to treat such persons as public authorities for the purposes of discharging its obligations under the Convention.<sup>iv</sup> In fact, Morocco accepted a much broader definition of 'public official' when it became party to the UN Convention against Corruption.<sup>v</sup>

4. In addition, Article 231-1 omits any reference to the various forms of complicity and participation as required under Article 4 of the Convention. Article 231-2 of the Criminal Code states that conviction for the crime of torture will result in imprisonment ranging from 5-15 years and a fine ranging from 10,000-30,000 Dirhams.<sup>vi</sup> It does not provide for sanctions against superior authority, including public officials who knew that the crime of torture was committed. It also fails to take necessary and reasonable measures to prevent or stop the crime. In its General Comment No 2, the CAT pointed out that where they knew or should have known that torture was occurring or was likely to occur, those exercising superior authority cannot escape criminal responsibility.<sup>vii</sup>

5. Under international law, torture is absolutely prohibited.<sup>viii</sup> Both the CAT and the UN General Assembly have affirmed repeatedly that the prohibition against torture is a peremptory norm of international law.<sup>ix</sup> The peremptory nature of the prohibition makes the crime of torture not subject to prescription, including any statute of limitation. Legal procedural obstacles, which preclude the initiation or continuation of legal proceedings, constitute a major impediment to the prosecution of perpetrators of gross human rights violations. In Morocco, under the Criminal Procedure Code, the statute of limitation for the

crime of torture is 20 years.<sup>x</sup> This prevents any judicial proceedings in the majority of cases of torture documented in the Report of the Equity and Reconciliation Commission,<sup>xi</sup> a Government-created truth commission, including the cases of 89 detainees who died while at custody.<sup>xii</sup>

6. Furthermore, under the Criminal Code, the crime of torture is not excluded from the provisions of Articles 51 and 53 related to amnesties and pardons respectively. In its General Comment No 2, the CAT has confirmed that:<sup>xiii</sup>

“...amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.”

7. The use of torture and other forms of ill-treatment in Moroccan prisons and detention facilities has been exacerbated by the conditions of detention provided for under the Moroccan legal framework, in particular the Criminal Procedure Code and the Counter-Terrorism Act 2003. Resulting amendments to Article 66 of the Criminal Procedure Code allow for extending the length of *garde à vue* (detention in police custody) of terrorism suspects to 96 hours, renewable twice upon authorisation from the public prosecutor.

8. Furthermore, during the *garde à vue*, the representative of the public prosecution, at the request of the police, may also delay the defendant’s contact with a lawyer, for up to 48 hours as from the first renewal, meaning that a “terrorist” suspect might be prevented from communicating with a lawyer for the first 6 days of *garde à vue*. Under international standards, anyone arrested or detained has the right to be assisted by a lawyer without delay and to communicate and consult with his lawyer without interception or censorship and in full confidentiality. This right may be delayed only in exceptional circumstances and must comply with strict criteria determined by law. In any event, a person deprived of liberty should have access to a lawyer within 48 hours of his or her arrest or detention.<sup>xiv</sup>

9. In addition, although Article 293 of the Criminal Code of Procedure prohibits the use of “confessions” obtained through torture and other ill-treatment,<sup>xv</sup> this Article remains largely disregarded by Moroccan courts.

### **PROLIFERATION OF TORTURE DURING THE “WAR ON TERROR”**

10. In the aftermath of the 2003 terrorist attacks, the Moroccan Parliament adopted a new anti-terrorism law,<sup>xvi</sup> introducing a range of additional terrorism offences, including *apologia* and incitement,<sup>xvii</sup> without requiring either intent to incite or a concrete risk of violence. Special rules under the anti terrorism law, such as prolonged *garde à vue* without access to a judge and/or a lawyer, have facilitated torture and other ill-treatment. Judges have decided most cases on the basis of forced “confessions”, inaccessible evidence and rushed proceedings. The ICJ has received consistent and credible reports of mass arrests which includes reports of the detention of several individuals who were cited by the CAT in its recent List of Issues published before the review of Morocco in November 2011.<sup>xviii</sup>

11. There are also serious allegations of Morocco’s engagement in the secret rendition of individuals.<sup>xix</sup> Although the practice of secret rendition following 11 September 2001 has been orchestrated by the United States, it has involved the complicity and participation of a number of other States, including Morocco. In the case of Morocco, the cooperation of local authorities with other governments in undertaking counter-terrorism activities, including in the context of the US-proclaimed “war on terror”, has resulted in many serious human rights violations, including torture and other ill-treatment, enforced disappearances, secret detention and secret renditions of terrorist suspects. Such renditions involve transfers to States where the person is at risk of torture, ill-treatment or other serious human rights violations, in breach of the principle of *non-refoulement*. In addition to causing severe physical pain, these transfers to unknown locations and unpredictable conditions of detention increase the mental strain on the detainees as well as their sense of isolation, making them more vulnerable to torture and other ill-treatment. In many cases, persons are subjected to

prolonged incommunicado detention, which can itself constitute a form of torture or ill-treatment.

12. Morocco has been central to an international network of renditions. It has acted as a transit, source and destination country. Morocco has secretly arrested numerous terrorist suspects, including, amongst others, Binyam Mohamed Al Habashi, Ramzi Bin Al-Shibh, and Mohammed Haydar Zammar. Some of these secret detentions occurred under the High Value Detainee Programme run by the United States Central Intelligence Agency (CIA).

13. By engaging in these secret, illegal renditions and transfers, Morocco has breached its obligations under international law, including under the Convention. Secret detention itself constitutes a crime under international law, violating the absolute prohibition against cruel, inhuman or degrading treatment and enforced disappearance. Victims have no access to the outside world; no knowledge of where they are or have been held; and no contact with their legal representative, their families or any persons other than their interrogators or guard.

14. Under international standards, detainees must be registered and held in officially recognised places of detention. However, Morocco has had a long and troubled history of resorting to secret detentions and enforced disappearances where victims have been held for years, and in some cases decades, in secret detention centres.<sup>xx</sup> In the last ten years, several detainees subjected to rendition to Morocco by the United States, former detainees from Guantánamo Bay, and Islamist suspects arrested after the 2003 Casablanca attacks, in which 12 suicide bombers killed more than 40 people, have reportedly been held under the authority of the DST in Témara and subjected to ill-treatment and torture. The Témara detention centre is not listed as a detention facility under the authority of the Ministry of Justice and the Moroccan authorities have persistently denied its existence. The DST is not entitled under the law to arrest and detain terrorist suspects or to question individuals. A legal basis for intelligence agents interrogating and detaining persons does not exist. Under Moroccan law, officers of the DST are not members of the “Police judiciaire”, the only law enforcement branch empowered to arrest or detain criminal suspects.<sup>xxi</sup> Consequently, the detention centre of Témara is not an authorised place of detention.

15. Credible reports have also emerged that the United States was helping Morocco to build another interrogation and detention facility for Al-Qaeda suspects at Ain Aouda, near the capital Rabat.<sup>xxii</sup> Although Moroccan authorities deny that detention and interrogation of “terrorist” suspects occur outside the ordinary legal framework, in reality the intelligence services act in a climate of total impunity.

## INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND MECHANISMS

16. Despite its pledge made in 2006 when standing for membership in the Human Rights Council, to “ensure the ratification or the adherence to the very few international instruments to which Morocco has not yet become a party”,<sup>xxiii</sup> Morocco has yet to ratify or accede to the following core human rights instruments:

- First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR);<sup>xxiv</sup>
- Second Optional Protocol to the ICCPR;
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW);<sup>xxv</sup>
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT);<sup>xxvi</sup>

- Convention for the Protection of All Persons from Enforced Disappearance; and
- Rome Statute of the International Criminal Court.

17. With regards to the Convention on the Elimination of All Forms of Discrimination against Women, Morocco has not removed declarations to articles 2 and 15(4) of the Convention, nor its reservation to article 29. This is despite the fact that Morocco has expressed its intention to remove the declarations and reservation,<sup>xxvii</sup> and that it accepted a recommendation to this end in the first cycle of the UPR.<sup>xxviii</sup>

18. Morocco is up-to-date in its periodic reporting obligations to the Committee on the Elimination of Discrimination Against Women. However, despite commitments to “present, on a regular basis, periodical reports to the relevant treaty bodies”,<sup>xxix</sup> Morocco has failed to adhere to reporting deadlines for periodic reports to the Human Rights Committee (HRCttee), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Rights of the Child (CRC), and Committee on Migrant Workers (CMW):

- Morocco is yet to submit its sixth periodic report to the HRCttee (due 1 November 2008);
- Morocco is yet to submit its fourth periodic report to CESCR (due 30 June 2009);
- Morocco is yet to submit its joint third and fourth periodic report to the CRC (due 20 January 2009);
- Morocco is yet to submit its initial report (due 1 July 2004) and its second periodic report (due 1 July 2009) to the CMW.

19. Although Morocco has invited Special Procedures to undertake official visits to Morocco on an *ad hoc* basis,<sup>xxx</sup> it has not issued a standing invitation to the Special Procedures. While Morocco has agreed to allow for a future visit from the SR on adequate housing and the IE on water and sanitation, and despite its pledge to “continue cooperation with the special procedures”,<sup>xxxi</sup> Morocco has failed to respond to requests to carry out a country visits by the WG on arbitrary detention (2009), the Independent Expert on cultural rights (October 2010), the SR on trafficking (October 2010), and the SR on freedom of association and assembly (September 2011).

## RECOMMENDATIONS

20. The ICJ calls upon the Working Group and the Council to urge the Government of Morocco to:

- i). Enact legislation defining the crime of torture consistent with Article 1 of the Convention Against Torture;
- ii). End the practice of prolonged incommunicado detention, review the legal period of *garde à vue*, and ensure that no amnesties/pardons are granted for torture;
- iii). Provide for commensurate sanctions against senior officials authorising, facilitating acquiescing in or consenting to acts of torture committed by their subordinates;
- iv). Provide detainees with adequate guarantees against torture or ill-treatment, including the right to legal counsel from the moment of arrest and the right to challenge the lawfulness of detention before independent and impartial courts;
- v). Ensure that all detainees, without exception, are brought promptly before civilian, independent courts, where the process leading to criminal prosecution meets international standards of impartiality of investigation, fairness of procedures in prosecution and fundamental standards of fair trial;
- vi). End immediately the policy and practice of secret detention and secret rendition and ensure that the apprehension and transfer of suspects complies with the international

- standards, in particular with the absolute nature of the prohibition of torture and the principle of *non-refoulement*;
- vii). Register all detainees, including by disclosing their identity; the date, time and place of their detention; the identity of the authority that detained and interrogated them; and the grounds for their detention;
  - viii). Establish an independent Commission of Inquiry to promptly, thoroughly and impartially investigate all the allegations of torture and ill-treatment of convicted prisoners and detainees and bring to justice state officials and law enforcement officers, including members of the DST, who carried out, ordered, facilitated or acquiesced in such practices, particularly in the context of the so-called war on terror;
  - ix). Implement the recommendations of the Moroccan Equity and Reconciliation Commission to reform the Moroccan security services and the legal framework under which they operate as well as reforming the judicial system and ensuring its independence in line with international standards;
  - x). Ensure, in accordance with the Convention Against Torture, that mechanisms to obtain full reparation are accessible to all victims of torture or ill-treatment;
  - xi). Order retrials for all those convicted after the 2003 attacks on the basis of evidence obtained through torture or other ill-treatment, and ensure that these retrials meet international standards of due process;
  - xii). Become a party to: the First Optional Protocol to the ICCPR; the Second Optional Protocol to the ICCPR; the Optional Protocol to the ICESCR; OP-CEDAW; OP-CAT; the Convention for the Protection of All Persons from Enforced Disappearance; and the Rome Statute of the International Criminal Court;
  - xiii). Remove its declarations to articles 2 and 15, and its reservation to article 29, of the CEDAW;
  - xiv). Immediately sign, with a view to ratification, the Third Optional Protocol to the Convention on the Rights of the Child;
  - xv). Provide without delay: its sixth periodic report to the HRCttee; its fourth periodic report to the CESCR; its joint third and fourth periodic report to the CRC; its initial report and second periodic report to the CMW;
  - xvi). Issue a standing invitation to the Special Procedures;
  - xvii). Accept at the earliest opportunity the requests to undertake official missions in Morocco by the Working Group on arbitrary detention, the Independent Expert on cultural rights, the Special Rapporteur on trafficking, and the Special Rapporteur on freedom of association and assembly; and extend to those Special Procedures all reasonable cooperation and assistance to facilitate timely and effective country missions.
  - xviii). Present to the Council, during the plenary session to adopt the outcome document for the UPR of Morocco, a national plan of action for the implementation of accepted recommendations and voluntary pledges and commitments;
  - xix). Present to the Council, two years after adoption of the outcome document, a mid-term progress report on the status of implementation of recommendations and voluntary pledges and commitments.



ENDNOTES:

<sup>i</sup> International Commission of Jurists *Submission to the Committee against Torture on the Examination of the Fourth Periodic Report of the Kingdom of Morocco under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, October 2011, available at [http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=23898](http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23898).

<sup>ii</sup> Under Article 231-1 of the Moroccan Criminal Code, torture refers to “any act that causes severe physical or mental pain or suffering intentionally inflicted by a public agent or upon his instigation or with his express or tacit consent, upon a person for the purpose of intimidating or pressuring him or for pressuring a third person, to obtain information or a confession, to punish him for an act that he or a third party committed or is suspected of having committed, or when such pain or suffering is inflicted for any other objective based on any form of discrimination”. Dahir n° 1-06-20 of 14 February 2006. Official Gazette n° 5400 of 2 March 2006.

<sup>iii</sup> Article 224 of the Moroccan Criminal Code defines ‘public agents’ as “all persons who, in some capacity, have a paid or unpaid function or mandate, even a temporary one, and who work in that capacity for the State, public administration, local authorities, public institutions or other public services.”

<sup>iv</sup> International Law Commission, Articles on State Responsibility, as adopted by the UN General Assembly in its resolution 56/83, UN Doc A/Res/56/83 (2001), Articles 5 and 8.

<sup>v</sup> The United Nations Convention against Corruption defines a ‘public official’ as “(i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a “public official” in the domestic law of a State Party.” United Nations Convention against Corruption, 14 December 2005, 2349 UNTS 41, Article 2(a).

<sup>vi</sup> Article 231-2 of the Criminal Code states that “A Public Agent who practices torture as defined under Article 231-1 is punished with imprisonment ranging from five to 15 years and a fine ranging from 1,0000 to 30,000 Dirhams”.

<sup>vii</sup> The Committee Against Torture has stated that “...those exercising superior authority – including public officials – cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures.” Committee Against Torture, General Comment 2, Implementation of article 2 by States parties, UN Doc CAT/C/GC/2 (2008), para 26.

<sup>viii</sup> Article 2(2) of the Convention Against Torture provides “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

<sup>ix</sup> Ibid at para. 1; and see, for example, UN General Assembly 64/153, UN Doc A/RES/64/153 (2010).

<sup>x</sup> Article 5 of the Code of Criminal Procedure: Dahir n° 1.02.255 of 3 October 2002, Official Gazette n° 5078 of 30 January 2003.

<sup>xi</sup> The Equity and Reconciliation Commission in its findings considered decades of serious human rights violations in Morocco, including torture, enforced disappearances, unlawful killings and secret detentions.

<sup>xii</sup> Records of deaths in custody show that there were 32 cases in Egdez, 31 in Tazmamert, 16 in Kal’at Meggouna, 8 in Takounit, 1 in Krama, and 1 in Sadd Elmensour Addhabi. Report of the Moroccan Truth Commission, *Instance Équité et Réconciliation*, available at: [http://www.ier.ma/article.php?id\\_article=1435](http://www.ier.ma/article.php?id_article=1435).

<sup>xiii</sup> Committee Against Torture, General Comment 2 (above note 8), para 5.

<sup>xiv</sup> Principle 7 of the UN Basic Principles on the Role of Lawyers; Human Rights Committee, Concluding Observations of the Human Rights Committee on Israel, UN Doc CCPR/CO/78/ISR, para 13; and *Brannigan and McBride v United Kingdom* [1993] ECHR 21, para 64.

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- <sup>xv</sup> Article 293 of the Criminal Code of Procedure states that a confession obtained through “violence or coercion shall not be considered as evidence by the court”.
- <sup>xvi</sup> Act No. 03-03 of 5 June 2003 of Morocco (anti-terrorism law).
- <sup>xvii</sup> Articles 218(2) and 218(5) respectively of the Criminal Code of Morocco.
- <sup>xviii</sup> This includes Hammou Hassani, Bouchta Charef, Adel Elfardaoui, Abellah El-Manfaa, Abd Assamad El-Msimi and Youssef Khoudri. Committee Against Torture, List of issues to be considered during the examination of the fourth periodic report of Morocco (CAT/C/MAR/4), UN Doc CAT/C/MAR/Q/4 (2011).
- <sup>xix</sup> Secret rendition refers to the process of seizing and transferring individuals pursuant to counter-terrorist operations conducted outside the normal legal framework, and procedures that bypass all judicial and administrative due process, effectively placing those individuals outside the protection of the law.
- <sup>xx</sup> Secret detention centres include Qal’at M’gouna, Agdz, Derb Moulay Cherif in Casablanca, and Tazmamart.
- <sup>xxi</sup> This is stated at Article 18 of the Code of the Criminal Procedure.
- <sup>xxii</sup> “The terror prison US is helping build in Morocco” at: <http://www.timesonline.co.uk/tol/news/world/article729946.ece>.
- <sup>xxiii</sup> Note Verbale dated 17 April 2006 from the Permanent Mission of the Kingdom of Morocco to the United Nations, presenting Morocco’s candidature to the Human Rights Council (hereafter “Voluntary Pledge”), para. 17(A), available at <http://www.un.org/ga/60/elect/hrc/morocco.pdf>.
- <sup>xxiv</sup> Morocco also expressed its intention to accede to the First Optional Protocol to the ICCPR in 2004, but is yet to do so: see *Concluding Observations of the Human Rights Committee on Morocco*, UN Doc CCPR/CO/82/MAR, para. 4.
- <sup>xxv</sup> Morocco has stated on various occasions that it has ratified this treaty, including during its review before the Committee Against Torture on 2 November 2011. However, Morocco has not yet lodged its instrument of ratification with the depositary.
- <sup>xxvi</sup> Morocco has stated on various occasions that it has ratified this treaty, including during its review before the Committee Against Torture on 2 November 2011. However, Morocco has not yet lodged its instrument of ratification with the depositary.
- <sup>xxvii</sup> Morocco expressed this intention to the Committee on the Elimination of Discrimination Against Women during the examination of its third and fourth periodic reports to CEDAW: see *Concluding Observations of the Committee on the Elimination of Discrimination Against Women on Morocco*, UN Doc CEDAW/C/MAR/CO/4, paras. 14 and 15. This intention also formed part of Morocco’s Voluntary Pledge when standing for membership in the Human Rights Council: see above note xiv, para. 17(M).
- <sup>xxviii</sup> Recommendation 3, made by Slovenia: “3. To communicate to the United Nations Secretary-General the withdrawal of its reservations to CEDAW (article 9, paragraph 2, article 16, paragraph 1 (h), and article 16, paragraph 2, as well as its declaration on article 15, paragraph 4)” in *Report of the Working Group on the Universal Periodic Review of Morocco*, UN Doc A/HRC/8/22 (2008), p.13.
- <sup>xxix</sup> Voluntary Pledge, above note xiv, para 17(C).
- <sup>xxx</sup> Namely: the Special Rapporteur on the sale of children, child prostitution and child pornography (2000); the Special Rapporteur on human rights of migrants (2003); the Special Rapporteur on the right to education (2006); the Working Group on enforced or involuntary disappearances (2009); and the Independent Expert on cultural rights (September 2011).
- <sup>xxxi</sup> Voluntary Pledge, above note xiv, para. 17(B).