

Reforming the Judiciary in Morocco



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Introduction

Overview

In this report, the International Commission of Jurists (ICJ) analyses provisions of the 2011 Constitution and the structures and mechanisms it establishes, as well as existing laws and mechanisms that impact on the independence of the judiciary in Morocco, in light of international human rights standards. The report makes a range of specific recommendations that aim to contribute to efforts to ensure that the ongoing process of law and institutional reform enhances the independence of the judiciary and correspondingly increases respect for human rights and the rule of law in the country.

The judicial system is central to respect for the rule of law and the protection of human rights. Both individual and institutional independence are necessary. An independent judiciary means that victims can seek redress, that perpetrators of human rights violations are brought to justice, and that anyone suspected of a criminal offence receives a fair trial. Furthermore, by acting as a check and balance on the other branches of government, the courts ensure that the executive and legislative branches comply with international human rights and the rule of law.

The International Covenant on Civil and Political Rights (ICCPR), to which Morocco is a party, guarantees the right to a fair and public hearing by a competent, independent and impartial tribunal.¹ This right is absolute. It is not subject to any exception. Morocco is obligated to respect and ensure respect of this right as well as to provide for necessary safeguards to secure its realisation.²

Despite constitutional guarantees of judicial independence and separation of powers, Morocco has long fallen short of meeting its obligation to ensure that the courts are independent and not dominated by the executive branch. In its 2004 review of Morocco's implementation of its obligations under the ICCPR, the Human Rights Committee (the expert treaty monitoring body) concluded that Morocco had failed to guarantee the independence of the judiciary.³

The ICJ considers that judicial independence in Morocco has suffered from control by the executive branch over judicial matters, and that this in turn has eroded public confidence in the justice system and has compromised the effective administration of justice.

The moment is now ripe for meaningful change in Morocco.

In 2011, following a series of peaceful protests, the government initiated a process of constitutional reform. A new constitution was approved by referendum in July 2011. Like the 1996 Constitution, the 2011 Constitution guarantees the independence of the judiciary. However, the 2011 Constitution also establishes new institutions that have the potential to bolster the independence of the judiciary and enhance protection of human rights and the rule of law. In particular it creates a new judicial council to oversee guarantees relating to the independence, appointment, promotion, retirement and discipline of judges, and to which judges can turn if their independence is threatened. The 2011 Constitution also replaces the Constitutional Council with a Constitutional Court empowered to rule on the constitutionality of draft and existing laws. To implement these changes, the 2011 Constitution requires the enactment of

¹ International Covenant on Civil and Political Rights (hereafter ICCPR), Article 14. Morocco ratified the ICCPR on 3 May 1979.

² ICCPR, Article 2.

³ Concluding Observations of the Human Rights Committee on Morocco, UN Doc. CCPR/CO/82/MAR, para. 19.

four new organic laws by November 2016. The 2011 Constitution has thus opened the door to comprehensive reform of the system of justice in Morocco.

Summary of Recommendations

The report covers the following areas:

- The High Judicial Council
- The Statute for Judges
- Judicial Accountability: the Ethics and Discipline of Judges
- Military Courts
- The Office of the Public Prosecutor
- The Constitutional Court

In each section, the report reviews the existing state of law and practice, discusses the changes, if any, foreseen by the 2011 Constitution, assesses the situation in terms of international law and standards, and makes a series of comprehensive recommendations.

The main findings and recommendations of this report are summarized below.

A. The High Judicial Council

The current Conseil Supérieur de la Magistrature (CSM), which remains in existence until it is replaced by the new Conseil Supérieur du Pouvoir Judiciaire (CSPJ), is dominated by members of the executive. The ICJ believes that due to its composition and competencies, the CSM has failed to ensure the independence of the judiciary. The King is the president and the Minister of Justice is the vice-president of the CSM. The careers of judges are dependent on the goodwill of the executive. The Minister of Justice is charged with overseeing the selection, appointment, and promotion of judges, while the CSM is restricted to an advisory role. The Minister of Justice and not the CSM has primary authority in initiating disciplinary proceedings against judges and in imposing sanctions.

The ability of the executive to shape the careers of judges, including their promotion, transfer and discipline, is inconsistent with international standards safeguarding the independence of the judiciary. The Human Rights Committee, interpreting the requirements of Article 14 of the ICCPR, has stated that States must protect “judges from any form of political influence in their decision-making” by “establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them”.⁴ The Human Rights Committee and the UN Special Rapporteur on the independence of judges and lawyers have raised concerns about the involvement of the executive in the selection, promotion and disciplining or termination of judges and have recommended that an independent body undertake such matters. The Guidelines and Principles on the Right to a Fair Trial and to Legal Assistance in Africa, adopted by the African Commission on Human and Peoples’ Rights, as well as the European Charter on the Statute for Judges also call for an independent body for the selection of judges.

The CSPJ envisioned by the 2011 Constitution should be an entirely different creature. The CSPJ has vastly expanded competencies under the new Constitution. Judges have the right to report threats to their independence to the CSPJ. The Council has the authority to draft reports and make recommendations on the state of justice and the judicial system. The 2011 Constitution also guarantees the CSPJ administrative and financial autonomy. Most importantly, the CSPJ is to oversee all guarantees related to the independence of judges, including their appointment, promotion, retirement and discipline. While the 2011 Constitution does not mention training, transfer or

⁴ General Comment No. 32 at para.19.

assignment, or performance assessment, Article 116 of the Constitution provides that a new organic law will determine the criteria for the management of the careers of judges and the rules of procedure for judicial discipline.

In order to guarantee the independence of the judiciary, both institutionally and individually, it is vital that the CSPJ is an independent council in law and practice. To this end the ICJ recommends, among other things, that the new organic law ensures that:

- The CSPJ and not the Minister of Justice has authority over all aspects of the careers of both judges and prosecutors, including not only appointment, promotion, retirement and discipline but also training, transfer and assessment.
- The Minister of Justice is divested of any role in establishing the roster for promotions, referring disciplinary cases or suspending judges.
- There is clear and objective criteria for the five members of the CSPJ who are to be appointed by the King. This criteria should ensure that all or most of the five individuals are members of the legal profession.
- The CSPJ has dedicated operational and administrative resources, including office space independent of the Ministry of Justice, and has full control over these resources.
- The CSPJ has a role in developing an adequate budget for the judiciary through consultations with Parliament.

B. The Statute for Judges

The 1974 Law on the Statute for Judges provides few details on the recruitment and appointment of judges. Rather the specific procedures are set out in Decree No. 2-05-178 of 21 April 2006, which in turn grants the Minister of Justice wide latitude in determining the selection process for trainee judges, their training and the procedure to be appointed as a judge.

The Minister of Justice also has a role in promotion and career development for judges. The Minister is responsible for preparing and adopting, after consulting with the CSM, the roster of judges eligible for promotion, called the *liste d'aptitude*. In addition, the Minister of Justice oversees the performance review of judges. The 1974 Law on the Organisation of the Judiciary provides that the Minister of Justice appoints inspectors to assess their performance. A decree on the competencies and the organisation of the Ministry of Justice provides that the Judicial Inspection Service is under the direct authority of the Minister of Justice. In addition, the Minister of Justice is the president of the board of directors for the Higher Institute of the Judiciary, which is responsible for all training of judges. Five other government ministers or their representatives sit on the board as well.

Neither the Law on the Statute for Judges nor the Law on the Organisation of the Judiciary contain any guarantees of the rights to freedom of expression and association for judges. In practice, these rights were regularly undermined. International law, however, is clear that judges enjoy the rights to freedom of expression and association, subject to the requirement that in exercising these rights judges should conduct themselves in a manner so as to preserve the dignity of their office and the impartiality and independence of the judiciary.

Under the 2011 Constitution sitting judges are irremovable. The 2011 Constitution also provides for the right to freedom of expression of judges to be exercised in a manner consistent with their obligations of reserve and judicial ethics. Their right to establish and join professional associations is guaranteed, within the limits of the requirements of judicial independence and impartiality and in accordance with the law.

With a view to enhancing the independence of the judiciary in a manner consistent with international standards, the ICJ has made the following recommendations for the new organic law:

- The method of judicial selection should be set forth in the law, should be fair and transparent and should guard against judicial appointment for improper motives.
- The law should prohibit discrimination on any ground in judicial selection.
- The judicial selection process should specify objective criteria that focus on legal qualifications and training, integrity and ability, efficiency and experience.
- Similarly, all decisions concerning assignment and promotion should be based on merit.
- The procedures for selecting, appointing and promoting judges should be under the supervision of the CSPJ.
- The Higher Judicial Institute should be placed under the supervision of the CSPJ.
- The Judicial Inspection Service should be affiliated with the CSPJ and not the Ministry of Justice.
- The new law must provide for removal from office only for specific reasons of incapacity or behaviour rendering a judge unfit to discharge his or her duties and only following a fair and transparent procedure before an independent body.
- Decisions to discipline judges must be based on established standards of judicial conduct following a fair hearing by an independent body and must be subject to appeal or review. The law should include a range of specific sanctions and the disciplinary sanctions imposed in each case must be proportionate.
- The law should reinforce the constitutional guarantees of freedom of expression and association, including by ensuring that judges are not subject to any form harassment or disciplinary measures as a result of the lawful exercise of this right and that professional associations can freely carry out their statutory activities.

C. Judicial Accountability: the Ethics and Discipline of Judges

Neither the Law on the Statute for Judges nor the Law on the Organisation of the Judiciary contains a code of judicial ethics. The absence of a code of ethics undermines the public's faith in the accountability and integrity of the judiciary. Judges must conduct themselves according to a clear code of conduct that is consistent with international standards and must be held to account for any breach of the code.

The Statute for Judges sets forth the disciplinary regime. Article 58 provides that judges may be subject to discipline for any failure to comply with the obligations of his or her office, honour, finesse or dignity. Disciplinary proceedings are then initiated by the Minister of Justice, who refers the matter to the CSM. The CSM appoints a rapporteur to conduct the investigation. The judge under investigation is entitled to review the entire file, with the exception of the opinion of the rapporteur. The judge is also entitled to a hearing before the CSM and is given eight days' notice prior to the hearing. The judge may be assisted at the hearing by counsel. In cases in which criminal proceedings are brought or in other cases of alleged serious misconduct, a judge may be suspended from carrying out his or her duties immediately by an order of the Minister of Justice. The Minister of Justice has discretionary powers to decide which acts constitute serious misconduct.

The current disciplinary regime does not comply with international standards. Since Article 58 of the law is broad and vague, judges have no clear notice about the types of conduct that might amount to a disciplinary infraction. The process is controlled by

the Minister of Justice, the judge concerned does not have full access to the disciplinary file, and any sanction imposed through royal decree is immune from review. In order to be consistent with international law, any allegation of judicial misconduct must be investigated independently and impartially. There must be a proceeding before a competent, independent and impartial body, with full respect for a judge's due process rights. Any sanction must not only be proportionate, it must also be subject to appeal before an independent judicial body.

The 2011 Constitution envisions that a new disciplinary regime will be established in the organic law of the CSPJ. The CSPJ is charged with overseeing the discipline of judges and individual decisions of the CSPJ may be challenged for abuse of power to the highest administrative jurisdiction. The ICJ recommends the following measures be undertaken to ensure that the new system for judicial accountability is consistent with respect and protection of the independence and integrity of the judiciary:

- A detailed and comprehensive code of ethics, in line with the Bangalore Principles, should be developed by the members of the judiciary or in close consultation with them.
- This code of ethics should be established in law as the basis on which judges will be held to account professionally.
- The disciplinary procedure should be set forth in the law and should afford judges the right to a fair hearing before an independent and impartial body and to due process guarantees, including the right to be represented by counsel, to a review of the complete investigative file and to a reasonable amount of time to prepare and present a defence.
- Any decision made should be subject to review by an independent higher judicial tribunal.
- Judges should generally be immune from civil and criminal liability arising from the conduct of their judicial functions. Criminal liability may arise for exceptionally serious criminal conduct, such as responsibility for corruption or human rights violations.
- The State should guarantee compensation for any harm suffered by individuals as a result of acts or omissions by judges in the improper or unlawful exercise of their judicial duties.

D. Military Courts

Like ordinary courts, military courts are subject to the requirements of Article 14 of the ICCPR. The ICJ believes that the reform of the judicial system in Morocco must include taking effective steps to restrict the jurisdiction of military courts to trials of members of the military for breaches of military discipline that do not amount to human rights violations as well as to guarantee the independence and impartiality of such courts.

Under existing laws, military courts currently have wide-ranging personal and subject matter jurisdiction. They may be used to try civilians for crimes committed against members of the armed forces, for crimes against the "external security of the State" or for crimes where civilians and military members are co-conspirators. They may be used to try juveniles where those juveniles are members of the armed forces or are nationals of an enemy state. The jurisdiction of military courts is not limited to crimes involving military-related offences but extends to ordinary crimes and to human rights violations. In order to ensure the independence and impartiality of military courts and in line with the developing consensus, reflected in some international standards and recommendations of human rights bodies and mechanisms, the ICJ recommends that Morocco revise its military court system as follows:

- Military courts should be divested of jurisdiction over civilians.

- The personal jurisdiction of military courts should be limited to military personnel who are over the age of 18 at the time of the alleged infraction.
- The subject matter jurisdiction of military courts should be limited to conduct involving alleged breaches of military discipline.
- Military courts should have no jurisdiction over crimes under international law and human rights violations.
- Military judges who sit on military courts should be independent and impartial and have a status guaranteeing their independence and impartiality. In particular they must remain outside the military chain of command and military authority in respect of matters concerning the exercise of any judicial function.
- The accused must have adequate time and facilities for the preparation of his or her defence, including access to materials that the prosecution intends to rely on in court and any exculpatory information. Any restrictions on disclosure of material to the accused must be determined by a judge. They should be exceptional and strictly limited, proportionate and necessary to legitimate aims; the exclusion of information from the defence should not unduly prejudice the rights of the defence or the overall fairness of the proceedings.
- There must be a full right of appeal of the conviction and sentence by the military court to a higher civilian tribunal.

E. The Office of the Public Prosecutor

Under Moroccan law, prosecutors are part of the judicial corps. However, they do not enjoy the same security of tenure and guarantees of individual independence as judges.

Under the current law, the executive wields substantial influence over prosecutors. Under the 1974 Law on the Statute for Judges, the Office of the Public Prosecutor is under the authority of, and functionally subordinate to, the Minister of Justice. The Code of Criminal Procedure empowers the Minister of Justice to direct the Prosecutor-General of the Court of Appeal to initiate, prosecute or refer cases. The Prosecutor-General is also required to comply with written instructions issued by the Minister of Justice. The ICJ believes that undue influence by the executive has had a negative impact on the effective investigation and prosecution of human rights violations.

The 2011 Constitution provides that prosecutors must act in conformity with written instructions coming from their hierarchical superiors. The CSPJ is vested with competence over all guarantees relating to the judicial corps, including prosecutors. However, in the case of prosecutors, it must take into consideration evaluations prepared by their hierarchical superiors. The Constitution does not define who these hierarchical superiors are. International law and standards require the Office of the Public Prosecutor to be independent of the judiciary and to be objective and impartial. Under international law, even where a prosecutor's office is structurally a part of the executive branch, individual prosecutors should be functionally independent.

The ICJ recommends the following key reforms concerning prosecutors in the new organic law on the Statute for Judges:

- Selection of prosecutors should be based on clear and objective criteria and should safeguard against improper motives or discrimination.
- Since prosecutors are judges under the Statute for Judges, and in order to protect them from any form of arbitrary proceedings while exercising their prosecutorial functions, in particular the investigation and prosecution of cases of human rights violations, guarantees of security of tenure should be extended to prosecutors.
- Disciplinary offences and procedure should be set forth in law and should include fair hearing and due process guarantees.

- The duty of prosecutors to carry out their functions independently, impartially and with objectivity should be enshrined in law.
- The Minister of Justice should have no authority over the Office of the Public Prosecutor or ability to control the careers of individual prosecutors.
- “Hierarchical authorities” should be defined to exclude the Minister of Justice or officials within the Ministry of Justice.
- The nature and scope of any power by the executive to issue written instructions should be defined in law. Instructions pertaining to individual cases and/or to prevent an investigation from proceeding to court should be categorically prohibited by the law.
- Any such power to issue written instructions must be exercised transparently and in accordance with the law.

F. The Constitutional Court

The 2011 Constitution creates a Constitutional Court to replace the Constitutional Council. Like the Council, the new Court will have jurisdiction to determine the validity of parliamentary elections and referendums and the constitutionality of organic laws, ordinary laws and regulations prior to promulgation. Significantly, unlike the Council, the Constitutional Court will also have jurisdiction over constitutional challenges to laws that arise in the course of litigation. The conditions and procedures for such a challenge will be set forth in a new organic law. The Constitutional Court once established will be the only court in Morocco that has jurisdiction to rule on the constitutionality of a law.

Since Article 133 of the 2011 Constitution provides that the new Constitutional Court has jurisdiction to determine the constitutionality of laws that infringe constitutionally guaranteed rights and freedoms, if raised by a party during the course of a trial, compliance with Article 14 of the ICCPR requires the Constitutional Court to be independent and impartial. It is thus all the more important that the new organic law concerning the Constitutional Court enshrine the principles of independence and impartiality. To that end the ICJ recommends that the law:

- Specifically guarantees the independence and impartiality of the Constitutional Court and prohibits any interference by the executive or legislative branches in the work of the Court.
- Ensures that the Constitutional Court is financially independent and that sufficient material and human resources are allocated to the Court and that the Court exercises control over these resources.
- Establishes objective criteria for the appointment of members to the Constitutional Court and guarantees adequate conditions of tenure.
- Guarantees security of tenure for members of the Court.
- Ensures that the procedure for bringing an Article 133 claim to the Court is not unduly restrictive.

About this Report

This report is based on a conference organized by the ICJ with the Moroccan National Human Rights Council in March 2012, a high-level mission to Morocco undertaken in April 2013, discussions with a wide variety of stakeholders and research of existing laws and policies. Its recommendations are based principally on the following sources: UN Basic Principles on the Independence of the Judiciary; UN Guidelines on the Role of Prosecutors; Draft Universal Declaration on the Independence of Justice; Bangalore Principles of Judicial Conduct; African Commission on Human and Peoples’ Rights Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; European Charter on the Statute for Judges; Committee of Ministers of the Council of Europe Recommendation (2010)12; Committee of Ministers of the Council of Europe Recommendation (2000)19; Human Rights Committee General Comment No. 32; Draft Principles Governing the Administration of Justice through Military Tribunals; case law from the European Court of Human Rights, the Inter-American

Court of Human Rights, the Inter-American Commission of Human Rights; and reports by the UN treaty bodies, special rapporteurs and working groups. These sources are discussed in detail in the ICJ's Practitioners Guide No. 1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors.

To demonstrate that they have the political will to meaningfully reform the judiciary, the Moroccan authorities should seek inspiration from these standards in drafting the new laws relating to the judiciary. They should remove all the obstacles that undermine judicial independence identified in this report and comply with its recommendations. The ICJ considers that the implementation of these recommendations could help bring Moroccan law and practice in line with international law and standards and institutionalise judicial independence, impartiality and respect for human rights in Morocco.

A. The High Judicial Council

The Conseil Supérieur de la Magistrature (CSM) is the body currently charged with oversight of the judiciary. Under the 2011 Constitution, the CSM will be replaced by a new judicial council called the Conseil Supérieur du Pouvoir Judiciaire (CSPJ). A new organic law will define the election, organization and functioning of the CSPJ.⁵ Until then, the CSM remains in force.

This section will discuss the international standards that both impose on Morocco the obligation to ensure that its judiciary is independent and are intended to safeguard that independence. These standards are applicable to judicial councils and the management of the judiciary. This section will then analyse the functioning of the CSM in light of the international standards, identifying some of its flaws. Finally this section proposes recommendations aimed to ensure that the new organic law for the CSPJ establishes an effective independent body that is consistent with international standards and safeguards the independence of the judiciary.

1. International law and standards

i) Separation of powers

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) guarantees everyone the right to “a fair and public hearing by a competent, independent and impartial tribunal established by law”.

The guarantee of the independence of the judiciary encompasses both the independent character of decision-making by the judge (“individual independence”) and the independent character of the judiciary as a whole from the other branches of government (“institutional independence”).

An essential condition of an independent and impartial judiciary is respect for the principle of separation of powers of the state, meaning that the executive, legislative and judicial branches are separate and independent from each other.⁶ As the Human Rights Committee, the body of independent experts responsible for monitoring the implementation of the ICCPR, has explained: “A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal”.⁷ Similarly, the Inter-American Commission on Human Rights has stated that the requirement of judicial independence “necessitates that courts be autonomous from the other branches of government, free from influence, threats or interference from any source and for any reason”.⁸

⁵ 2011 Constitution, Articles 113-116.

⁶ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 18 (“It is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency.”); Report of the Special Rapporteurs on the situation of human rights in Nigeria, UN Doc. E/CN.4/1997/62/add.1 (1997), para. 71 (“the separation of powers and executive respect for such separation is a sine qua non for an independent and impartial judiciary to function effectively”); Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/1995/39 (1995), para. 55; *Judgment of 31 January 2001*, Inter-American Court of Human Rights, Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsano v. Peru), para. 73.

⁷ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

⁸ Report on Terrorism and Human Rights, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 229.

Judicial councils are not a feature of all judicial systems. Where they exist, however, they are subject to the same requirements of safeguarding the independence of the judiciary as an institution and of individual judges. The composition, organization and functions of judicial councils must be consistent with the separation of powers and the independence of the judiciary. What that means is that where judicial councils are involved in such matters as setting the qualifications, selection, training, discipline, and tenure of judges, they must be constituted so as to ensure that the State fulfils its obligation to respect and preserve judicial independence. Judicial councils must be both able to act independently and they must have the ability to ensure that the judiciary as a whole and each judge is truly independent.

ii) Composition of judicial councils

Judicial councils should be bodies that are independent of the executive and legislative powers and a significant proportion of their membership should be judges who are chosen by their peers.⁹ As the Special Rapporteur on the independence of judges and lawyers has noted, "if the body is composed primarily of political representatives there is always a risk that these 'independent bodies' might become merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly".¹⁰ Similarly, the Explanatory Memorandum to the European Charter on the Statute for Judges states that in order to avoid the "risk of party-political bias," the judges who are "members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature".¹¹

iii) Management of the judiciary

In General Comment No. 32, the Human Rights Committee explained that Article 14 of the ICCPR imposes the obligation on States to "take specific measures

⁹ According to the Committee of Ministers of the Council of Europe, "at least half" of the members of a judicial council should be judges. See Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: independence, efficiency and responsibilities (hereafter "CoM Recommendation (2010)12"), paras. 26, 27 & 46; see also European Charter on the Statute for Judges, Principle 1.3. The International Association of Judges, a professional association, recommends "a majority of judges" elected by their peers. See IAJ 1st SC Conclusion 2003: The role and function of the high council of justice or analogous bodies in the organisation and management of the national judicial system. The Draft Universal Declaration on the Independence of Justice (hereafter "Singhvi Declaration") provides that proceedings for judicial removal or discipline "shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board." The Singhvi Declaration formed the basis for the UN Basic Principles on the Independence of the Judiciary and was formally recommended to States by the Commission on Human Rights in Resolution 1989/32, UN Doc. E/CN.4/RES/1989/32. The African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (hereafter "ACHPR Principles and Guidelines") provides that mechanisms for "monitoring the performance of judicial officers" shall "be constituted in equal part of members [of] the judiciary and representatives of the Ministry responsible for judicial affairs." Section A, Principle 4(u). The Consultative Council of European Judges adopted in November 2010 a Magna Carta of Judges that provides: "To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions."

¹⁰ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para.28.

¹¹ Explanatory Memorandum to the European Charter on the Statute for Judges, Council of Europe, July 1998, DAJ/DOC (98) 23, Principle 1.3.

guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them".¹² Similarly, the African Commission on Human and Peoples' Rights (ACHPR) has stated: "The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary."¹³

A range of human rights bodies have raised concern about the involvement of the executive or the legislature in the appointment of judges. The Human Rights Committee and others have recommended the establishment of an independent body to safeguard appointment, promotion and regulation of the judiciary. In the case of Tajikistan, for example, the Human Rights Committee raised the "apparent lack of independence of the judiciary, as reflected in the process of appointment and dismissal of judges, as well as their economic status". It recommended the establishment of "an independent body charged with the responsibility of appointing, promoting and disciplining judges at all levels".¹⁴

The Special Rapporteur on the independence of judges and lawyers has likewise recommended an independent authority in charge of the selection of judges.¹⁵ The European Charter on the Statute for Judges also envisages an authority "independent of the executive and legislative powers" for every decision "affecting the selection, recruitment, appointment, career progress or termination of office of a judge".¹⁶

Regardless of whether carried out by a judicial council or by another means, the requirement of independence applies not only to the composition of the appointing body but also to the procedure and criteria for appointment of judges. Furthermore, the independence of judges is safeguarded by ensuring guarantees of security of tenure, adequate remuneration and criteria and procedures governing their promotion, transfer and suspension or cessation of their functions.¹⁷ International standards relating to the selection, promotion, training, tenure and discipline of the judiciary are briefly summarized below. The legal guidance is presented in greater detail in Sections B (The Statute for Judges) and C (Judicial Accountability).

The selection of judges should be based on objective and transparent criteria.¹⁸ To safeguard the independence of the judiciary and ensure that judges are competent, international standards require people to be selected as judges on the basis of their

¹² Human Rights Committee, General Comment No. 32, para. 19.

¹³ ACHPR Principles and Guidelines, Section A, Principle 4(h).

¹⁴ Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 17. See also Concluding Observations of the Human Rights Committee on Honduras, UN Doc. CCPR/C/HND/CO/1, para. 16.

¹⁵ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 27.

¹⁶ European Charter on the Statute for Judges, Principle 1.3.

¹⁷ Human Rights Committee, General Comment No. 32, para. 19.

¹⁸ CoM Recommendation (2010)12, para. 44; UN Basic Principles on the Independence of the Judiciary (hereafter "UN Basic Principles on the Independence of the Judiciary"), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 10; the ACHPR Principles and Guidelines, Section A, Principle 4 (i); European Charter on the Statute for Judges, Principle 2.1. See also Concluding Observations of the Human Rights Committee on Bolivia, UN Doc. CCPR/C/79/add.74, para. 34; Concluding Observations of the Human Rights Committee on Lebanon, UN Doc. CCPR/C/79/Add.78, para. 15; Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para. 14.

legal training, experience, and integrity.¹⁹ The UN Basic Principles on the Independence of the Judiciary (the UN Basic Principles) requires that “[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives” and that promotions “should be based on objective factors, in particular ability, integrity and experience”.²⁰

In the selection of judges, there must be no discrimination on any ground, except that a requirement that a candidate be a national of the country concerned is not considered discriminatory.²¹ The Human Rights Committee has called on States to ensure appointment of qualified judges from among women and minorities, as has the Special Rapporteur on the independence of judges and lawyers.²²

The Latimer House Guidelines provide that “judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination”.²³

Decisions on the promotion of judges should be based on the same kind of independent and objective criteria that regulate selection.²⁴ Assessment of judges should be based on “objective criteria” and judges should be able to express their views and to challenge assessments before an independent authority or a court.²⁵ Both initial and in-service training programmes should be implemented by an “independent authority” and “in full compliance with educational autonomy”.²⁶

Judges should have guaranteed tenure until the expiration of their term of office, where such exists, or until a mandatory retirement age.²⁷ They should be subject to removal from office only “on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law”.²⁸

¹⁹ UN Basic Principles on the Independence of the Judiciary, Principle 10; ACHPR Principles and Guidelines, Section A, Principles (4)(i)-(k); CoM Recommendation (2010)12, paras. 44-45.

²⁰ UN Basic Principles on the Independence of the Judiciary, Principles 10 & 13; see also Singhvi Declaration, para. 14.

²¹ UN Basic Principles on the Independence of the Judiciary, Principle 10; CoM Recommendation (2010)12, para. 45; ACHPR Principles and Guidelines, Section A, Principle 4(j); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in Beijing in 1995 and adopted by the LAWASIA Council in 2001, OP 13 (hereafter “Beijing Statement of Principles”).

²² Concluding Observations of the Human Rights Committee on Sudan, UN Doc. CCPR/C/79/Add.85, para. 21; Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 34.

²³ Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998 at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers’ Association, and the Commonwealth Legal Education Association, Principle 11.1 (hereafter “Latimer House Guidelines”).

²⁴ UN Basic Principles on the Independence of the Judiciary, Principle 13 (“Promotion of Judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience”); ACHPR Principles and Guidelines, Section A, Principle 4(0) (“Promotion of officials shall be based on objective factors, in particular ability, integrity and experience”); CoM Recommendation (2010)12, para. 44 (“Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity”).

²⁵ CoM Recommendation (2010)12, para. 58.

²⁶ CoM Recommendation (2010)12, para. 57.

²⁷ UN Basic Principles on the Independence of the Judiciary, Principle 12; CoM Recommendation (2010) 12, para. 49; ACHPR Principles and Guidelines, Section A, Principle 4(l); Human Rights Committee, General Comment No. 32, para. 19.

²⁸ Human Rights Committee, General Comment No. 32, para. 20; ACHPR Principles and Guidelines, Section A, Principle 4(p-r); CoM Recommendation (2010)12, para. 50; UN Basic Principles on the Independence of the Judiciary, Principle 18.

Disciplinary proceedings should be conducted by an “independent authority” and in accordance with established standards of judicial conduct that are consistent with internationally accepted standards. The judge concerned should have the right to a fair hearing, including the right to challenge the decision and the sanction imposed.²⁹ The sole exception to the right of independent review is where the disciplinary decision is made by the highest court or by the legislature in an impeachment or similar proceeding.³⁰

iv) Financial resources of the judiciary

As a practical matter, in order to ensure the rule of law, the right of access to courts, the independence of the judiciary and the right to a fair trial, the state must ensure that the judiciary is provided with adequate resources in order to discharge its functions effectively.³¹

The Special Rapporteur on the independence of judges and lawyers has consistently urged that the judiciary be involved in the drafting of its budget.³² A number of regional standards also provide that the judiciary should be consulted regarding the preparation of the budget and its implementation.³³

The ICJ has likewise identified the lack of participation by the judiciary in the drafting of its budget as a factor that can undermine judicial independence and impartiality. “Inasmuch as other branches of power or State institutions wield an important influence in the allocation and administration of those resources given to the judiciary, there is a real possibility of influencing the outcomes of particularly sensitive cases, which would entail an attack on the independence of the judiciary”.³⁴

2. The current Conseil Supérieur de la Magistrature (CSM)

The ICJ considers that the current composition, competencies and financial and organizational structure of the CSM are inconsistent with the international standards set out above concerning the independence of the judiciary. In particular, as detailed below, aspects of the CSM render both that body and the judiciary as a whole subordinate to the executive branch.

Under the 1996 Constitution, the CSM is presided over by the King, while the Minister of Justice is the vice-president. Its other members consist of the first president of the Court of Cassation, the prosecutor-general of the Court of Cassation, the president of the First Chamber of the Court of Cassation, two judges elected by the judges of the Courts of Appeal, and four judges elected by the magistrates of the First Instance Courts.³⁵

²⁹ UN Basic Principles on the Independence of the Judiciary, Principles 17 (fair hearing), 19 (determination on the basis of established standards of judicial conduct) and 20 (right to independent review); CoM Recommendation (2010)12, para. 69; Singhvi Declaration, paras. 26-27; ACHPR Principles and Guidelines, Section A, Principle 4(q) (fair hearing and independent review of decisions of disciplinary, suspension or removal proceedings).

³⁰ UN Basic Principles on the Independence of the Judiciary, Principle 20.

³¹ UN Basic Principles on the Independence of the Judiciary, Principle 7; ACHPR Principles and Guidelines, Section A, Principle 4(v): see also Concluding Observations of the Human Rights Committee on the Central African Republic, UN Doc. CCPR/C/CAF/CO/2, para. 16.

³² Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 39.

³³ ACHPR Principles and Guidelines, Section A, Principle 4(v); CoM Recommendation (2010)12, para. 40.

³⁴ *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioners' Guide No. 1*, International Commission of Jurists, Geneva, 2007, p. 33 (hereafter “*Practitioners' Guide No. 1*”).

³⁵ 1996 Constitution, Article 86.

The subordination of the CSM to the executive is expressed through provisions of the legal framework governing the functioning of the CSM. For example, the secretariat of the CSM is under "the direct authority of the Minister of Justice".³⁶ The competencies of this secretariat are exercised by a judge appointed by a royal decree on the proposition of the Minister of Justice.³⁷

The CSM has no offices and instead holds its meetings at the Ministry of Justice. The CSM also has no budget and no authority over the budget for the judiciary as a whole.

Further, the CSM's limited competencies, most of which are consultative, allows for the executive, in particular the Minister of Justice, to exercise effective control over the career of judges and the judicial system as a whole. Indeed, various provisions of the Moroccan law effectively ensure that the CSM is more of an advisory body to the Minister of Justice than an independent institution in charge of ensuring the independence of the judiciary.

Under Law No. 1-74-467 on the Statute for Judges, the CSM is consulted by the Minister of Justice on, among other things, drawing up the "*liste d'aptitude*" (the list of judges who will be promoted); transferring prosecutors; proposing the extension of the age of mandatory retirement of a judge for a period of up to two years, renewable twice; and informing the CSM of actions by a judge that are subject to disciplinary action and appointing a rapporteur to investigate.³⁸ In addition, the Minister of Justice, after receiving the advice of the CSM, can impose disciplinary sanctions against judges. These disciplinary measures include warnings, reprimands, delays in promotion, and elimination from the *liste d'aptitude*. The opinions of the CSM are not binding on the Minister of Justice.

Under the current legal framework, the appointment, promotion, transfer, training and discipline of judges rest largely with the executive rather than the judicial branch of the State.

The procedures for the selection of trainee judges and access to the training institute are determined by and under the control of the Minister of Justice.³⁹ It is the Minister of Justice and not the CSM who oversees the body responsible for the training of judges, originally the National Institute of Judicial Studies and now the Higher Institute of the Judiciary.⁴⁰ While reforms in 2002 established the Higher Institute of the Judiciary as a public institution with financial and administrative autonomy, they also stipulated that the Minister of Justice was President of its Executive Board. A 2003 decree specifically provided that "guardianship of the Higher Institute of the Judiciary is guaranteed by the government authority responsible for justice" and added five other government ministers or their representatives to the Institute's Board.⁴¹

Furthermore, the Minister of Justice plays a significant role in the promotion of judges. Article 23 of Law No.1-74-467 provides that no judge can be promoted to a superior grade, within the limit of vacant budgetary posts, if he or she is not on the "liste

³⁶ Article 15 of Decree No. 2-10-310 of 11 April 2011 determining the competencies and the organisation of the Ministry of Justice.

³⁷ Law No. 1-74-467, Article 70.

³⁸ See Articles 23, 56, 60, 61 and 65 of Law No. 1-74-467. Further information on the promotion process is in Section B.

³⁹ Law No. 1-74-467, Article 5; Decree No. 2-05-178 of 21 April 2006.

⁴⁰ Decree No. 2-98-385 of 23 June 1998 on the competencies and organisation of the Ministry of Justice, Article 1; Royal Decree, Law No. 09-01 on the Higher Institute of the Judiciary, 3 October 2002.

⁴¹ Prime Minister Decree No. 2-03-40 made for the purpose of Law No. 09-01 of 17 September 2003, Articles 1 and 2.

d'aptitude". Article 7 of the Decree determining the conditions and modalities of rating judges and their advancement provides that "the list is set up and adopted by the Minister of Justice following a proposition by the CSM".⁴²

In terms of discipline, the Minister of Justice plays a significant role in both imposing disciplinary sanctions and initiating disciplinary proceedings against trainee and qualified judges.

As regards trainee judges, under Article 10 of Law No. 1-74-467 on the Statute for Judges, warnings, reprimands, temporary suspensions and dismissals of trainee judges are pronounced by a commission composed of the Minister of Justice as President, the Secretary-General of the Ministry of Justice, the director of the Civil Affairs Directorate, the director of the Criminal Affairs Directorate, and the director of the Higher Institute of the Judiciary.

In terms of qualified judges, the Minister of Justice can refer them to the CSM for disciplinary proceedings.⁴³ Having consulted the *ex officio* members of the CSM, the Minister appoints a rapporteur to investigate the case.⁴⁴ The CSM reviews the rapporteur's report and may order a further investigation. The referred judge has access to the investigative file, with the exception of the rapporteur's report, and may be assisted by legal counsel. The referred judge is given eight days' notice prior to his or her hearing before the CSM.⁴⁵ Following the hearing and after consulting with the CSM, disciplinary decisions are pronounced either by a decision of the Minister of Justice (warning, reprimand, delaying promotions for a period up to two years, and elimination from the *liste d'aptitude*) or by royal decree (demotion, temporary suspension for a period up to six months, forced early retirement or leave of absence, and dismissal). Decisions of the Minister of Justice can be challenged before the administrative courts. Royal decrees, according to consistent jurisprudence of the Moroccan courts, are not subject to any form of appeal or review.⁴⁶ Further detail on the disciplinary procedure is in Section C.

In cases of allegations of criminal conduct or serious professional misconduct, the judge may be "immediately suspended from office by order of the Minister of Justice".⁴⁷ This immediate suspension does not require any prior consultation with the CSM. The Minister of Justice has discretion to decide which act or omission constitutes serious misconduct.

Law No. 1-74-467 on the Statute for Judges includes other provisions that enable the Minister of Justice to control the career development of judges, thus potentially influencing their work. The Minister has the authority to: propose the appointment of judges to the central administration of the Ministry of Justice; make decisions concerning the granting of leave; decide whether to place judges on a leave of absence or into retirement; assign judges for a period of three months a year to the post of sitting judge, investigative judge or prosecutor; and evaluate the work of judges who are seconded.⁴⁸

3. The new Conseil Supérieur du Pouvoir Judiciaire (CSPJ)

⁴² Decree n° 2-75-883 of 23 December 1975 determining the conditions and modalities of rating judges and their advancement in grade and echelon.

⁴³ Law No. 1-74-467, Articles 58-63 sets out the disciplinary procedure against qualified judges.

⁴⁴ Law No. 1-74-467, Articles 61-62.

⁴⁵ Law No. 1-74-467, Article 61.

⁴⁶ Decision *société Propriété agricole Abdelaziz contre président du conseil et ministre de l'agriculture*, publié *Revue juridique et politique, indépendance et coopération*, 1970, p. 541.

⁴⁷ Law No. 1-74-467, Article 62.

⁴⁸ See Articles 1, 30, 43, 45, 57, and 65 of Law No. 1-74-467 on the Statute for Judges.

Article 113 of the 2011 Constitution mandates a new judicial council, which will replace the CSM, called the Conseil Supérieur du Pouvoir Judiciaire (CSPJ), to govern the application of guarantees relating to the independence, appointment, promotion, retirement and discipline of judges. The CSPJ has the authority, on its own initiative, to draft reports on the state of justice and the judicial system and to present its recommendations. It may also be required to give its opinion on any matter relating to justice at the request of the King, the Government or the Parliament. Article 109 of the Constitution provides that judges who consider that their independence has been threatened must refer the matter to the CSPJ. Article 114 provides that individual decisions of the CSPJ are subject to review for abuse of power by the highest administrative court.

Under Article 116 of the Constitution, the CSPJ is to have administrative and financial autonomy. It is to hold at least two sessions per year. In disciplinary matters it will be assisted by experienced judicial-inspectors.

Article 116 of the Constitution also states that the election, organization, and functioning of the CSPJ and the criteria concerning the career management of the judiciary and rules for disciplinary procedure will be determined by an organic law.⁴⁹

In terms of its composition, Article 115 of the Constitution, states that the King will preside over the CSPJ, which will be comprised of:

- the First President of the Court of Cassation, who will be the Deputy President of the CSPJ;
- the Prosecutor-General attached to the Court of Cassation;
- four representatives of the judges of the Courts of Appeal, elected from among them;
- six representatives of the judges of the Courts of First Instance, elected from among them;
- the Ombudsman;
- the President of the National Human Rights Council;
- five persons nominated by the King who are known for their competence, impartiality, integrity and for their contribution to the independence of justice and the rule of law. One of the five will be nominated by the Secretary General of the High Council of Muslim Scholars.

With respect to the ten judges of the Courts of Appeal and Courts of First instance who are elected, the number of women judges elected must be proportionate to the total number of women in the judicial corps as a whole.

The Constitutional provisions relating to the composition of the CSPJ provide some improvements in terms of its independence, in comparison with the composition of the CSM. In particular, the Minister of Justice no longer sits as Vice-President. Female judges are guaranteed representation on the CSPJ as a proportion of their numbers in the judiciary as a whole. However, although the absolute number of elected judges on the CSPJ has increased relative to the CSM, their percentage has been reduced.

	CSM	CSPJ
Judges/prosecutors elected by their peers	6	10
Judges/prosecutors ex officio members	3	2

⁴⁹ An "organic law", common in civil law systems, is a law provided for by the Constitution to complement general provisions of the Constitution. It has a higher status than other laws and requires approval from the Constitutional Court before it is adopted.

Individuals from the executive	2	1
Individuals appointed as members by the executive	-	5 (of which 1 nominated by the Secretary General of the High Council of Muslim Scholars)
Non-judicial ex officio members	-	2
Total members	11	20
Percentage of elected judges	54.54%	50%

Of a total of twenty members, including the King as President, the CSPJ will have ten judges elected by their peers, as well as the First President and Prosecutor-General to the Court of Cassation who are appointed by virtue of their position. Both the Ombudsman and the President of the National Council for Human Rights, who are automatically members of the CSPJ, hold their offices by royal appointment.⁵⁰ Thus, the composition and method of appointment of members of the new body still will not meet internationally recommended standards of independence as the King will sit on and preside over the body, the King appoints a quarter of the members, and the majority of the CSPJ will not be judges elected by their peers.

4. Assessment of national law in light of international standards

International law and standards provide that all decisions concerning the selection, career, and termination from office of judges should be made in an objective and transparent manner and be free of political influence. These decisions should be made by an independent body consisting of a majority of judges who are chosen by their peers. In this regard, both the Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have warned of the dangers of the involvement of the executive branch. When other branches of government are charged with determining the course of judges' careers, there is obviously the risk of external influence on judicial functions. In order for a judicial council to effectively safeguard independence of the judiciary, it too must be independent of the executive and legislative powers. Its membership cannot be dominated by the other branches, it must be granted the necessary authority to take decisions concerning the judiciary and individual judges and it must have organizational and financial autonomy.

In the case of Morocco, the CSM fell short of international law and standards in a number of areas. Its composition consisted primarily of members of the executive branch. The Special Rapporteur on the independence of judges and lawyers has cautioned against bodies being composed "primarily of political representatives" for fear of undue government influence.⁵¹ The Committee of Ministers of the Council of Europe Recommendation (2010)12 (CoM Recommendation (2010)12) and the European Charter on the Statute for Judges both advise that at least half the members of such a council be judges elected by their peers following methods guaranteeing the widest representation of the judiciary.⁵² In addition to not being institutionally independent of the executive, the CSM had no financial autonomy and lacked administrative independence. The secretariat was placed under the direct control of the Minister of Justice. By contrast, the Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have repeatedly

⁵⁰ Article 2 of Royal Decree No. 1-11-25 of 17 March 2011 on the establishment of the Ombudsman institution provides that the Ombudsman is nominated by royal decree. Article 34 of Royal Decree No. 1-11-19 of 3 March 2011 on the establishment of the National Council for Human Rights provides that its President is nominated by royal decree.

⁵¹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28.

⁵² CoM Recommendation (2010)12, para. 27; European Charter on the Statute for Judges, Principle 1.3.

recommended an independent body to safeguard the independence of the judiciary.⁵³ Furthermore, the CSM's role was limited to consulting with the Minister of Justice, while the latter had practical authority over all the important decisions concerning the judiciary, including selection, appointment, promotion and discipline. In General Comment No. 32, the Human Rights Committee explained that the requirement of independence includes "the procedure and qualifications for the appointment of judges", as well as their "security of tenure", and "the conditions governing promotion, transfer, suspension and cessation of their functions".⁵⁴ Judges are to be protected against "any form of political influence" by adopting "clear procedures and objective criteria" for their appointment, remuneration, tenure, promotion, suspension and dismissal.⁵⁵

Under the 2011 Constitution, the CSPJ is intended to be independent, but its actual independence and its ability to safeguard the independence of the judiciary will be determined by the provisions of new organic laws. Enhancing the independence of the judiciary in Morocco will depend in large part on the independence afforded to the CSPJ in terms of its composition, financing and administration, its ability to oversee all issues relating to the judiciary, including the selection, promotion and termination of tenure of judges, and adopting fair and transparent procedures to be followed by the CSPJ in the exercise of these functions. Furthermore, since judges are supposed to report threats to their independence to the CSPJ, the CSPJ must be able to undertake an independent and impartial investigation, in line with international standards.⁵⁶

Although its composition is an improvement over the CSM in that the Minister of Justice no longer has a seat and the total number of judges has been increased, it is still the King who presides over the new body. The CSPJ should assume the role previously played by the Minister of Justice with regard to selecting trainee judges, appointing permanent judges, drawing up the *liste d'aptitude* of judges who are eligible for promotions, and overseeing the Judicial Inspection Service.

In terms of composition, the ICJ considers that the new organic law should set out objective criteria for the appointment of the five members to be named by the King. In particular, the ICJ considers that most if not all of these five individuals should be drawn from representatives of the legal profession, including practicing lawyers and law professors.

Additionally, it will be crucial that the Prosecutor-General and President of the Court of Cassation are each appointed to their posts in an independent manner, through a transparent procedure that is based on objective criteria, related to skills, knowledge, experience and integrity. To do otherwise would undermine the CSPJ's ability to function as an independent body.

In terms of its competencies, the CSPJ is to oversee all guarantees relating to the independence of judges, including their appointment, promotion, retirement and discipline. Article 116 of the Constitution provides that a new organic law will determine the criteria for the management of the careers of judges and rules of procedure for judicial discipline.

⁵³ Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 17; Concluding Observations of the Human Rights Committee on Honduras, UN Doc. CCPR/C/HND/CO/1, para. 16; Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), paras. 25-27.

⁵⁴ Human Rights Committee, General Comment No. 32, para. 19.

⁵⁵ *Id.*

⁵⁶ See Concluding Observations of the Human Rights Committee on Albania, UN Doc. CCPR/CO/82/ALB, para. 18; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/BRA/CO/2, para. 17.

The new organic laws on the CSPJ and the Statute for Judges will prove crucial in ensuring that the deficiencies of the current system are not replicated. These laws should establish the powers of the CSPJ in relation to all issues concerning the management of the judiciary, including the selection, appointment, promotion, training, transfer/assignment and disciplining of judges, as well as the determination and allocation of resources. The criteria for such decisions should be objective and should safeguard the independence of the judiciary, in line with international standards. Furthermore, the variety of laws, decrees and orders currently in force that grant the executive significant power in these areas must be annulled or reformed.

In particular, the Minister of Justice's role in overseeing the appointment, transfer, promotion and disciplining of judges should be transferred to the CSPJ. The Higher Institute of the Judiciary and the Judicial Inspection Service should also be placed under the oversight of the CSPJ rather than the Minister of Justice. The new laws should ensure that the CSPJ is directly involved in the preparation of the budget for the judiciary, that the financial resources accorded the judiciary are adequate, and that the CSPJ is empowered to administer the allocation of judicial resources.

In addition, the CSPJ must have financial and organisational independence from the executive and legislative branches of government, as well as sufficient resources to perform its functions. Although Article 116 of the 2011 Constitution provides that the CSPJ will have administrative and financial autonomy, no provisions are made in the Constitution for securing this autonomy or guaranteeing adequate resources. These will have to be provided for in the new organic law. The organic law should further ensure that the secretariat of the CSPJ is appointed by its members and not the Minister of Justice.

Decisions pertaining to judicial careers made by the CSPJ must be subject to objective criteria and fair and transparent procedures. These should be set forth in the forthcoming law on the Statute for Judges relating to the selection, appointment, promotion, transfer, discipline and termination of tenure of judges, as discussed in Sections B and C below. However, all of these decisions must be subject to the generally applicable requirements of fairness and due process and be subject to independent review. In particular, as noted above, in respect of disciplinary matters, judges are entitled both to a fair hearing and the right to challenge the substance of the decision and any sanctions imposed before an independent body.

In this regard, while Article 114 states that the "individual decisions" of the CSPJ are subject to appeal before the highest administrative court for abuse of power, the scope of which decisions are reviewable is not clear nor is the effectiveness of such a remedy readily apparent given that review is limited to abuse of power.⁵⁷ The independence of the reviewing body is also not guaranteed, given the fact that the highest administrative court is part of the Court of Cassation, whose President sits as the Deputy President of the CSPJ. Thus, measures aimed at safeguarding the right to an independent and impartial and fair review of decisions of the CSJP must be included in the organic law.

Finally, the new organic law should clarify the report-drafting function of the CSPJ under Article 113. While the CSPJ has the constitutional authority to make recommendations regarding the judiciary, the new law should require that the executive and legislative branches consult with the CSPJ on matters relating to the judiciary, including judicial reforms, and that these branches are required to consider the recommendations of the CSPJ.

⁵⁷ The French version states "exces de pouvoir".

5. Recommendations

In light of the above, the Moroccan authorities should ensure that the new organic law on the CSPJ:

- i. Includes objective criteria and qualifications for the five members of the CSPJ to be appointed by the King. Such criteria should ensure that all or most of the five individuals are members of the legal profession, including practicing lawyers and law professors;**
- ii. Empowers the CSPJ in all matters relating to the career of judges and judicial independence, including the selection, appointment, training, assessment, transfer, promotion, disciplining and termination of tenure of judges and ends the role of the Ministry of Justice and other executive or legislative powers in these regards, including by annulling or amending the relevant laws and decrees that empower other authorities;**
- iii. Empowers the CSPJ to consult directly with Parliament in setting the budget for the judiciary and to meaningfully contribute in its management;**
- iv. Provides that all authorities, in particular the Parliament and the Government, must consult the CSPJ and consider its opinion on all matters relating to the judiciary, including judicial reforms, and that the CSPJ is empowered to report on such matters independently of all other branches of State and has the discretion to decide on the format of and whether to submit such a report;**
- v. Includes guarantees to ensure the financial and organisational independence of the CSPJ, including by:**
 - a. providing that the members of the CSPJ appoint the secretariat of the CSPJ;**
 - b. guaranteeing adequate operational and administrative resources, including office space that is separate from the Ministry of Justice; and**
 - c. ensuring the CSPJ exercises full control over these resources;**
- vi. Provides for fair and transparent procedures to be followed by the CSPJ particularly when exercising their mandate to appoint, promote and discipline judges and to terminate the tenure of judges; and**
- vii. Ensures that all decisions of the CSPJ relating to the selection, career and termination of tenure of judges, is subject to independent, impartial and effective judicial review or appeal.**

B. The Statute for Judges

In accordance with the 2011 Constitution a new organic law will determine the Statute for Judges.⁵⁸ Until the promulgation of this new law, the Statute for Judges Law of 1974 remains in force.

There were significant shortcomings in the guarantees for independence of the judiciary in the 1996 Constitution. Shortcomings are also found in the current Statute for Judges Law. Although the 1996 Constitution provided that the judicial authority was independent of the legislative and executive powers, in actuality this independence was undermined by subsidiary legislation and practices. Under the Statute for Judges Law, the selection, training, assessment, promotion, assignment, discipline and removal from office of judges rests largely with the executive branch.

This section will discuss the international standards relevant to the selection, career management and discipline of judges, which aim to safeguard the independence of

⁵⁸ 2011 Constitution, Article 112.

the judiciary as an institution and individual judges. This section will also discuss safeguards of the rights to freedom of expression and association. It will then analyse the current Statute for Judges Law in the light of international standards. It will conclude by evaluating the reforms envisaged by the 2011 Constitution and make recommendations for the new organic law on the statute for judges.

1. International law and standards

International standards safeguarding the independence of the judiciary aim to ensure that matters related to the appointment of judges, their training, evaluation, promotion and discipline, are free from improper influence by the other branches of government.

In General Comment No. 32, the Human Rights Committee stated that the requirement of an independent judiciary set out in Article 14 of the ICCPR refers, among other things, to "the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions."⁵⁹ To safeguard judicial independence, it has recommended that States establish "clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."⁶⁰

In reviewing States' compliance with their obligations under Article 14 of the ICCPR, the Human Rights Committee has noted with concern the lack of independent mechanisms for the recruitment and discipline of judges. In the case of the Republic of Congo, for example, it called on the State to give particular attention to the training of judges and to the system governing their recruitment and discipline, in order to free them from political, financial and other pressures, ensure their security of tenure and enable them to render justice promptly and impartially.⁶¹ In the case of Madagascar, it queried the method of appointment and noted that there was no mechanism "to prevent possible interference by the executive branch in the affairs of the judiciary".⁶²

Similarly, the European Court of Human Rights, in interpreting the obligations imposed by the guarantee of the right to a fair trial before an independent and impartial tribunal in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), has held repeatedly that "in order to establish whether a tribunal can be considered 'independent' for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence."⁶³

⁵⁹ Human Rights Committee, General Comment No. 32, para. 19.

⁶⁰ General Comment No. 32, para. 19; See, e.g., Concluding Observations of the Human Rights Committee on Bolivia, UN Doc. CCPR/C/79/add.74, para. 34; Concluding Observations of the Human Rights Committee on Lebanon, UN Doc. CCPR/C/79/Add.78, para. 15; Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para. 14; Concluding Observations of the Human Rights Committee on Sudan, UN Doc. CCPR/C/79/Add.85, para. 21.

⁶¹ Concluding Observations of the Human Rights Committee on the Congo, UN Doc. CCPR/C/79/Add.118, para. 14.

⁶² Concluding Observations of the Human Rights Committee on Madagascar, UN Doc. CCPR/C/MDG/CO/3, para. 26.

⁶³ See generally *Incal v. Turkey*, ECtHR, Application No. 22678/93, Judgment of 9 June 1998, para. 65, *Findlay v. United Kingdom*, ECtHR, Application No. 22107/93, Judgment of 25 February 1997, para. 73; *Bryan v. United Kingdom*, ECtHR, Application No. 19178/91, Judgment of 22 November 1995, para. 37.

Under international standards, selection criteria for judges must be both based on merit and applied in a transparent manner.⁶⁴ For example, the UN Basic Principles state that persons "selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of selection shall safeguard against judicial appointments for improper motives."⁶⁵ The ACHPR Principles and Guidelines provide that the process of appointment "shall be transparent and accountable" and that the method of selection "shall safeguard the independence and impartiality of the judiciary."⁶⁶

In terms of their career progression, the promotion of judges should be based on objective factors, such as "ability, integrity and experience".⁶⁷ The Human Rights Committee has noted that if promotion decisions depend on the discretion of administrative authorities, it may "expose judges to political pressure and jeopardize their independence and impartiality".⁶⁸

Furthermore judicial training programmes should be run by independent authorities and should meet "requirements of openness, competence and impartiality inherent in judicial office".⁶⁹ In this regard, the European Charter proposes an independent body composed of a majority of a judges, which "ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties".⁷⁰

Security of tenure is a fundamental condition for judicial independence. Unless judges have security of tenure, they are vulnerable to pressure from those in charge of decisions whether to renew a judge's post. Thus international standards prescribe that judges should have guaranteed tenure until retirement age or the expiry of their term of office.⁷¹ According to some standards, life tenure should be the norm.⁷² Judges should only be subject to removal from office for reasons of incapacity or behaviour that renders them unfit to discharge their duties.⁷³

According to the UN Basic Principles and other international and regional standards, the disciplining of judges and any decisions concerning suspension or removal should be based only on established standards of judicial conduct following fair proceedings before an independent body. These proceedings must include an independent, impartial, thorough and fair investigation and adjudication.⁷⁴ In addition, the examination of the matter at its initial stage should be kept confidential, unless

⁶⁴ See generally ACHPR Principles and Guidelines, Principle 4(i) (noting that the "sole criteria" shall be the suitability of a candidate "by reason of integrity, appropriate training or learning and ability".); CoM Recommendation (2010)12, para. 44; European Charter on the Statute for Judges, para. 2.1. See also ICJ *Practitioners' Guide No. 1*, p. 41.

⁶⁵ UN Basic Principles on the Independence of the Judiciary, Principle 10.

⁶⁶ ACHPR Principles and Guidelines, Principle 4(h).

⁶⁷ UN Basic Principles on the Independence of the Judiciary, Principle 13; see also ACHPR Principles and Guidelines, Principle 4(o); Singhvi Declaration, para. 14.

⁶⁸ Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para. 14.

⁶⁹ CoM Recommendation (2010)12, para. 57.

⁷⁰ The European Charter, para 2.3, which refers to para 1.2 where the detailed requirements of this body are set out.

⁷¹ CoM Recommendation (2010)12, para. 49; UN Basic Principles on the Independence of the Judiciary, Principle 12; ACHPR Principles and Guidelines, Principle 4(l).

⁷² Latimer House Guidelines, Guideline II.1.

⁷³ UN Basic Principles on the Independence of the Judiciary, Principle 18; ACHPR Principles and Guidelines, Principle 4(p).

⁷⁴ CoM Recommendation (2010)12, para. 69; UN Basic Principles on the Independence of the Judiciary, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

otherwise requested by the judge.⁷⁵ Furthermore, disciplinary measures or sanctions must be proportionate and subject to an independent review.⁷⁶ For example, CoM Recommendation (2010)12 provides that disciplinary proceedings “should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction”.⁷⁷ In General Comment No. 32, the Human Rights Committee clarified: “The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary”.⁷⁸

The Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have regularly expressed concern about the role played by legislative or executive branches in disciplining judges.⁷⁹ Judges should “only be removed in accordance with an objective, independent procedure prescribed by the law”.⁸⁰ Even if the disciplinary body is a legislative or executive one, the due process and fair trial safeguards apply and the right of appeal is even more important.⁸¹

In addition, the Committee of Ministers of the Council of Europe recommends that judges have recourse to a judicial council if they feel that their independence is threatened and that the law should provide for sanctions against persons seeking to influence judges in an improper manner.⁸² This is consistent with recommendations of the Human Rights Committee that States ensure independent and impartial investigations into allegations of improper interference with the independence of the judiciary.⁸³

The Universal Declaration of Human Rights and the ICCPR alike guarantee the rights of all persons to freedom of expression, belief, association and assembly. Respect for the rights of judges to freedom of association and expression are fundamental to ensuring the independence of the judiciary and to the fulfilment by judges of their role in upholding the rule of law and respect for human rights. International standards therefore aim to safeguard these rights.

Principle 8 of the UN Basic Principles provides that “members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”⁸⁴ Principle 9 provides that judges “shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence”. CoM Recommendation (2010)12, the ACHPR Principles and

⁷⁵ UN Basic Principles on the Independence of the Judiciary, Principle 17.

⁷⁶ CoM Recommendation (2010)12, para. 69; UN Basic Principles on the Independence of the Judiciary, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

⁷⁷ CoM Recommendation (2010)12, para. 69.

⁷⁸ Human Rights Committee, General Comment No. 32, para. 20.

⁷⁹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 60; Communication No. 814/1998, *Patukhov v. Belarus*, para. 7.3; Communication No. 933/2000, *Adrien Mundy Busyo et al. v. Democratic Republic of the Congo*, para. 5.2.

⁸⁰ Concluding Observations of the Human Rights Committee on the Republic of Moldova, UN Doc. CCPR/CO/75/MDA, para. 12.

⁸¹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 61.

⁸² CoM Recommendation (2010)12, paras. 8 & 14.

⁸³ Concluding Observations of the Human Rights Committee on Albania, UN Doc. CCPR/CO/82/ALB, para. 18; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/BRA/CO/2, para. 17.

⁸⁴ UN Basic Principles on the Independence of the Judiciary, Principle 8.

Guidelines, the European Charter on the Statute for Judges, the Latimer House Guidelines, and the Beijing Principles all contain similar guarantees.⁸⁵

2. The current law on the Statute for Judges

The law on the Statute for Judges of 1974 was implemented by royal decree during a state of emergency.⁸⁶ It provides that there is one body of judges in Morocco, which is made up of judges and prosecutors who are both divided into various grades or levels.⁸⁷ Since the Moroccan system considers both judges and prosecutors as members of the judiciary, most of the provisions in the 1974 Statute of Judges Law relate to both judges and prosecutors. Given the differences in the role, status and protections afforded to judges and prosecutors under international law, the situation of prosecutors is considered at section E below.

i) Selection, training and promotion

As a general rule, judges are appointed from among trainee judges.⁸⁸ However, other individuals, including law professors and lawyers who possess the requisite experience, can also be appointed directly to the bench.⁸⁹ Under Article 4 of the Statute for Judges, all candidates for judicial office must be Moroccan nationals; enjoy all civil rights and be of good character; be physically able to carry out the functions of the post; be over the age of 21 years; and have regularised his or her position with regards to military or civil service.

Trainee judges are recruited according to the needs of the various jurisdictions through an open competition process.⁹⁰ The form of the competition, the conditions of admission, the exams, marking scheme and examination board are determined by royal decree. This decree grants the Minister of Justice a range of powers in relation to the selection process, including announcing the exam, determining the terms and criteria for the selection of candidates to sit the exam and the finalisation of the list of such candidates, appointing the members of the marking panel and determining the topics for examination.⁹¹

The training period lasts for a minimum of two years and includes a series of practical placements the details and timing of which are again determined by the Minister of Justice.⁹² Training is carried out under the auspices of the Higher Institute of the Judiciary. The Institute is composed of a General Director and an Executive Board. The Board is presided over by the Minister of Justice and comprises the President of the first Chamber of the Court of Cassation, the first Prosecutor-General of the Court of Cassation, the Secretary-General of the CSM, the first President of a Court of Appeal, the Prosecutor-General before a Court of Appeal, the head of the Bar Association, the president of a law faculty, the President of a Shari'a faculty, three professors at the Institute in charge of trainee judges, three professors at the Institute in charge of clerks and a representative of each of the trainee judges and of

⁸⁵ CoM Recommendation (2010)12, para. 25; ACHPR Principles and Guidelines, Section A, Principles 4(s) and (t); European Charter on the Statute for Judges, para. 1.7; Latimer House Guidelines, Guideline VII.3.

⁸⁶ There was a state of emergency in Morocco between 1965 and 1977. In 1965 popular unrest in Casablanca was suppressed in March and the King proclaimed a state of emergency in June, resulting in a suspension of the Parliament.

⁸⁷ Articles 1 and 2 of the Statute of Judges Law.

⁸⁸ Law No. 1-74-467, Article 3.

⁸⁹ *Id.* Law professors must have 10 years of experience, lawyers 15 years and individuals from administrative tribunals 10 years or grade scale 11.

⁹⁰ Law No. 1-74-467, Article 5.

⁹¹ Decree No. 2-05-178 of 21 April 2006, Articles 2-15.

⁹² Law No. 1-74-467, Article 6

the clerk's, both of who are elected by their respective peers.⁹³ Following a Prime Ministerial Decree of 2003, five government ministers or their representatives also sit on the Institute's Board.⁹⁴ The Board decides on the content of the training, issues relating to employees, financial and administrative issues, internal regulations, programmes and exams.⁹⁵ Judges are not consulted regarding the content of the training.

At the end of the training there is another exam the conditions of which are also set out by decree. Successful candidates are eligible for, but are not guaranteed, appointment,⁹⁶ since the Minister of Justice can order the dismissal of those trainee judges who "do not meet the conditions to be appointed as judges".⁹⁷ The law is silent as to what these conditions are and thus gives the Minister of Justice discretion in determining these conditions and dismissing eligible candidates.

A separate disciplinary procedure applies for trainee judges, which provides for sanctions to be handed down by a commission presided over by the Minister of Justice and composed of four other members of the executive, all of whom are subject to the authority of the Ministry of Justice.⁹⁸

The Judicial Inspection Service, which is under the direct authority of the Ministry of Justice, assesses the performance of members of the judiciary.⁹⁹ According to the Organisation of the Judiciary Law of 1974, the Minister of Justice appoints the inspectors from either the judges of the Court of Cassation or those judges who work in the Central Administration of the Ministry of Justice.¹⁰⁰ Judges appointed as inspectors have general powers of "investigation, verification and control" and can specifically summon judges, hear their testimony and review all relevant files.¹⁰¹ The inspection reports are sent immediately to the Minister of Justice with conclusions and recommendations for action.¹⁰²

As regards promotion, judges are promoted both in terms of their grade (there are 3 grades in total) and their echelon (there are nine echelons within each grade).

Under the Decree determining the conditions and modalities of rating judges and their advancement (the 1975 Decree),¹⁰³ promotion to a superior echelon is based both on seniority (one to four years from one echelon to another)¹⁰⁴ and the "notation" of a magistrate. Article 2 of the Decree provides that every year, a "notation sheet" is established for each judge based on his/her qualifications, personal aptitude, professional integrity, behaviour and ability to exercise higher functions". The authority to rate the judges belongs to: the Minister of Justice as regards the prosecutor-generals at the Courts of Appeal; the presidents of the Courts of Appeal as

⁹³ Law No. 01-09 of 3 October 2002, Article 5

⁹⁴ Prime Minister Decree No. 2-03-40 made for the purpose of Law No. 09-01 of 17 September 2003, Articles 1 and 2.

⁹⁵ Law No. 01-09 of 3 October 2002, Article 6

⁹⁶ 1996 Constitution, Articles 33 and 84; and Law No. 1-74-467, Article 7.

⁹⁷ Law No. 1-74-467, Article 7.

⁹⁸ Law No. 1-74-467, Article 10. Prime Minister Decree No.2-98-385 on the functions and organisation of the judiciary, Article 1; and Prime Minister Decree No.2-03-40 made for the purpose of Law No.09-01 of 17 September 2003, Articles 1 and 2.

⁹⁹ Decree No.2-98-385 of 23 June 1998 on the functions and organisation of the Ministry of Justice, Article 1

¹⁰⁰ Law No.1-74-338, Article 13

¹⁰¹ Law No.1-74-467, Article 17(3).

¹⁰² Law No.1-74-467, Article 17(4).

¹⁰³ Decree n° 2-75-883 of 23 December 1975 determining the conditions and modalities of rating judges and their advancement in grade and echelon.

¹⁰⁴ *Id.*, Article 9.

regards the sitting judges in these courts; and the presidents of the tribunals of first instance as regards the sitting judges in these courts.¹⁰⁵

The procedure for promotion to a superior grade is provided for in both Law No.1-74-467 and the 1975 Decree. Article 23 of the law provides that no judge can be promoted to a superior grade if he or she is not on the "liste d'aptitude". Only those who justify that they have 5 years of experience in their grade can be entered on the list. Article 4 of the Decree provides that "the number of inscriptions in the liste d'aptitude for the promotion to a superior grade is fixed according to the necessities of service". Article 7 of the Decree provides that "the list is set up and adopted by the Minister of justice following a proposition by the CSM".

When establishing the list, university diplomas, qualifications and ability to perform the relevant duties of the higher grade are considered.¹⁰⁶ There is only one position offered to a judge with no possibility of appeal. If a judge does not accept the promotion, it is cancelled.¹⁰⁷

Judges can be re-assigned or transferred in a variety of circumstances, including at their request, as a result of promotion, due to the closure or creation of a court or to remedy a deficiency that is seriously affecting the functioning of a court.¹⁰⁸ The assignment of judges is by royal decree following a proposal by the CSM.¹⁰⁹ The Minister of Justice also exercises transfer powers and can issue an order delegating a judge to fill a post "in case of necessity" for up to three months per year.¹¹⁰ Pursuant to the 1974 Statute for Judges, judges can also be seconded outside of the judiciary.¹¹¹ Judges on secondment continue to belong to the judiciary and maintain the same promotion and retirement rights.¹¹²

ii) Tenure and termination of office

Under Article 85 of the 1996 Constitution, sitting judges were irremovable from office. This guarantee of security of tenure was not extended to public prosecutors.

The 1974 Statute for Judges sets the mandatory retirement age at 60 years. However, the retirement age can be extended in individual cases by the Minister of Justice, after consulting the CSM, when it is recognised as being "necessary in the interests of the work".¹¹³

If a judge is subject to disciplinary proceedings, forced retirement without a pension or the revocation of office can be a punishment pronounced by royal decree on the advice of the CSM.¹¹⁴ Further details concerning judicial disciplinary proceedings are set out in Section C (Judicial Accountability).

iii) Freedom of association and expression

The 1996 Constitution guaranteed the rights to freedom of expression, opinion and association to all citizens. However, Articles 13 and 14 of the Statute for Judges, which concern the exercise of these rights by judges, require judges to maintain the

¹⁰⁵ *Id.*, Article 3.

¹⁰⁶ Law No.1-74-467, Article 23(5).

¹⁰⁷ *Id.*, Article 24.

¹⁰⁸ *Id.*, Article 55.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*, Article 57.

¹¹¹ *Id.*, Articles 38-43.

¹¹² *Id.*, Article 38.

¹¹³ *Id.*, Article 65.

¹¹⁴ *Id.*, Article 59.

reserve and dignity of their function and to refrain from all political deliberations and all demonstrations of a political nature. In addition, Article 14 prohibits judges from joining trade unions. In practice, the right of judges to freedom of association and expression were severely curtailed beyond the restrictions permitted under international standards. Judges that attempted to speak out were frequently subjected to disciplinary proceedings and severe sanctions.

3. Assessment of national law in light of international standards

International law requires that decisions concerning the careers of judges – from selection and appointment through assignment, transfer and promotion to discipline and termination of office – must be free from undue influence by other branches of government. In other words, the law must protect the independence of the judiciary by ensuring that these decisions are not motivated by political or other improper considerations, in either fact or appearance. Criteria for appointment and promotion must be transparent, objective and based on merit. Judges must be guaranteed security of tenure and all disciplinary proceedings should be conducted before an independent body with fair trial and due process guarantees. Furthermore, judges like other individuals enjoy the rights to freedom of expression and freedom of assembly. These rights must not only be guaranteed in law but also in practice.

The 1974 Statute for Judges and subsidiary legislation, including decrees, granted far too much control to the Minister of Justice and thus was not consistent with international law and standards. The UN Basic Principles provide: “Any method of selection shall safeguard against judicial appointments for improper motives.”¹¹⁵ Similarly, the European Court has held that the independence of a tribunal depends on whether there are safeguards against outside pressures in the manner of judicial appointment and in the terms of office.¹¹⁶ In Morocco, however, the Minister of Justice determined the selection procedure and drew up the list of eligible candidates with few safeguards against appointment for improper motives. In addition, the Minister of Justice was granted effective control over the training institute, could unilaterally extend a judge’s retirement, and oversaw the Judicial Inspection Service, which assessed the performance of judges and was instrumental in determining promotions. These features of the current system contrast with repeated calls by the Human Rights Committee and others for independent mechanisms for the recruitment, promotion, training and discipline of judges.¹¹⁷ With regard to promotion, the UN Basic Principles, the ACHPR Principles and Guidelines and the Singhvi Declaration, provide that promotion must be based on objective factors, including ability, integrity and experience. The Human Rights Committee has observed that where promotion depends on the discretion of administrative authorities, it could render judges vulnerable to “political pressure” and thus “jeopardize their independence and impartiality.”¹¹⁸

Like the 1996 Constitution, the 2011 Constitution provides that sitting judges are irremovable and that the judiciary is independent. Further, the 2011 Constitution seeks to strengthen safeguards for the independence of the judiciary in line with international standards, in particular by providing that judges have the right to bring threats to their independence to the CSPJ and by a provision specifying that the law punishes anyone attempting to illegally influence a judge (Article 109). Under Article 111, the enjoyment of the right to freedom of expression is to be exercised by judges

¹¹⁵ UN Basic Principles on the Independence of the Judiciary, Principle 10.

¹¹⁶ *Incal v. Turkey*, EctHR, Application No. 22678/93, Judgment of 9 June 1998, para. 65.

¹¹⁷ See, e.g., Concluding Observations of the Human Rights Committee on the Congo, UN Doc. CCPR/C/79/Add.118, para. 14; Concluding Observations of the Human Rights Committee on Madagascar, UN Doc. CCPR/C/MDG/CO/3, para. 14.

¹¹⁸ Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para. 14.

in a manner consistent with their obligations of judicial restraint and judicial ethics, and the right to freedom of association in a manner consistent with the requirements of impartiality and independence and in accordance with the conditions set out in the law. Judges are prohibited from joining trade unions or political parties.

The new organic laws concerning judges and the functioning of the CSPJ should further safeguard the institutional and individual independence of the judiciary in Morocco. There are a number of guarantees that these laws should ensure with a view to ending inappropriate executive influence and control over the career of judges and the judiciary as a whole.

i) Selection, appointment and transfer

An essential element in ensuring the judiciary meets its core function of imparting justice independently and impartially is the selection and appointment of judges. This in turn depends upon both the application of objective criteria based on merit and a fair and transparent procedure. The 2011 Constitution guarantees the independence of the judiciary. While (unsurprisingly) it does not itself set forth criteria for appointment to the judiciary, Article 113 of the Constitution however, mandates the CSPJ to ensure the application of the guarantees accorded judges in terms of their independence, appointment, advancement, retirement and discipline.

With a view to ensuring the independence of the judiciary, the new organic law on the Statute for Judges should set forth criteria for being selected as a trainee judge and appointed as a judge that are consistent with international standards. Thus the criteria should focus principally on the qualifications and training in law, experience, skills and integrity required and ensure that the method of selection safeguards against judicial appointments for improper motives. The new Statute for Judges should also provide that there shall be no discrimination in the selection of judges on any grounds other than nationality. Additional steps should be taken to ensure the training and subsequent appointment of qualified women and members of minority communities.

The new organic law on the Statute for Judges should avoid deferring much of the detail on the implementation of selection and appointment procedures to subsidiary legislation, as is currently the case under the 1974 Statute for Judges. Rather, the new organic law on the Statute for Judges should address and reform the substantial role of the executive under current selection procedures, which is provided for in subsidiary legislation (see recommendations in Section A).

The new organic law on the Statute for Judges should include provisions on training for both trainee judges and qualified judges. In doing so, the Statute must provide for an appropriate training programme and detail the conditions that the body charged with carrying out this training must meet in discharging this function. In particular, where the Higher Institute of the Judiciary remains as the body charged with carrying out judicial training, it should be required to act in accordance with the requirements of open-mindedness, competence and impartiality and be placed under the supervision of the CSPJ.

ii) Assessment, promotion and assignment

The criteria and procedures used for assessing the work of judges, their promotion and their assignment or transfer must be set out in the new Statute for Judges Law. The CSPJ is tasked by the 2011 Constitution with overseeing guarantees accorded to judges in relation to their promotion and defers to an organic law for other questions relating to the management of the career of judges. Concerning the assessment of the work of judges, Article 116 of the Constitution provides that in disciplinary

matters experienced inspectors assist the CSPJ. With regard to prosecutors, Article 116 of the Constitution requires the CSPJ to take into consideration the assessment reports established by their "hierarchical authority".

In order to ensure the independence of the judiciary, assessments of judges should be carried out by the supervising judge of the court on which the individual judge sits and/or his or her judicial delegate(s), in accordance with a set of objective criteria that are applicable throughout the country and are based on "an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law".¹¹⁹ Such assessments must involve discussions with the judge concerned, who should also be able to read and challenge the appraisal. The oversight of the Ministry of Justice over the inspection of judges and the Judicial Inspection Service should be revoked.

The law on the Statute for Judges should also detail the same objective criteria for promoting judges and should set out the procedure that applies in this regard.¹²⁰ The decision-making process should include a system of regular periodic appraisals by judges trained to perform this function conducted on the basis of standardised methods to assess a set of identified criteria as set out above. The procedure must be impartial and ensure that decisions on the promotion of a judge are not made on the basis of improper or discriminatory motives. The law should specify that final decision-making power regarding promotions of judges is vested in the CSPJ and necessary amendments to the law should be made to divest the Minister of Justice of a role in drawing up the list of judges who are eligible for promotion.

Furthermore, the systems for assessment of judges and decisions on their promotions must be designed and carried out in a manner that ensures that judges remain independent, including from judicial colleagues in judicial decision-making.

The new law should also detail the specific situations in which a judge can be transferred, seconded or reassigned. To ensure consistency with international standards, the law should specify that final decision-making power in this regard should rest with the CSPJ and in the absence of a system of regular rotation or promotion, that the consent of the judge to a transfer, secondment or reassignment, which should not be unreasonably withheld, should in principle be sought.¹²¹ Necessary measures should also be taken to divest the Minister of Justice of power to order the temporary transfer of judges.

iii) Tenure and termination of office

The new law must provide for termination of office only for specific reasons and only following a fair and transparent procedure. To ensure consistency with international standards safeguarding the independence of the judiciary, the law must specify that the reasons for suspension or removal from office, prior to the expiration of a judge's term of office, must be restricted to reasons of incapacity or behaviour that renders the individual unfit to discharge his or her duties.¹²² While the 2011 Constitution maintains the irremovability of sitting judges, the new judiciary law should further safeguard security of tenure by setting out guaranteed tenure until the stated age of retirement or a specific age of retirement for judges. These provisions should ensure that the Minister of Justice is divested from control over the discretionary extension of a judge's tenure, as is currently the case. The new law

¹¹⁹ Singhvi Declaration, para. 14.

¹²⁰ UN Basic Principles on the Independence of the Judiciary, Principle 13; Singhvi Declaration, para. 14.

¹²¹ UN Basic Principles on the Independence of the Judiciary, Principle 14, Singhvi Declaration, para. 15.

¹²² UN Basic Principles on the Independence of the Judiciary, Principle 18.

must provide for premature termination of or suspension from office only for specific reasons and only following a fair and transparent procedure. To ensure consistency with international standards safeguarding the independence of the judiciary, the law must specify that the reasons for suspension or removal from office prior to the expiration of the judges' term of office, must be restricted to reasons of incapacity or behaviour that renders the individual unfit to discharge his or her duties.¹²³

The Statute for Judges should set out the basis for terminating office for disciplinary reasons together with the applicable procedure; these provisions should be consistent with international standards. The Law should specify that oversight for these procedures is vested in the CSPJ, not the Minister of Justice. The law and procedure must also be amended in a manner that divests the Minister of Justice of authority to initiate disciplinary proceedings against judges, refer them to disciplinary boards or to temporarily suspend them from office. Further analysis and recommendations concerning disciplinary proceedings against judges are set out below at Section C (Judicial Accountability).

iv) Freedom of association and expression

Under Article 111 of the Constitution, the right to freedom of expression of judges is to be exercised in a manner consistent with their obligations of judicial restraint and judicial ethics. Their right to establish and join professional associations is guaranteed, within the limits of the requirements of judicial independence and impartiality and in accordance with the law. Respect for these rights and the laws regulating their exercise must be consistent with international standards and upheld in practice.

The Moroccan Law of Associations, as amended in 2002, provides for associations to be formed "freely and without authorization".¹²⁴ In order to establish an association, it is necessary only to declare it with the local authorities in conformity with the provisions of Article 5 of the law. However, in practice, the authorities have consistently disregarded the procedures laid out in the 2002 law.

On 20 August 2011, when over three hundred judges gathered to declare the establishment of a new association, the "Moroccan Judges' Club", local authorities ordered the venue for the association's first meeting to be closed. While the Club continues to operate under the procedure established by the 2002 law, some of its members have reportedly been subjected to various forms of pressures, including being summoned by the Judicial Inspection Service to explain public statements, transferred to remote places, and banned by the Minister of Justice from attending conferences outside the country.¹²⁵

The new Statute for Judges should guarantee the right of judges to freedom of expression and to association with others, subject only to the requirement to preserve the dignity of judicial office and the impartiality and independence of the judiciary. No restrictions may be placed on the exercise of these rights other than those provided for by Articles 19 and 22 of the ICCPR. Guarantees in the law should include the right of judges to form and join professional associations and not be subject to any form of harassment or disciplinary measures as a result of the exercise of this right. The right of such professional associations to freely carry out their statutory activities must also be guaranteed. Crucially, these rights must be respected in practice.

¹²³ UN Basic Principles on the Independence of the Judiciary, Principle 18.

¹²⁴ Royal Decree No. 1-58-376 of 15 November 1958, Official Gazette No. 2404 of 27 November 1958.

¹²⁵ See for example http://www.club-magistrats-maroc.com/mosahamat_juges_details.php?id=36 (accessed 24 October 2013).

4. Recommendations

In light of the above, the authorities in Morocco should ensure that the new organic law on the Statute for Judges:

- i. Sets out fair and transparent procedures for selecting trainee judges and appointing judges, such procedures to be overseen by the CSPJ with final-decision making power relating to these decisions vested in the CSPJ;**
- ii. Sets forth objective criteria for appointments, including qualifications, integrity, ability, efficiency and experience, and excludes discrimination on any ground;**
- iii. Guarantees appropriate initial and ongoing training for judges, at the expense of the State and ensures that the Higher Institute of the Judiciary is placed under the supervision of the CSPJ;**
- iv. Details objective criteria and a transparent procedure for assessing the work of judges and grants the CSPJ oversight of the Judicial Inspection Service, including the appointment of inspectors, who should be judges. Assessment procedures must be uniform, impartial and fair, and include discussions with the judge concerned and guarantee the right of the judge to challenge assessments before the CSPJ;**
- v. Sets out objective criteria and a transparent procedure for promoting judges, and grants the CSPJ oversight and decision-making power in this regard, to the exclusion of the Minister of Justice. Such criteria should include, among others, integrity, independence, professional competence, experience, and commitment to uphold the rule of law;**
- vi. Details the specific situations in which, and the relevant time period for which, a judge can be assigned or seconded to another position and the applicable procedure in this regard. This procedure shall include obtaining the consent of the judge, and vest decision-making solely in the CSPJ, to the exclusion of the Minister of Justice;**
- vii. Since prosecutors are judges under the Statute for Judges, and in order to protect them from any form of arbitrary proceedings while exercising their prosecutorial functions, in particular the investigation and prosecution of cases of human rights violations, extends security of tenure to prosecutors;**
- viii. Safeguards security of tenure by setting out guaranteed tenure until a stated age of retirement, applicable to all judges, and divests the decision making-power of the Minister of Justice over short-term extensions to a judge's tenure;**
- ix. Details the instances in which a judge's tenure can be suspended or terminated, other than by resignation, limiting this to being medically certified as unfit, reaching the retirement age limit, or as a result of the imposition of a lawful sanction of dismissal imposed following a full and fair disciplinary procedure in which the rights of the judge have been respected;**
- x. Grants oversight of the termination of tenure procedures to the CSPJ, including as regards the temporary suspension of judges, to the exclusion of the Minister of Justice, and ensures due process and fairness guarantees for judges, including the right of appeal against such decisions;**
- xi. Guarantees the rights of judges (and prosecutors) to freedom of expression and association, including the right to form and join associations aimed at representing their interests, promoting their professional training and protecting their judicial independence in**

- a manner consistent with international law and standards. No restrictions may be placed on the exercise of these rights other than those provided for by articles 19 and 22 of the ICCPR;**
- xii. Guarantees the right of judges to not be subject to any form of harassment or disciplinary measures as a result of the exercise of their right to form and join professional associations;**
 - xiii. Ensures that professional associations can freely carry out their statutory activities; and**
 - xiv. Is sufficiently detailed so as to preclude subsidiary legislation that grants the executive a predominant role in the selection, appointment, promotion, transfer, training, inspection and discipline of judges, including trainee judges.**

C. Judicial Accountability: the Ethics and Discipline of Judges

The public's faith in the integrity of the judiciary is crucial to respect for the rule of law. As the Special Rapporteur on the independence of judges and lawyers has noted, "what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society".¹²⁶ The judiciary must not only be independent and impartial, it must also be seen to be independent and impartial by litigants and members of the public. Furthermore, judges must decide matters before them impartially on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or indirect or direct interference from any quarter for any reason.¹²⁷ Judges must also conduct themselves in a manner that is consistent with an established code of conduct. They must be subject to discipline when they are found to have breached the code following a fair procedure before an independent and impartial body.

There is no separate code of judicial conduct in Morocco, but the 1974 Law on the Statute for Judges and the 1974 Law on the Organisation of the Judiciary set forth some standards for judicial behaviour. These laws are due to be replaced by the new organic laws on the Statute for Judges and the CSPJ. In view of this anticipated law reform, this section will discuss international law and standards applicable to both judicial ethics and discipline. It will then provide a summary of the standards and disciplinary system currently in force in Morocco, in the light of these international standards. Finally it will make recommendations for legal reform with a view to ensuring that the laws as amended will set out standards of judicial conduct and a disciplinary system that are consistent with international standards and enhance accountability.

1. International law and standards

i) Judicial ethics

Ethical standards for judges in the discharge of their professional duties should be set down in law or codes of conduct.¹²⁸ The leading international guidance on judicial ethics is the Bangalore Principles of Judicial Conduct (the Bangalore Principles), which was drafted by a group of chief justices under the auspices of the UN.¹²⁹ The

¹²⁶ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2004/60 (2003), para. 40.

¹²⁷ UN Basic Principles on the Independence of the Judiciary, Principle 2

¹²⁸ CoM Recommendation (2010)12, para 73; International Bar Association Minimum Standards of Judicial Conduct, para 29(b); Singhvi Declaration, para. 27.

¹²⁹ For drafting history see UNODC, Commentary on the Bangalore Principles of Judicial Conduct (September 2007).

Bangalore Principles were subsequently endorsed by resolutions of the UN Commission on Human Rights and the Economic and Social Council.¹³⁰

The Bangalore Principles are organized around six core values: independence, impartiality, integrity, propriety, equality and competency and diligence. For example, Principle 1.3 provides: "A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches, but must also appear to a reasonable observer to be free therefrom".¹³¹ Under Principle 2.5, a judge "shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially". Such situations include where the judge previously served as a lawyer or was a material witness in the case or has personal knowledge of the case, or where the judge or a member of the judge's family "has an economic interest in the outcome of the matter in controversy".¹³² A judge and members of the judge's family "shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties".¹³³ The same restriction applies to court staff "or others subject to the judge's influence, direction or authority".¹³⁴

Grounds for and decisions about discipline, including removal, of a judge must be based on these ethical standards.¹³⁵ The UN Basic Principles provide: "All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."¹³⁶

Judges should play a leading role in the development of such codes and should be able to seek advice on ethics from a body within the judiciary.¹³⁷

ii) Judicial discipline

As discussed in greater detail above in Section B 1 (Statute for Judges), any allegation of judicial misconduct must be investigated independently, impartially, thoroughly and fairly and adjudicated in the context of fair proceedings before a competent, independent and impartial body, in which a judge's rights are respected. Decisions to discipline a judge must be based on the established standards of judicial conduct and the sanctions, including disciplinary measures or sanctions, suspension or removal must be proportionate and subject to appeal before an independent judicial body.¹³⁸

¹³⁰ Commission on Human Rights Resolution 2003/43, UN Doc. E/CN.4/2003/L.11/Add.4; UN Economic and Social Council (ECOSOC), Strengthening Basic Principles of Judicial Conduct, UN Doc. E/RES/2006/23.

¹³¹ Bangalore Principles, Principle 1.3.

¹³² Bangalore Principles, Principles 2.5.1, 2.5.2, and 2.5.3. The Singhvi Declaration and the Burgh House Principles on the Independence of the International Judiciary contain similar prohibitions.

¹³³ Bangalore Principles, Principle 4.14.

¹³⁴ Bangalore Principles, Principle 4.15.

¹³⁵ UN Basic Principles on the Independence of the Judiciary, Principle 19.

¹³⁶ See UN Basic Principles on the Independence of the Judiciary, Principle 19.

¹³⁷ Bangalore Principles, para.8 of the preamble ("WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country."); see also Committee of Ministers Recommendation (2010)12, paras. 73 & 74; and see *Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, International Commission of Jurists, Geneva, 2011, p.211.

¹³⁸ CoM Recommendation (2010)12, para. 69; UN Basic Principles on the Independence of the Judiciary, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

Furthermore, to safeguard judicial independence, the law should guarantee that judges enjoy personal immunity from suits for damages for improper acts or omissions in the exercise of their judicial functions.¹³⁹ Judges should not be subject to any discipline or civil liability for the manner in which they interpret the law, assess the facts or weigh the evidence.¹⁴⁰ Nor should judges be subject to disciplinary procedures if their decisions are overruled or modified on appeal.¹⁴¹ The State may however be responsible for ensuring adequate reparation for improper acts or omissions of judges committed in the exercise of their judicial functions. Judges should also be granted immunity in relation to criminal acts committed in the course of their judicial functions.¹⁴² Criminal liability may arise for exceptionally serious criminal conduct, such as responsibility for corruption or human rights violations. Judges like other individuals are also accountable in criminal law for acts they may commit in their private capacity.¹⁴³

2. Current standards on judicial conduct and discipline

i) Judicial conduct

Although there is no separate code of judicial conduct *per se* in Morocco, provisions in the 1974 Law on the Statute for Judges, the Organisation of the Judiciary Law, the Code of Civil Procedure, and the Criminal Code impose certain duties on judges in respect of their professional conduct.

Articles 13 to 22 of the 1974 Law on the Statute for Judges detail the rights and responsibilities of judges. Upon taking office, judges must take an oath to faithfully discharge their duties, to keep deliberations secret and to conduct themselves as a dignified and loyal judge.¹⁴⁴ Judges are prohibited from engaging in political deliberations or demonstrations as well as any actions aimed at impeding the functioning of the courts.¹⁴⁵ They are also forbidden from forming or joining trade unions.¹⁴⁶ Article 19 requires judges to refrain from communicating to anyone copies of, or extracts or information received from, case files. Article 15 prohibits judges from pursuing paid or unpaid activity outside of their professional functions, subject to exceptions that can be granted by the Minister of Justice. Articles 16 and 17 impose requirements of financial disclosure on judges and set out provisions to prevent potential conflicts of interest. Article 58 requires that any prejudice by judges against their professional duties, honour, finesse or dignity can be subject to disciplinary sanctions. Under the Law on the Organisation of the Judiciary, judges are prohibited from sitting on the same court with a judge to whom they are related, unless certain exemptions apply, or from hearing cases where a relative is a solicitor for one of the parties in the case.¹⁴⁷

If a judge abandons his or her post or retires before the mandatory retirement age, the judge is served with a notice ordering him or her to return to work and, within seven days of receipt of the notice, can be ordered to do so.¹⁴⁸ If the judge does not

¹³⁹ UN Basic Principles on the Independence of the Judiciary, Principle 16.

¹⁴⁰ ACHPR Principles and Guidelines, Section A, Principle 4(n) ("Judicial officers shall not be: (i) liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions")

¹⁴¹ CoM Recommendation (2010)12, para. 70; see also ACHPR Principles and Guidelines, Section A, Principle 4(n)(ii); Concluding Observations of the Human Rights Committee on Vietnam, UN Doc. CCPR/CO/75/VNM, para. 10.

¹⁴² ACHPR Principles and Guidelines, Section A, Principle 4(n)

¹⁴³ CoM Recommendation (2010)12, para. 71.

¹⁴⁴ Law No. 1-74-467, Article 18.

¹⁴⁵ Article 13.

¹⁴⁶ Article 14.

¹⁴⁷ Law on the Organisation of the Judiciary, No. 1-74-338 of 1974, Articles 24 and 25.

¹⁴⁸ Law No. 1-74-467, Article 63.

return within this period he or she can be subject to dismissal, with or without pension rights, by royal decree, on the advice of the CSM.¹⁴⁹

In addition, Article 391 of the Code of Civil Procedure stipulates that a claim for damages can be lodged against a judge in cases of wilful misrepresentation, fraud or misappropriation; if claims for compensation are expressly provided for in legislation; or in cases of denial of justice. Article 392 defines "denial of justice" as when a judge refuses to rule on a request or neglects to rule on a case at the appropriate time for a hearing. Article 148 of the Criminal Code of Procedure which prohibits the detention of an individual for more than 24 hours without being interrogated, states: "any judge or official who ordered or knowingly tolerated such detention is liable to penalties for arbitrary detention".

ii) Procedures for judicial discipline

Articles 58 through 63 of the 1974 Statute for Judges set forth the disciplinary regime.

Disciplinary proceedings are initiated by the Minister of Justice who, upon receipt of allegations of a judge's misconduct, refers the matter to the CSM and, after consultation with the *ex officio* members of the CSM, appoints a rapporteur to investigate the case.¹⁵⁰ The rapporteur must be judge of a higher grade than the judge being investigated. Following the investigation by the rapporteur, the CSM reviews the report of the rapporteur and may order a further investigation. Where the matter is also the subject of criminal proceedings, the CSM may suspend the disciplinary procedure until there has been a final decision, not subject to review, on the criminal proceedings.¹⁵¹

The judge under investigation is entitled to have access to the investigative file, with the exception of the opinion of the rapporteur.¹⁵² The judge is also entitled to a hearing and to eight days' notice before the date on which the CSM meets to consider the case. He or she can be assisted during the hearing by a colleague or a lawyer.¹⁵³

In cases in which criminal proceedings are brought or in other cases of allegations of serious misconduct, a judge may be suspended from carrying out his or her duties immediately by an order of the Minister of Justice, either with or without a reduction in salary.¹⁵⁴ If a judge is suspended, the CSM must convene as soon as possible and, in any event, a final decision must be made within four months of the date on which the suspension began.¹⁵⁵ If no decision is taken or no sanction imposed within this time period, the judge is entitled to the reinstatement of his or her full salary and to the recovery of deductions, where applicable.¹⁵⁶ The only exception to this is where criminal proceedings have been initiated. In such cases, any final decision is deferred until the criminal case has been completed, at which point the judge may be entitled to claim reimbursement of deductions provided a final decision on the disciplinary proceedings against him/her has been delivered.

The law sets out two types of sanctions against judges found to have engaged in misconduct. In the first category are warnings; reprimands; delays in promotion for a period of two years; and deletions from the shortlist for promotions. The second category consists of: demotions; suspensions from office for up to six months,

¹⁴⁹ *Id.* The decision takes effect from the day the judge abandoned his or her post.

¹⁵⁰ Law on the Statute for Judges, No. 1-74-467, Article 61.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Law No. 1-74-467, Article 62. Family benefits are excluded from any deductions.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

without pay except for family benefits; compulsory retirement or cessation of office without a pension; and dismissal, with or without a pension.¹⁵⁷ The last two penalties in the first category and the first two penalties of the second category may also be combined with a transfer of office.¹⁵⁸

Sanctions are imposed by order of the Minister of Justice for first category sanctions and by royal decree for second category sanctions. In both cases the decision must be taken after consultation with the CSM.¹⁵⁹ Decisions of the Minister of Justice can be challenged before the administrative courts. However, according to consistent jurisprudence of the Moroccan courts, royal decrees cannot be subject to any form of appeal or review.¹⁶⁰

3. Assessment of national law in light of international standards

Although Article 58 of the 1974 Statute for Judges defines disciplinary offences, the wording of this Article is vague and not precise. Deciding what constitutes failure to comply with obligations of honour, finesse or dignity is left in the hands of the executive. The executive also controls the current system of judicial discipline, including the initiation of disciplinary proceedings. Furthermore, although lesser sanctions are subject to review, those sanctions imposed by royal decree are immune from judicial review. This is inconsistent with international standards on the right of judges to challenge any disciplinary decision or sanction. Finally, the fact that a judge is denied access to the opinion of the rapporteur means that there is no guarantee of the fairness of the disciplinary procedure.

This system of judicial discipline is therefore inconsistent with international standards. It exposes judges to improper political pressure. Although the 2011 Constitution mandates the creation of a new disciplinary system, it does not protect the right to the full review of any decision taken by the CSPJ. Decisions may only be challenged for abuse of power, which again would appear to be inconsistent with international standards.

The new laws on the CSPJ and Statute for judges should provide for a comprehensive reform of the current disciplinary system in full compliance with international standards.

Under these standards, disciplinary proceedings should be based on an established code of conduct. This code should be sufficiently detailed to ensure that judges have notice of what conduct is prohibited and to prevent problems of arbitrary interpretation. International law and standards also impose certain procedural guarantees on the judicial disciplinary system. As the UN Basic Principles provide, charges made against a judge in his or her professional capacity must be "processed expeditiously and fairly under an appropriate procedure".¹⁶¹ These requirements include the right to a fair hearing before an independent authority or a court and the right to challenge the decision or sanction.¹⁶² In General Comment No. 32, the Human Rights Committee stated: "Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial

¹⁵⁷ Law No. 1-74-467, Article 59.

¹⁵⁸ *Id.*

¹⁵⁹ Law No. 1-74-467, Article 60.

¹⁶⁰ Decision *société Propriété agricole Abdelaziz contre président du conseil et ministre de l'agriculture*, publié *Revue juridique et politique, indépendance et coopération*, 1970, P. 541

¹⁶¹ UN Basic Principles on the Independence of the Judiciary, Principle 17.

¹⁶² CoM Recommendation (2010) 12, para. 69.

protection being available to contest the dismissal is incompatible with the independence of the judiciary."¹⁶³

Further specific concerns and recommendations are set forth below.

i) The development of code of ethics and a new disciplinary regime

In view of the absence of a separate and distinct code of conduct for judges in Morocco, it is very important, in terms of legal certainty and public confidence in the judiciary, that such a code be incorporated into either the new organic law on the Statute for Judges or the organic law concerning the CSPJ. This will enable both judges and the public to have a clear understanding of the framework for the performance of judicial duties and situations in which and the procedures through which judges will be held to account.

The ICJ considers that Morocco should look to the Bangalore Principles in developing its code of judicial ethics. The Singhvi Declaration and the Burgh House Principles on the Independence of the International Judiciary also contain ethical standards, which are similar to the Bangalore Principles but in some instances more detailed. For example, the Singhvi Declaration provides: "A judge shall ensure the fair conduct of the trial and inquire fully into any allegations made of a violation of the rights of a party or of a witness, including allegations of ill-treatment".¹⁶⁴ The current listing of disciplinary offences, as reflected in Article 58 of the 1974 Statute for Judges, is far too vague. Furthermore, in order to safeguard the independence of judges, the drafters should ensure that in the new Code, with respect to issues on which a judge may apply for an exception or derogation from a given rule (such as is currently the case with non-judicial activities under Article 15 of the 1974 Law), that the Minister of Justice does not have sole decision-making authority.

The development of such a code should be done either by the judiciary itself or at a minimum in close consultation with the judiciary.¹⁶⁵

In terms of the disciplinary procedure, the new organic law on the CSPJ will set forth the rules of disciplinary procedure. Insofar as the current 1974 Statute for Judges contains certain procedural safeguards, it is important that the new organic law on the Statute for Judges ensures that the procedures are fair, are heard and determined before an independent and impartial body and respect the rights of the judges, including to due process. It is also important that the findings and any sanctions imposed may be appealed by the judge to a higher independent and impartial body. The right to legal representation should be preserved. Adequate time for the preparation of defence should be provided for.

Under the current 1974 Statute for Judges, neither the judge nor his or her legal counsel is entitled to view the opinion of the rapporteur. This is a serious deficiency given that the rapporteur's opinion is likely to be the basis of any disciplinary decision. Although disciplinary proceedings are not the same as a criminal case, the Human Rights Committee has held that whenever "a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee

¹⁶³ Human Rights Committee, General Comment No. 32, para. 20.

¹⁶⁴ Singhvi Declaration, para. 37.

¹⁶⁵ Bangalore Principles, para.8 of the preamble ("WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country."); see also *Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, International Commission of Jurists, Geneva, 2011, p.211.

of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee".¹⁶⁶

The new organic law on the Statute for Judges should guarantee judges suspected of judicial misconduct the right to a fair hearing by an independent body and should ensure that decisions are based on accepted standards of judicial conduct that are consistent with international standards. The law should be drafted in a manner so as to ensure that any sanction imposed following a finding of misconduct is proportionate, and should ensure that any decision and sanction imposed is subject to review or appeal by a higher independent body.

In addition, the law should be amended so as to reduce the degree of executive power over the judiciary. In particular, the law should divest the Minister of Justice of the authority to initiate disciplinary proceedings, appoint rapporteurs to investigate allegations of misconduct and to provisionally suspend judges from office. The law should also divest the authority of the executive to pronounce disciplinary sanctions against judges. Furthermore, as discussed in Sections A and B above, judicial inspectors, as provided for in Article 116 of the 2011 Constitution, and the Judicial Inspection Service as a whole should be removed from the control of the Minister of Justice and placed under the oversight of CSPJ.

ii) Criminal and civil liability

For acts committed in their private capacity, judges are subject to the same laws that apply to other individuals. However, it is important that protections are in place to ensure that criminal or civil proceedings are not used to undermine the impartiality or independence of judges.

Article 122 of the 2011 Constitution states that "*damages caused by a judicial error create a right to a reparation by the State*". This suggests, in line with international standards, including Principle 16 of the UN Basic Principles, that while States are liable for harm suffered as a result of a decision of or misconduct by a judge in the course of their professional duties, judges themselves are not susceptible to civil liability for their judicial decisions. However, the new Constitution does not clarify - what is set out in international standards - that judges should enjoy immunity from civil damages for acts or omissions committed in the exercise of their judicial functions. It is also silent on the criminal liability of judges.

The new organic law on the Statute for Judges should therefore clarify that the State is liable for harm suffered as a result of acts or omissions committed by a judge in the improper or unlawful exercise of his or her judicial duties and set out civil and criminal immunity for actions taken by judges in the exercise of their judicial functions. Criminal liability may arise for exceptionally serious criminal conduct, such as responsibility for corruption or human rights violations.

4. Recommendations

In order to secure the accountability of the judiciary without undermining its independence and impartiality, the Moroccan authorities should ensure that:

- i. A sufficiently detailed and comprehensive code of ethics, in line with the Bangalore Principles, is developed by the members of the judiciary or in close consultation with them;**

¹⁶⁶ *Paul Peterer v. Austria*, Human Rights Committee Communication No. 1015/2001, Views of 20 July 2004, UN Doc. CCPR/C/81/D/1015/2001 (2004), para. 10.7.

- ii. **This code of ethics is established in law as the basis on which judges will be held to account professionally;**
- iii. **A disciplinary procedure for addressing complaints against judges for alleged breaches of the code of ethics is set out in law and affords judges the right to a fair hearing before an independent and impartial body and to due process guarantees, as well as the right to have decisions and sanctions reviewed by a higher, independent, impartial and judicial body in line with international standards, including:**
 - a. **the prompt, independent, impartial, fair and expeditious determination of the complaint;**
 - b. **the right to consult and be represented by legal counsel;**
 - c. **a reasonable amount of time to prepare a defence and the provision of all relevant information relating to the complaint;**
 - d. **the right to a full hearing by the independent and impartial decision-making body, during which the judge has an opportunity to present a defence;**
 - e. **the decision to be made on the basis of the code of ethics, in the light of objective and relevant evidence;**
 - f. **in the event of a finding of misconduct, ensuring a range of sanctions and the imposition of proportionate sanctions;**
 - g. **the complaint or charges to be kept confidential until a decision is made, unless the judge concerned decides otherwise;**
 - h. **the disciplinary decision to be published upon its determination; and**
 - i. **the right of the judge to appeal against any disciplinary decision or sanction to an independent higher tribunal;**
- iv. **The disciplinary procedure does not undermine the independence and impartiality of the judiciary and, to this end:**
 - a. **ensure that the CSPJ has oversight of the disciplinary process, including over the appointment and functioning of judicial inspectors, the Judicial Inspection Service and over the initiation of disciplinary proceedings and the imposition of interim measures and disciplinary sanctions; and**
 - b. **end the powers of the executive in relation to the disciplinary procedure, including the ability to refer matters to the disciplinary board, appoint rapporteurs, suspend judges pending a disciplinary decision and impose sanctions;**
- v. **The law be amended and clarify that judges are generally immune from civil and criminal liability arising from the conduct of their judicial functions. Criminal liability may arise for exceptionally serious criminal conduct, such as responsibility for corruption or human rights violations; and**
- vi. **The law clarify that the State should guarantee compensation for any harm suffered by individuals as a result of acts or omissions by judges in the improper or unlawful exercise of their judicial duties.**

D. Military Courts

The military court system was established by Royal Decree No. 1-56-270 of 10 November 1956 on the Code of Military Justice (the CMJ).¹⁶⁷ The military justice system consists of the court of the royal armed forces and, in times of war, the military court of the army, as well as the Court of Cassation in certain cases specified by the CMJ.

¹⁶⁷ Royal Decree No.1-56-270 of 10 November 1956 on the Code of Military Justice, as amended.

This section will discuss the international law and standards applicable to military courts. It will then summarize the features of the current system of military justice and will conclude with recommendations for significant reforms to bring the military courts into compliance with Morocco's human rights obligations.

1. International law and standards

The guarantees of Article 14 of the ICCPR apply to all courts, including military ones. The Human Rights Committee has explained that these guarantees apply regardless of whether the court is "ordinary or specialized, civilian or military".¹⁶⁸ Moreover, everyone has the right to be tried "by ordinary courts or tribunals using established legal procedures".¹⁶⁹ Military courts are not ordinary courts. Therefore, their use to try civilians is considered deeply problematic. Due to concerns about the purpose of military courts and their lack of independence and impartiality, a range of human rights expert bodies and mechanisms recommend that military courts be used only to try members of the military and then only for military-related offences. Military courts should not be used to try human rights violations, including but not limited to torture, enforced disappearance and extrajudicial and summary execution. Military courts also should have no jurisdiction over offences committed by civilians, even where the target or victim of the offence is the military. The scope of these restrictions are discussed in greater detail below.

i) Subject matter jurisdiction: trial of non-military related offences

Subject matter jurisdiction, or *ratione materiae*, refers to a court's authority to hear and decide a particular type of case. It is separate from questions of personal, or *in personam*, jurisdiction which refers to whether a court has jurisdiction over a particular person. Under international law and standards, the subject matter jurisdiction of military courts should be limited to military-related offences.

The Human Rights Committee and other treaty monitoring bodies and special procedures, as well as regional human rights standards and bodies, have addressed the issue of bringing military personnel accused of human rights violations to trial in military courts. An ICJ study in 2004 found that the human rights treaty bodies and mechanisms of the UN Commission on Human Rights (the precursor to the UN Human Rights Council), as well as the Inter-American Court and Commission on Human Rights, had concluded that this practice was incompatible with international human rights law. This is because "gross human rights violations – such as extrajudicial executions, torture and enforced disappearance – carried out by members of the military or police cannot be considered to be military offences, service-related acts, or offences committed in the line of duty".¹⁷⁰

This is consistent with other sources of international law and standards. For example, the ACHPR Principles and Guidelines state: "the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel".¹⁷¹ The Inter-American Court and Commission have held that military tribunals may not "be used to try violations of human rights or other crimes that are not related to the functions that the law assigns to military forces and that should therefore be heard by the regular courts".¹⁷² Thus in a case concerning Brazil, the

¹⁶⁸ Human Rights Committee, General Comment No. 32, para. 22.

¹⁶⁹ UN Basic Principles on the Independence of the Judiciary, Principle 5.

¹⁷⁰ Federico Andreu-Guzman, *Military jurisdiction and international law: military courts and gross human rights violations*, Vol. I, International Commission of Jurists, Geneva, 2004, p.12.

¹⁷¹ ACHPR Guidelines and Principles, Section A, Principle L(a).

¹⁷² Report on Terrorism and Human Rights, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 232; see also *Judgment of 6 August 2000*, IACtHR, Durand and Ugarte v. Peru, paras. 117 and 118 (noting that military's actions were "common crimes" and should be under "ordinary justice").

Inter-American Commission stated that “trying common crimes as though they were service-related offences merely because they were carried out by members of the military violates the guarantee of an independent and impartial court”.¹⁷³ In its recommendations issued to member states on improving the administration of justice, the Inter-American Commission observed: “Military justice has merely a disciplinary nature and can only be used to try Armed Forces personnel in active service for misdemeanours or offences pertaining to their function. In any case, this special jurisdiction must exclude the crimes against humanity and human rights violations”.¹⁷⁴

Similarly, the Human Rights Committee and the Committee Against Torture have repeatedly expressed concern when military tribunals’ jurisdiction includes human rights offences committed by members of the military.¹⁷⁵ The Committee on the Rights of the Child has also stated that violations of human rights and children’s rights “should always be examined by civilian courts under civilian law, not military courts”.¹⁷⁶

The Draft Principles Governing the Administration of Justice through Military Tribunals (hereafter referred to as the Decaux Principles), which were adopted by the then UN Sub-Commission on the Promotion and Protection of Human Rights in 2005, are consistent with the above-referenced jurisprudence. The Decaux Principles state:

“In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.”¹⁷⁷

In addition, the Inter-American Convention on Forced Disappearance of Persons and the UN Declaration on the Protection of All Persons from Enforced Disappearance, both specifically exclude the use of military courts for trials of individuals charged with acts of enforced disappearance.¹⁷⁸

¹⁷³ *Report No. 55/01 of 16 April 2001*, Inter-American Commission on Human Rights, Case Nos. 11.286, 11.406, 11.407, 11.412, 11.413, 11.415, 11.416 and 11.417, *Aluisio Cavalcante et al. v. Brazil*, para. 153.

¹⁷⁴ IACHR Annual Report 1997, OAS Doc. OEA/Ser.L/V/II.98 doc. 6 rev. 13 (1998), Ch. VII Recommendation I.

¹⁷⁵ Concluding Observations of the Human Rights Committee on Venezuela, UN Doc. CCPR/C/79/Add.14, para. 10; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/79/Add.66, para. 315; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/BRA/CO/2, para. 9; Concluding Observations of the Human Rights Committee on Colombia, UN Doc. CCPR/C/79/Add2, para. 393; Conclusions and Recommendations of the Committee against Torture on Guatemala, UN Doc. CAT/C/GTM/CO/4, para. 14; Concluding Observations of the Human Rights Committee on the Democratic Republic of Congo, UN document CCPR/C/COD/CO/3, para. 21; Conclusions and Recommendations of the Doc. against Torture on Mexico, UN Doc. CAT/C/MEX/CO/4, para. 14; Conclusions and Recommendations of the Committee against Torture on Peru, UN Doc. CAT/C/PER/CO/4, para. 16. See generally *Military jurisdiction and international law*, pp. 61-71.

¹⁷⁶ Concluding Observations of the Committee on the Rights of the Child on Colombia, UN Doc. CRC/C/15/Add.30, para. 17.

¹⁷⁷ Draft Principles Governing the Administration of Justice through Military Tribunals, UN Doc. E/CN.4/2006/58, Principle 9 (hereafter “Decaux Principles”).

¹⁷⁸ See Inter-American Convention on Forced Disappearance of Persons, Article IX; Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133, para. 16. (“They shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.”). But note that the *Convention on the Protection of All Persons from Enforced Disappearance* states only that persons tried for such an offence “shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law”. See Article 11(3).

ii) Personal jurisdiction: trial of civilians and juveniles

Military courts are specialized courts, not ordinary courts. The UN Basic Principles provide: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".¹⁷⁹ Similarly, the ACHPR Principles and Guidelines state that military courts should not "in any circumstances whatsoever have jurisdiction over civilians".¹⁸⁰ The Singhvi Declaration states that the "jurisdiction of military tribunals shall be confined to military offences".¹⁸¹

In General Comment No. 32, the Human Rights Committee stated that while the ICCPR "does not prohibit the trial of civilians in military courts or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned."¹⁸² The Committee further stated that military trials of civilians should be "exceptional" and "limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials".¹⁸³

However, the Committee has called on a number of countries to prohibit trials of civilians by military courts.¹⁸⁴ Indeed, as described by the Special Rapporteur on the independence of judges and lawyers, there is a developing consensus in international law towards the prohibition of military trials for civilians.¹⁸⁵ The Working Group on Arbitrary Detention, the Committee against Torture, and the Special Rapporteur have taken the position that military courts are incompetent to try civilians.¹⁸⁶

In *Incal v. Turkey*, the European Court heard the case of the trial of a civilian by a specialized security court one of whose members was a military judge. Although it noted that domestic law provided certain procedural guarantees of independence and impartiality, nevertheless the applicant had legitimate fears about a judge who remained subject to military discipline. There was thus a violation of Article 6 of the European Convention.¹⁸⁷

The Inter-American human rights system has also denounced the use of military courts to prosecute civilians for security offences in times of emergency. "The basis of this criticism has related in large part to the lack of independence of such tribunals from the executive and the absence of minimal due process and fair trial guarantees in their processes."¹⁸⁸ The Inter-American Commission noted that "military tribunals

¹⁷⁹ UN Basic Principles on the Independence of the Judiciary, Principle 5.

¹⁸⁰ ACHPR Principles and Guidelines, Section A, Principle L (c).

¹⁸¹ Singhvi Declaration, Principle 5(f).

¹⁸² Human Rights Committee, General Comment No. 32, para. 22.

¹⁸³ Id.

¹⁸⁴ HRC Concluding Observations: [Slovakia](#), UN Doc. CCPR/C/79/Add.79 (1997) §20; see also HRC Concluding Observations: [Lebanon](#), UN Doc. CCPR/C/79/Add.78 (1997) §14; [Chile](#), UN Doc. CCPR/C/CHL/CO/5 (2007) §12; [Tajikistan](#), UN Doc. CCPR/CO/84/TJK (2004) §18; [Ecuador](#), UN Doc. CCPR/C/ECU/CO/5 (2009) §5

¹⁸⁵ Report of the Special Rapporteur on the independence of judges and lawyers (Mission to Peru), UN Doc. E/CN.4/1998/39/Add.1, paras. 78-79; see also Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 36.

¹⁸⁶ Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, para. 8; Report of the Special Rapporteur on the independence of judges and lawyers (Mission to Peru), UN Doc. E/CN.4/1998/39/Add.1, paras. 78-79.

¹⁸⁷ *Incal v. Turkey*, ECtHR, Application No. 41/1997/825/1031, Judgment of 9 June 1998, paras. 67-68 & 72-73.

¹⁸⁸ Report on Terrorism and Human Rights, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, paras. 230 & 256. See also

by their very nature do not satisfy the requirements of independent and impartial courts applicable to the trial of civilians, because they are not a part of the independent civilian judiciary but rather are a part of the executive branch, and because their fundamental purpose is to maintain order and discipline by punishing military offenses committed by members of the military establishment".¹⁸⁹ In *Las Palmeras*, the Inter-American Court, referring to prior case law, stated that "in a democratic state of laws, the criminal military jurisdiction is to be restricted and exceptional in scope and intended to protect special juridical interests associated with the functions that the law assigns to the military forces. Hence, military personnel are to be tried for crimes or misdemeanours that, by their nature, harm the juridical interests of the military".¹⁹⁰

The Decaux Principles provide:

"Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts."¹⁹¹

As for juveniles, they have "at least the same guarantees and protection as are accorded to adults" under Article 14 of the ICCPR.¹⁹² In addition, as the Human Rights Committee recognizes, they need special protection. In General Comment No. 32, the Committee stated that juveniles should be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence, be tried as soon as possible in a fair hearing in the presence of legal counsel, taking into account their age or situation.¹⁹³ Detention before and during trial is to be avoided to the extent possible. States should establish "an appropriate juvenile criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age".¹⁹⁴ Furthermore, measures "other than criminal proceedings" should be considered.¹⁹⁵

Articles 37 and 40 of the *Convention on the Rights of the Child* list specific safeguards for individuals under the age of 18 at the time of the alleged crime. The arrest and detention of children should be a measure of last resort and for the shortest appropriate period of time. Children should be held separately from adults when deprived of their liberty. They have the right to access legal advice and representation and to a prompt hearing before a competent, independent and impartial court.¹⁹⁶ In its concluding observations, the Committee on the Rights of the Child has urged States to ensure that a military tribunal tries no child.¹⁹⁷

Likewise, the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), adopted by the General Assembly in 1985, stipulate that each national jurisdiction should undertake to establish a "set of laws, rules and provisions specifically applicable to juvenile offenders".¹⁹⁸ Incarceration is to be avoided and the

Judgment of 30 May 1999, Inter-American Court of Human Rights, Castillo Petruzzi et al. v. Peru, para. 128.

¹⁸⁹ *Report on Terrorism and Human Rights*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 231.

¹⁹⁰ *Judgment of 6 December 2001*, Inter-American Court of Human Rights, *Las Palmeras Case*, para. 51 (citing *Judgment of 18 August 2000*, Cantoral Benavides Case, para. 113).

¹⁹¹ Decaux Principles, Principle 5.

¹⁹² Human Rights Committee, General Comment No. 32, para. 42.

¹⁹³ Human Rights Committee, General Comment No. 32, paras. 42-44.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Article 37 of the Convention on the Rights of the Child.

¹⁹⁷ See, e.g., Concluding Observations of the Committee on the Rights of the Child on the Democratic Republic of Congo, UN Doc. CRC/C/15/Add.153, para. 75.

¹⁹⁸ A/RES/40/33, Rule 2.3.

"well-being of the juvenile shall be the guiding factor in the consideration of her or his case".¹⁹⁹

Principle 7 of the Decaux Principles categorically rule out the jurisdiction of military tribunals to try individuals under the age of 18 at the time of the crime. As the Decaux Principles explain, "A fortiori these protective arrangements rule out the jurisdiction of military courts in the case of persons who are minors".²⁰⁰

iii) Fair trial before an independent and impartial tribunal

Where a member of the military is brought before a military tribunal for a military-related offence, he or she is entitled to all the fair trial guarantees of international law. Article 14 of the ICCPR applies to all courts and tribunals, regardless of whether they are ordinary or specialized, civilian or military.²⁰¹ In addition, the fair trial guarantees of international humanitarian law "parallel to a large extent those prescribed under applicable international human rights law, and indeed were drawn largely from human rights law".²⁰² Protocol I to the Geneva Conventions provides for an "impartial and regularly constituted court". Protocol II refers to a "court offering the essential guarantees of independence and impartiality". As the Decaux Principles state, "If respect for these judicial guarantees is compulsory during armed conflicts, it is not clear how such guarantees could not be absolutely respected in the absence of armed conflict. The protection of rights in peacetime should be greater than, if not equal to, that recognized in wartime."²⁰³ The Human Rights Committee has observed that even during states of emergency, no derogation is permitted from the requirements of fair trial.²⁰⁴

In a number of cases the European Court of Human Rights has examined the applicability of Article 6 of the European Convention to military proceedings involving military personnel. The independence and impartiality of a court are assessed with regard to "the manner of the appointment of its members, their terms of office, the existence of guarantees against outside pressures and whether the military criminal courts presented an appearance of independence".²⁰⁵

In *Findlay v. the United Kingdom*, the European Court concluded that the fact that the other members of the court-martial board were subordinate to the convening officer and under his command and that the convening officer had the power to dissolve the court-martial and also acted as confirming officer, ratifying the sentence, meant that there had been a violation of the applicant's right to an independent and impartial tribunal.²⁰⁶ In a case involving Turkey, the Court found that the presence of lay judges was permissible under the European Convention but the fact that these lay judges were appointed by their "hierarchical superiors" and "subject to military

¹⁹⁹ A/RES/40/33, Rule 17.1.

²⁰⁰ Decaux Principles, para. 26. The Decaux Principles note that young volunteers present a "borderline case" if a state has not ratified the Optional Protocol on the involvement of children in armed conflicts. However Morocco ratified the Optional Protocol on 22 May 2002.

²⁰¹ Human Rights Committee, General Comment No. 32, para. 22; Concluding Observations of the Human Rights Committee on the Democratic Republic of the Congo, UN Doc. CCPR/C/COD/CO/3, para. 21. See also Decaux Principles, Principle No. 2; ACHPR, Principles and Guidelines, Principle L(b).

²⁰² *Report on Terrorism and Human Rights*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 254 (citing ICRC Commentary on the Additional Protocols).

²⁰³ Decaux Principles, para. 18.

²⁰⁴ Human Rights Committee, General Comment No. 29, States of emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, para. 16.

²⁰⁵ *Ibrahim Gurkan v. Turkey*, ECtHR, Application No. 10987/10, Judgment of 3 July 2012, para. 17.

²⁰⁶ *Findlay v. the United Kingdom*, ECtHR, Application No. 22107/03, Judgment of 25 February 1997, paras. 75-80.

discipline" led to the finding of a violation.²⁰⁷ The Turkish judgment came after the Constitutional Court of Turkey found that "domestic legislation in force at the time did not provide sufficient safeguards against the risk of outside pressures on the members of the military criminal courts", thus leading the European Court to reconsider the military courts in that country.²⁰⁸

The independence and impartiality of military courts must be guaranteed by law. The selection of judges should be based on clear criteria to ensure that individuals are chosen on the basis of merit. Although international law does not prohibit the appointment of judges by the executive branch, certain safeguards must be adopted to ensure independence and impartiality.²⁰⁹ Where there is a judicial council charged with appointing judges for ordinary courts, that council should play a role in the selection of judges for military courts. Further, military judges must have statutory independence from the military chain of command in the course of carrying out their judicial functions. They should also have security of tenure prior to the expiration of their terms, and should be held accountable according to a clearly defined code of ethics.

Article 14 of the ICCPR requires that all persons charged with a criminal offence be informed promptly and be given adequate time and facilities for the preparation of their defence. In General Comment No. 32, the Human Rights Committee stated that what counts as "adequate time" depends on the circumstances of each case. "If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed."²¹⁰

In addition "adequate facilities" must include access to "all materials that the prosecution plans to offer in court against the accused or that are exculpatory".²¹¹

Furthermore, trials should be public unless one of the specific grounds for excluding the public or the press from all or part of the proceedings applies.²¹² However, in all cases the judgment must be made public except where the interest of juvenile persons otherwise requires.²¹³ Indeed, the Decaux Principles explicitly recognize that "a statement of the grounds for a court ruling is a condition sine qua non for any possibility of a remedy and any effective supervision" and further that "military secrecy may not be invoked . . . to obstruct the publication of court sentences".²¹⁴

Any decision by a military tribunal should be subject to review by a higher court.²¹⁵ The Inter-American Commission has explained: "For a lawful and valid review of the

²⁰⁷ *Gurkan v. Turkey*, para. 19. See also *Sramek v. Austria*, ECtHR, Application No. 8790/79, Judgment of 22 October 1984, para. 42 ("Where, as in the present case, a tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society.").

²⁰⁸ *Gurkan v Turkey*, para. 16.

²⁰⁹ See generally Decaux Principles, Principle No. 13 and paras 45-47; see also *Report on Chile*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66 Doc.17 (1985), Ch. VIII, para. 140.

²¹⁰ Human Rights Committee, General Comment No. 32, para. 32.

²¹¹ Human Rights Committee, General Comment No. 32, para 33.

²¹² ICCPR, Article 14(1), Arab Charter, Article 13(b).

²¹³ ICCPR, Article 14(1).

²¹⁴ Decaux Principles, para.50 and Principle 10(d).

²¹⁵ See generally, *Report on Chile*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66 Doc.17 (1985), Ch. VIII, para. 172; Singhvi Declaration, Principle 5(f); Decaux Principles, Principle No. 15.

judgment in compliance with human rights standards, the higher court must have the jurisdictional authority to take up the merits of the particular case in question and must satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law.²¹⁶ In *Incal*, the European Court found appellate review lacking where the Court of Cassation did not have full jurisdiction.²¹⁷ Decaux Principle 17 states that, where military tribunals exist, "their authority should be limited to ruling in first instance". All appeals should be brought before the civil courts.²¹⁸

2. The current system of military courts

i) Personal and subject matter jurisdiction

In times of peace, the military court of the armed forces has jurisdiction over all crimes and infractions concerning all members of the military, including persons defined by royal or regulatory decree as in "active service".²¹⁹

Jurisdiction also extends to all persons, regardless of whether they are members of the military or not, who commit a crime against a member of the armed forces or equivalent bodies, or who commit a crime involving one or more members of the armed forces as their conspirators or accomplices.²²⁰ Misdemeanours committed by civilians and involving members of the military as accomplices or conspirators are heard before ordinary courts, unless there is a specific provision to the contrary.²²¹

Civilians can also be tried in military courts where the crime is classified as breaching the "external security of the State", in particular aiding the enemy and inciting service in hostile armed forces under Article 187 of the CMJ.²²²

The crimes under the jurisdiction of the military courts also include those set out under the Criminal Code or the specific crimes provided for at Chapter II of the CMJ, including mutiny, sedition and misbehaviour before the enemy.²²³

In addition, military courts have jurisdiction over individuals who were under the age of 18 at the time of the crime if they are members of the military or nationals of an enemy or occupied State.²²⁴

Where a military and civilian court possess concurrent jurisdiction, the case will be heard in the court that has jurisdiction over the offence with the most severe sentence. If the offences carry the same penalty or the crime is desertion, the military court's jurisdiction prevails.²²⁵

²¹⁶ *Report on Terrorism and Human Rights*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 239.

²¹⁷ *Incal v. Turkey*, ECtHR, Application No. 41/1997/825/1031, Judgment of 9 June 1998, para 72.

²¹⁸ Decaux Principles, Principle 17.

²¹⁹ Code of Military Justice, Article 3. Pursuant to Article 3, "Active service" includes young soldiers, voluntary recruits, those who have re-enlisted or are on indefinite leave, temporary recruits or reserve members, from the moment they join until they return home. It also includes those on leave or in military hospitals or prisons or under the jurisdiction of the military court, as well as prisoners of war.

²²⁰ *Id.*

²²¹ *Id.*, Article 8.

²²² *Id.*, Article 4.

²²³ *Id.*, Article 190.

²²⁴ Code of Military Justice, Article 5.

²²⁵ *Id.*, Article 7.

Military courts do not have jurisdiction over civil actions for monetary damages brought by victims. Any civil actions must be brought instead before ordinary courts, once the criminal proceedings before military courts have finished.²²⁶

ii) Composition

For misdemeanors and minor offences, a military court consists of a civilian judge from the Court of Appeal and two military judges. For more serious offences classified as "crimes", the number of military judges is increased to four.²²⁷ Misdemeanors, minor offences and crimes are either provided for by the CMJ (offences of a purely military nature such as desertion, mutiny, sedition and misbehaviour before the enemy) or by the Criminal Code.²²⁸ It is the civilian judge who presides over the military court, regardless of the seriousness of the offence. In a case involving crimes and misdemeanors against the external security of the State, the court will be composed of three civilian judges from the Court of Appeal and four military judges.²²⁹

In all cases the seniority of the civilian judge varies according to the rank of the accused.²³⁰ The military judges who sit on case will also vary in rank depending on the type of offence and the rank of the accused, in accordance with the provisions of Articles 13 to 15 of the CMJ. Where the accused is from a particular division of the army with its own hierarchy, the most senior military judges will be chosen from this division of the army.²³¹ If all the accused are civilians, the military judges must be commanders or captains.²³² Military judges can be replaced by other military judges during proceedings that continue for long periods.²³³

iii) Selection, appointment and conditions and security of tenure

Royal Decree No. 1-77-56 of 12 July 1977 sets out the statute of military judges and includes provisions concerning the appointment and conditions of tenure for military judges.

Following an open competition organised by the Major General of the armed forces, military judges are selected from among officers who hold a law degree or reservists who have a law degree, a minimum rank of lieutenant, and are at least 30 years of age.²³⁴ Once selected, military judges undergo two years of training before they are appointed to a court.²³⁵ Military judges are appointed by a royal decree on the proposal of the Minister of Defence.²³⁶

Following their appointment, the Minister of Defence draws up a list of individuals authorised to sit as military judges, according to their rank and seniority, having received proposals by their commanders.²³⁷ This list is amended on an ongoing basis

²²⁶ *Id.*, Article 9.

²²⁷ *Id.*, Article 11.

²²⁸ Under the Criminal Code, criminal offences are divided depending on their gravity into: Misdemeanors ("contraventions"), which are minor acts or omissions punishable by up to 1 month imprisonment or a fine up to 1200 dirham; Minor offences ("délits"), which are acts punishable by 1 month to 5 years imprisonment; and crimes ("crimes"), which are those acts punishable by the death penalty, life imprisonment or a term of 5 to 30 years' imprisonment.

²²⁹ *Id.*, Article 20.

²³⁰ *Id.*, Article 12.

²³¹ *Id.*, Article 16.

²³² *Id.*, Article 20.

²³³ *Id.*, Article 19.

²³⁴ Royal Decree No. 1-77-56 of 12 July 1977, Article 13.

²³⁵ *Id.*

²³⁶ *Id.*, Article 5.

²³⁷ Code of Military Justice, Article 21.

to take account of changes and promotions and is filed with the military court.²³⁸ The individuals on the list are called to hear a case in order of their registration, unless they are prevented from doing so by an impediment accepted by the Minister of Defence.²³⁹ Where an individual is unable to sit as a judge, by reason of such an impediment or due to a conflict of interest, the individual is temporarily replaced by an order of the Minister of Defence by the officer of the same rank who is next on the list.²⁴⁰ Appointment of the civilian judges of military courts is made on a yearly basis by a decree following the proposal of the Minister of Justice.²⁴¹

Conflict of interest rules bar a judge from hearing a case where he or she is related to the accused, has filed a complaint against or is a witness in the case against the accused, was previously a complainant against the accused in civil or criminal proceedings, or previously acted as the prosecutor, administrator or member of the court in the same case.²⁴²

Article 7 of Royal Decree No. 1-77-56 states that military judges are subject to the general disciplinary requirements of the armed forces. They cannot be arraigned before a court or board of inquiry without an order by the King, the Supreme Chief or Chief of Staff of the Armed Forces.²⁴³

Similarly, although investigating judges are to exercise their functions "subject to the absolute independence of investigating judges", they are subordinate to their hierarchical superiors and the Minister of Defence.²⁴⁴

iv) Prosecutors of the military courts

Article 23 of the CMJ provides for an investigating judge and his deputies to be in charge of the investigation and for the functions of the public prosecutor for the military courts to be carried out by the "Government-Commissioner" and his deputies.²⁴⁵ It also provides that the Government-Commissioner deputies and the investigating judges can carry out, without distinction, both the prosecutorial and investigation functions. However, Article 24 further specifies that, during a trial, investigating judges cannot carry out the functions of the Government-Commissioner in cases investigated by them. This can lead to the nullity of the trial.

The Government-Commissioners and the investigating judges are appointed by a royal decree on the proposal of the Minister of Defence. They are military judges who must have a minimum rank of commander. If the accused is a general or colonel, the prosecutor and investigating judge must be of equivalent rank and are appointed by the Minister of Defence.²⁴⁶

The same provisions that apply to judges of military courts also apply to prosecutors, including the conflict of interest requirements set out at Article 25 of the CMJ.²⁴⁷ Article 6 of the Statute for Military Judges provides that, subject to the absolute independence of investigating judges, in exercising their functions, military judges in charge of investigation and prosecution are subordinate to their hierarchical superiors and the Minister of Defence.²⁴⁸ In particular, the Minister of Defence is granted a

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*, Articles 21 & 28.

²⁴¹ Code of Military Justice, Article 22.

²⁴² Code of Military Justice, Article 28.

²⁴³ Royal Decree No. 1-77-56 of 12 July 1977, Article 7.

²⁴⁴ Royal Decree No. 1-77-56 of 12 July 1977, Article 6.

²⁴⁵ Code of Military Justice, Article 23.

²⁴⁶ Code of Military Justice, Article 24.

²⁴⁷ Code of Military Justice, Article 28.

²⁴⁸ Royal Decree No. 1-77-56 of 12 July 1977, Article 6.

variety of powers in relation to the investigation and referral of offences, which greatly undermine the ability of the military prosecutor to carry out his or her role independently.

It is the Minister of Defence, assisted by the judicial police, who is charged with investigating crimes, identifying perpetrators, and receiving complaints. This power is delegable to one or more officers-general. The Minister also exercises authority over the military judicial police.²⁴⁹ It is the Minister of Defence who decides, either upon receipt of a report from the judicial police or on his or her own initiative, whether to order the Government-Commissioner to open an investigation or to send the accused directly to trial.²⁵⁰

v) Trials before military courts

The Government-Commissioner is responsible for prosecuting cases before the military court, having notified the Minister of Defence of the referral.²⁵¹

The accused is afforded certain minimum guarantees, although these are not without serious limitations and/or restrictions. For example, the accused is guaranteed only five days' notice before the first hearing of: the charges; the applicable legal provision under which he or she is charged; and the details of witnesses that will be called. The accused must also notify the military court before the first session of the witnesses they intend to call.²⁵² This restriction, particularly in more complex cases or cases involving serious charges is likely to be inconsistent with the rights of the accused to be promptly informed in detail of the nature and cause of the charge against him or her and to adequate time and facilities to prepare a defence, guaranteed under Articles 14(3)(a) and (b) of the ICCPR.

Although the accused has the right to choose or be assigned legal counsel, who is entitled to receive copies of the investigative file, the prosecutor cannot share secret classified documents with the defence counsel.²⁵³ If insufficient compensatory measures are made to ensure the fairness of the proceedings, the non-disclosure may affect not only the right to a defence and to adequate facilities to prepare it but also the overall fairness of the trial.²⁵⁴

The accused or his defence has the right to be heard and is entitled to speak last.²⁵⁵

Trials of the military court are to be held in public, unless publicity is deemed a danger to public order or morals. The court can also order that the reporting of cases that are heard in public is prohibited.²⁵⁶

Following the trial, the judges must not communicate with anyone prior to delivering their judgment. Deliberations and voting must take place in the absence of the Government-Commissioner and the Registrar.²⁵⁷

²⁴⁹ Code of Military Justice, Article 32.

²⁵⁰ Code of Military Justice, Article 33. Such an order to open an investigation or refer the accused for trial is mandatory where a civil investigating judge or prosecutor finds the crime is within the competence of the military court (Article 34).

²⁵¹ Code of Military Justice, Article 78.

²⁵² Code of Military Justice, Article 80.

²⁵³ *Id.*

²⁵⁴ See, e.g., *Rowe and Davis v United Kingdom*, ECtHR, Application No. 28901/95, Judgment of 16 February 2000, paras. 53-67; *Judgment of 13 May 2008*, International Criminal Court, Case of The Prosecutor v Katanga and Ngudjolo, No. ICC-01/04-01/07-475 paras. 60-73.

²⁵⁵ Code of Military Justice, Article 96.

²⁵⁶ Code of Military Justice, Article 81.

²⁵⁷ Code of Military Justice, Article 98.

Decisions of the court are made by majority. In disciplinary matters and minor offences, a majority constitutes 2 out of 3 judges. In more serious crimes a majority constitutes 4 out of 5 judges and in crimes or misdemeanors against the security of the State, a majority constitutes 5 out of 7 judges.²⁵⁸

Article 105 requires various information to be set out in the judgment, including the crime and relevant provisions of the law, the demands of Government-Commissioners and the questions that the presiding judge posed, as required by the law, during the judges' deliberations. However, there is no specific requirement to provide reasons for the decision reached in the judgement.

vi) Appeals and reviews

Where the accused is found guilty, he or she has eight days to lodge an appeal before the Court of Cassation under the conditions prescribed in the Code of Criminal Procedure.²⁵⁹

The Court of Cassation is not a court of appeal. It does not rule on the merits of a case but rather decides whether the law has been correctly applied by the lower courts based on the facts.

The annulment of the decision by the Court of Cassation for lack of jurisdiction or any other reason results in the transfer of the case to a court with jurisdiction or a re-constituted military court, as appropriate. The only situation in which there is not a re-trial of a case whose judgment has been annulled is where the Court of Cassation has ruled that the act does not constitute an offence, an amnesty is pronounced or where the statute of limitations has run.²⁶⁰

3. Assessment of national law in light of international standards

The military court system in Morocco is inconsistent with international law. First, in terms of jurisdiction, military courts have jurisdiction over all offences committed by the military. International law is clear, however, that military court jurisdiction should be limited to military-related offences. They may not be used "to try violations of human rights or other crimes that are not related to the functions that the law assigns to military forces and that should therefore be heard by regular courts".²⁶¹ The Decaux Principles state that ordinary courts, not military courts, should be used to "conduct inquiries into serious human rights violations . . . and to prosecute and try persons accused of such crimes".²⁶²

Second, military courts in Morocco have jurisdiction over civilians when they commit offences involving state security, crimes against the military or crimes with members of the military as co-conspirators. Military courts also have jurisdiction over individuals under the age of 18 if they are members of the military or nationals of an enemy or occupied state. This jurisdiction over civilians and individuals under the age of 18 is also contrary to international law. The Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, and the Committee against Torture have all stated that military courts are incompetent to try civilians. The Human Rights Committee has allowed for the possibility of the trial of civilians in very limited circumstances, which do not exist under Moroccan law. In various instances the Human Rights Committee has called on States to prohibit trials

²⁵⁸ Code of Military Justice, Article 99.

²⁵⁹ Code of Criminal Procedure, Book II, Title, IV, Chapter II, Section IV.

²⁶⁰ Code of Military Justice, Article 111.

²⁶¹ Report on Terrorism and Human Rights, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 232.

²⁶² Decaux Principles, Principle 9.

of civilians by military courts. Furthermore, both the Committee on the Rights of the Child and the Decaux Principles are clear that military courts have no jurisdiction over individuals under the age of 18.

Finally, even where the jurisdiction of military courts is restricted to the trial of military personnel (excluding individuals under the age of 18 who are members of the military) for offences related to military service, international law imposes certain safeguards that are lacking in the Moroccan system. All the guarantees of Article 14 of the ICCPR are fully applicable to military courts. That means those who are tried in military courts have the same right to a fair trial before an independent and impartial tribunal as those tried in civilian courts. In particular, both civilian and military judges must be appointed in an independent manner and not by their hierarchical superiors. The selection of judges must always be based on objective criteria. They must be outside the chain of military command and immune from military discipline. As the Decaux Principles state: "Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy."²⁶³ Individuals charged with a criminal offence must be promptly informed of the charge and must have adequate time and facilities for the preparation of their defence, as well as full access to all materials the prosecution plans to offer in court and all materials that are exculpatory.

The Moroccan military courts fall short of these standards. The Minister of Defence draws up the list of individuals authorized to sit as military judges, on the basis of proposals by their commanders. The civilian judges on military courts are appointed by the Minister of Justice. Moreover, military judges are subject to the same disciplinary requirements as other members of the armed forces. The rights of the accused are severely compromised, in particular the right to adequate time and facilities for the preparation of a defence. The accused has only five days' notice before the first hearing. The standard for non-disclosure of matters deemed secret is unclear and may violate the right of access to all materials that the prosecution plans to offer in court. Finally the right of appeal by the Court of Cassation is limited. Under Article 14, the right to review by a higher tribunal "imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence".²⁶⁴ A review that is "limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant".²⁶⁵

The 2011 Constitution makes no explicit reference to military courts or the military justice system. Article 118 guarantees individuals' "access to justice for the defence of their rights and interests protected by law" and Article 120 guarantees the "right to a fair trial in a reasonable time". Article 23 also refers to the presumption of innocence and the right to a fair trial. In addition, the Preamble to the Constitution incorporates by reference the obligations of Morocco under international human rights law. In order to give effect to these constitutional guarantees, and to ensure the system is consistent with Morocco's obligations under international human rights law, certain changes must be made to laws applicable to military justice and practices in the military justice system. Specific recommendations concerning the military court system are discussed in greater detail below.

i) Subject matter jurisdiction

Because military courts have jurisdiction over all crimes under the Criminal Code committed by or against military personnel as well as those crimes set out in the CMJ, the subject matter jurisdiction of these courts is not limited to crimes of a strictly

²⁶³ Decaux Principles, Principle 13.

²⁶⁴ Human Rights Committee, General Comment No. 32, para. 48.

²⁶⁵ Id.

military nature. Neither the Moroccan Constitution nor the CMJ exclude crimes under international law and other human rights violations from the jurisdiction of military courts. Indeed the scope of crimes within the jurisdiction of the military courts allow for the possibility of a range of human rights violations to be heard, since all offences under the criminal code can be heard in these courts, where they have personal jurisdiction.

The practice of using military jurisdiction to try members of the armed forces who have committed gross human rights violations "is one of the greatest sources of impunity in the world".²⁶⁶ Under international law, the jurisdiction of military courts over military personnel should exclude human rights violations. Jurisdiction should be limited to trials of members of the military for offences of a military nature. All other offences should be subject to the jurisdiction of ordinary courts.

Thus the Code of Military Justice should be amended to specifically exclude jurisdiction of military courts over crimes under international law and other human rights violations and to strictly restrict the jurisdiction of military courts to cases involving members of the military for alleged breaches of military discipline.

ii) Personal jurisdiction: trial of civilians and juveniles

As described above, there is a developing consensus in international law towards the prohibition of military trials for civilians.

Although the Human Rights Committee expressed in its General Comment No. 32 the view that the trial of a civilian by a military court may in some exceptional circumstances be permissible under the ICCPR (when the civilian courts are unable to undertake such trials and if shown in the particular case to be necessary and justified by objective and serious reasons), the conditions under which civilians may be tried by military courts in Morocco do not rise to the level of "exceptional" set out by the Committee.²⁶⁷ Granting military courts jurisdiction over all offences committed by civilians against military personnel, or where military personnel and civilians are co-conspirators, simply does not meet this standard.

Therefore in order to meet the requirements of Article 14 of the ICCPR, the authorities must ensure that the CMJ is amended to remove the jurisdiction military courts currently have over civilians.

In terms of juveniles, the current CMJ permits them to be tried by military courts where they are members of the military or where they are nationals of an enemy or occupied state. This practice is inconsistent with international standards which provide that military courts should have no jurisdiction over individuals below the age of 18 at the time of the alleged crime. The CMJ must therefore be amended to divest the military courts of jurisdiction over individuals who were under 18 at the time of the crime.

iii) Fair trial before an independent and impartial tribunal

In all cases tried before military courts, including those in which the jurisdiction of military courts is restricted to its proper scope, the right to a fair trial before an independent, impartial and competent court must still be secured. The requisite international standards in the context of military courts are set out in Article 14 of the ICCPR and are reflected in the Decaux Principles.²⁶⁸

²⁶⁶ Andreu-Guzman, *Military jurisdiction under international law*, p. 8.

²⁶⁷ Human Rights Committee, General Comment No. 32, para. 22.

²⁶⁸ Decaux Principles, Principles 13 & 15.

First, the requirement of competence, independence and impartiality of a tribunal "is an absolute right that is not subject to any exception".²⁶⁹ The requirement of independence includes the procedure and criteria for the appointment of judges. There must be clear procedures and objective criteria for appointment in order to protect judges against any form of political influence in their decision-making. These requirements are lacking in the Moroccan CMJ. The Major-General of the Armed Forces organizes the competition to select military judges, who are appointed by royal decree on the recommendation of the Minister of Defence. It is the Minister of Defence who then draws up a list of individuals eligible to sit on military tribunals, on the basis of rank, seniority and proposals by the commanders. The prosecutor and investigating judges are also proposed by the Minister of Defence and formally appointed by the King. Both prosecutors and investigating judges are subordinate to their hierarchical superiors and the Minister of Defence.²⁷⁰ Civilian judges on military courts are appointed based on a proposal of the Minister of Justice. This means that the appointment of both civilian and military judges on military tribunals is controlled by the executive.

In terms of discipline, military judges remain subject to military discipline. There are insufficient safeguards to ensure that they are not subject to their hierarchical superiors. This was a crucial point in the European Court's decisions in both *Findlay v. United Kingdom* and *Gurkan v. Turkey*, where the Court found violations of the right to an independent and impartial tribunal.²⁷¹

In order to ensure that judges who sit on military tribunals are independent and impartial, the selection and appointment procedure needs to be amended and judges need to be insulated from military discipline and outside the military chain of command.

Second, the right to a fair trial includes the guarantee of a fair and public hearing. Although courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, these should be exceptional circumstances and not the norm.²⁷² In Morocco, military courts have the authority to prohibit the reporting of part or all proceedings. Trials are heard in public unless there is a danger to public order or morals. These grounds should be "strictly interpreted".²⁷³

Third, although military courts must provide various details in their judgment, there is no specific requirement to provide the reasons for their decision. A reasoned judgment should include the essential findings, evidence, legal reasoning and conclusions. The judgment must provide sufficient information to ensure that the decision is not arbitrary and that the accused understands the reason for the ruling. The right to a reasoned judgment is essential to the rule of law to protect against arbitrariness.²⁷⁴ The Decaux Principles explain that "a statement of the grounds for a court ruling is a condition sine qua non for any possibility of a remedy and any effective supervision."²⁷⁵

²⁶⁹ Human Rights Committee, General Comment No. 32, para. 19.

²⁷⁰ Royal Decree No. 1-77-56 of 12 July 1977, Article 6.

²⁷¹ *Findlay v. United Kingdom*, ECtHR, Application No. 22107/04, Judgment of 25 February 1997; *Gurkan v. Turkey*, ECtHR, Application No. 10987/10, Judgment of 3 July 2012.

²⁷² Human Rights Committee, General Comment No. 32, para. 29.

²⁷³ Decaux Principles, para. 49.

²⁷⁴ *Judgment of 5 August 2008*, Inter-American Court of Human Rights, *Apitz Barbera et al v Venezuela*, para. 78.

²⁷⁵ Decaux Principles, para. 50.

In order to comply with its obligations under the ICCPR, Morocco must amend the CMJ to ensure that military courts provide sufficiently detailed reasons for their judgments.

Fourth, the right to a fair trial also includes the right of a person charged with a criminal offence to be notified “promptly” and in detail of the nature of the criminal charge, the right to adequate time and facilities for the preparation of a defence, and access to all materials that the prosecution plans to offer in court or that are exculpatory. In Morocco, however, the CMJ only gives the accused five days’ notice before the first hearing. Although what counts as adequate time depends on the circumstances, five days is likely not a sufficient amount of time, particularly if the case is complex. The law should be amended to ensure that the accused is given adequate time and facilities to properly prepare his or her defence. Adequate facilities include access to all case files. In this regard, it is problematic that there are restrictions on disclosure of materials deemed secret. Under the CMJ, the Prosecutor decides what documents cannot be shared with the defence because they are secret.²⁷⁶ The basis on which such decisions are made is not clear. Under international standards, restrictions based on military secrecy cannot be invoked to obstruct the initiation or conduct of inquiries, proceedings or trials.²⁷⁷ Restrictions on the disclosure of evidence should be determined by a fair and impartial court, not the prosecutor. Furthermore, orders of non-disclosure should be exceptional. The non-disclosure of material should not impact the overall fairness of proceedings.

Fifth, the current law does not protect the right to review by a higher tribunal, a key element to the right to fair trial. While Article 14 does not require a full retrial, the reviewing court must have the ability to look at the “factual dimensions of the case”.²⁷⁸ The law must be changed to provide that the decisions of military courts are reviewed by a court that has the ability to review the sufficiency of the evidence as well as the law.

4. Recommendations

In light of the above, the Moroccan authorities should reform the military justice system so as to:

- i. Limit the personal jurisdiction of the Court to military personnel and to ensure that military courts do not have jurisdiction over crimes allegedly committed by civilians even where the victim is a member of the armed forces or an equivalent body or the accused is alleged to have committed the offence together with a member of the military (Article 3 of the CMJ);**
- ii. Explicitly restrict the jurisdiction of military courts to cases involving members of the military for alleged breaches of military discipline and, to this end:**
 - a. limit the offences set out at Chapter II of the CMJ accordingly;**
 - b. amend Article 190 of the CMJ to remove military courts’ jurisdiction over all offences under the Criminal Code;**
 - c. amend Articles 4 and 6 of the CMJ to remove the jurisdiction of military courts over state security crimes; and**
 - d. explicitly exclude the jurisdiction of military courts in cases involving crimes under international law or other human rights violations including war crimes, crimes against humanity, genocide, enforced disappearance, extrajudicial executions or torture;**

²⁷⁶ Code of Military Justice, Article 80.

²⁷⁷ Decaux Principles, Principle 10(b).

²⁷⁸ Human Rights Committee, General Comment No. 32, para. 48.

- iii. **Exclude the jurisdiction of military courts over all individuals under the age of 18 at the time of the alleged crime, regardless of their nationality or status (Article 5 of the CMJ);**
- iv. **Ensure that judges who sit on military courts are independent and impartial and that they have a status guaranteeing their independence and impartiality. In particular, they must remain outside the military chain of command and military authority in respect of matters concerning the exercise of any judicial function;**
- v. **Ensure that proceedings before military courts are carried out in a manner that is consistent with minimum requirements of fair trial guaranteed in international standards by:**
 - a. **ensuring that the accused is entitled to be informed of the reason for their arrest at the time of arrest and promptly informed of the charges in accordance with Article 9(2) of the ICCPR, and once formally charged, is promptly informed of the nature and cause of the charges against him or her;**
 - b. **ensuring respect for the rights of defence, including access to information relating to the case sufficiently far in advance of the first hearing; and**
 - c. **ensuring that decisions on limiting disclosure of information to the defence are made by a judge, and that restrictions on disclosure are exceptional and are limited to such restrictions as are necessary and proportionate to the aim of protecting the rights of another individual or to safeguard an important public interest and that the exclusion of information from the defence does not unduly prejudice the rights of the defence or the overall fairness of the proceedings;**
- vi. **Amend Articles 81 and 105 of the CMJ to ensure reasons are given for all decisions of the military court and that judgments of the court are available to the accused and their lawyer and are made public in all cases except where the interest of juveniles so requires; and**
- vii. **Amend the grounds for appealing against decisions of the military court to ensure a full right of appeal of the conviction and sentence by the military court to a higher civilian tribunal.**

E. The Office of the Public Prosecutor

Prosecutors play an essential role in the administration of justice. Respect for human rights and the rule of law requires a prosecutorial authority that is able to investigate and prosecute criminal offences with objectivity and impartiality.

The position of the public prosecutor is relatively unchanged in the 2011 Constitution. However, as long as prosecutors continue to be considered as members of the judiciary in Morocco, the constitutional provisions applicable to the judiciary should apply equally to prosecutors.

This section will first discuss the international law and standards applicable to prosecutors. It will then review the current laws and practices governing the Office of the Public Prosecutor, and the framework envisaged by the 2011 Constitution. Finally it will propose steps to strengthen the independence of the Office of the Public Prosecutor.

1. International law and standards

The main sources of international standards on prosecutors are the UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, standards set out in instruments adopted by the Council of Europe, the ACHPR and the Inter American Commission on Human Rights, and those set by treaty monitoring bodies (including in General Comments, conclusions and recommendations) or the jurisprudence of regional human rights courts.

In addition, the International Association of Prosecutors adopted standards on professional responsibility in 1999.

These standards aim to ensure that they play an effective role in the administration of justice in a manner that is consistent with the right to a fair trial and the protection of the rule of law and human rights. The standards from differing sources are largely similar and thus the review here most closely tracks the UN Guidelines on the Role of Prosecutors. The one significant area of difference between the various standards is on the institutional status of the prosecutorial service within the government and in particular whether it must be "independent" of the executive branch, or only "objective" and "impartial". This is due to the fact that the status and role of prosecutors differ in some national legal systems. However, even where the public prosecutor is a part of or subordinate to the executive power, international standards are explicit that the lines of authority must be clear and transparent and that prosecutors should be impartial in carrying out their duties. Specific guidance on such a situation is detailed below.

The UN Guidelines on the Role of Prosecutors (hereafter referred to as the UN Guidelines) were expressly formulated to assist States in "securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings".²⁷⁹ The Guidelines are intended to be applicable to all jurisdictions, regardless of whether the prosecutorial function is subsumed within or independent of the executive branch. The Guidelines are thus neutral on specific appointment procedures and the status of prosecutors within either the executive or judicial branches of the State.

The UN Guidelines clarify that the selection of individuals as Prosecutors should be based on objective criteria, should "embody safeguards against appointments based on impartiality or prejudice" and should exclude discrimination.²⁸⁰ Prosecutors should have "appropriate education and training" and should be made aware of the ideals and ethical duties of their office and of constitutional and statutory protections for suspects and victims, as well as human rights law.²⁸¹

The UN Guidelines also specify that promotions should be based on "objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures".²⁸²

The Guidelines clarify that States have a duty to ensure that prosecutors "are able to perform their professional functions without intimidation, hindrance, harassment, improper interference, or unjustified exposure to civil, penal or other liability".²⁸³

²⁷⁹ Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1, para. 189 (1990) (UN Guidelines on the Role of Prosecutors), Preamble.

²⁸⁰ UN Guidelines on the Role of Prosecutors, Guidelines 1 & 2(a); CoM Recommendation (2000)19, paras 5(a) & (b); ACHPR Principles and Guidelines, Section A, Principle F(c).

²⁸¹ UN Guidelines on the Role of Prosecutors, Guideline 2(b); CoM Recommendation (2000)19, para. 7.

²⁸² UN Guidelines on the Role of Prosecutors, Guideline 7; see also ACHPR Principles and Guidelines, Section A, Principle F(c); CoM Recommendation (2000)19, para. 5(b).

The conduct of prosecutors should be regulated by law or lawful regulations and they should be accountable for professional misconduct. In the face of allegations of professional misconduct which are the subject of disciplinary proceedings, prosecutors have the right to a fair hearing and independent review of any decisions.²⁸⁴

Furthermore, as public officials who are key players in the administration of justice, prosecutors should also be accountable to the public. As the Special Rapporteur on the independence of judges and lawyers has noted, among other things, some regional systems recommend the possibility of interested parties challenging a decision by a prosecutor not to prosecute.²⁸⁵

As regards the prosecutorial function, the UN Guidelines state that prosecutors shall "carry out their functions impartially", shall "protect the public interest" and "shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded".²⁸⁶ They are also under a duty to refuse to use evidence known or believed to have been obtained by recourse to unlawful means and must take steps to ensure that persons responsible for the use of such unlawful means are brought to justice.²⁸⁷ In keeping with the importance of prosecutors in the administration of justice and protection of human rights, the Guidelines also state that prosecutors "shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law".²⁸⁸

There is a strong preference for an independent prosecutorial authority. For example, in the context of Mexico, the Inter-American Commission on Human Rights focused on the need to increase "the independence, autonomy and impartiality which the Office of the Public Prosecutor must have".²⁸⁹ The Commission found a "clear violation of autonomy" and stated that "for the proper exercise of its functions [the public prosecutor] must have autonomy and independence from the other branches of government".²⁹⁰

The European Court has held that "in a democratic society both the courts and the investigation authorities must remain free from political pressure" and that "it is in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State".²⁹¹

The Special Rapporteur on the independence of judges and lawyers has noted a "growing tendency to move towards a more independent prosecution service model,

²⁸³ UN Guidelines on the Role of Prosecutors, Guideline 4; see also ACHPR Principles and Guidelines, Section A, Principle F(a)(ii); CoM Recommendation (2000)19, para. 11.

²⁸⁴ UN Guidelines on the Role of Prosecutors, Guideline 21; see also ACHPR Principles and Guidelines, Principle F(n); CoM Recommendation (2000)19, para. 5(e).

²⁸⁵ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 86.

²⁸⁶ UN Guidelines on the Role of Prosecutors, Guidelines 13(a) & (b) & 14; see also ACHPR Principles and Guidelines, Section A, Principle F(i) and (j); CoM Recommendation (2000)19, paras. 24 & 27.

²⁸⁷ UN Guidelines on the Role of Prosecutors, Guideline 16.

²⁸⁸ UN Guidelines on the Role of Prosecutors, Guideline 14; see also ACHPR Principles and Guidelines, Section A, Principle F(k); CoM Recommendation (2000)19, para. 16.

²⁸⁹ IACHR, *Report on the Situation of Human Rights in Mexico*, OAS Doc. OEA/Ser.L/V/II.100, para. 372. See also IACHR, *Annual Report 1997*, OAS Doc. OEA/Ser.L/V/II.98 doc. 6 rev. 13, Ch. VII.1.

²⁹⁰ *Report on the Situation of Human Rights in Mexico*, para. 381

²⁹¹ *Guja v. Moldova*, ECtHR, Application No. 14277/04, Judgment of 12 February 2008, paras. 86 & 90.

in terms of its relationship with other authorities, notably the executive".²⁹² A prosecution service that is autonomous and viewed by the public as such will increase confidence in its ability to investigate and prosecute crimes.²⁹³

Recommendation (2000)19, adopted by the Council of Europe's Committee of Ministers, on the role of public prosecution in the criminal justice system (CoM Recommendation (2000)19) closely follows the UN Guidelines. In addition, CoM Recommendation (2000)19 provides that where the public prosecution "is part of or subordinate to the government" States should take effective measures to guarantee, *inter alia*, that:

- the nature and scope of the powers of the government with respect to the public prosecution are established by law;
- the government exercises these powers in a transparent way and in accordance with national and international law;
- if the government has the power to give instructions to prosecute a case, such instructions should be in writing and must respect principles of transparency and equity; the government should be under a duty:
 - to seek prior written advice from either the public prosecutor or the body that is carrying out the public prosecution;
 - to explain its written instructions, especially when they deviate from the public prosecutor's advice, and to transmit them through hierarchical channels; and
 - to see to it that, before trial, the advice and instructions become part of the public case file;
- prosecutors remain free to make any legal argument of their choice to a court; and
- instructions not to prosecute a case are either prohibited or are exceptional.²⁹⁴

Regardless of whether prosecutors are independent of or subordinate to the government, they should always "be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law".²⁹⁵

The Bordeaux Declaration, adopted by the Consultative Council of European Judges and the Consultative Council of European Prosecutors in 2009, offers similar guidance. The Explanatory Note to the Declaration underscores that:

"The independence of public prosecutors is indispensable for enabling them to carry out their mission. It strengthens their role in a state of law and in society and is also a guarantee that the justice system will operate fairly and effectively and that the full benefits of judicial independence will be realised. Thus, akin to the independence secured to judges, the independence of public prosecutors is not a prerogative or privilege conferred in the interests of the prosecutors, but a guarantee of a fair, impartial and effective justice that protects both public and private interests of the person concerned."²⁹⁶

²⁹² Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 27.

²⁹³ See Report on Mission to Mexico of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/65/274, paras. 16 & 87.

²⁹⁴ CoM Recommendation (2000)19, para. 13(a)-(f).

²⁹⁵ CoM Recommendation (2000)19, para. 16. See also ACHPR Principles and Guidelines, Section A, Principle F(k).

²⁹⁶ Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE), Judges and Prosecutors in a Democratic Society, CM(2009)192 (hereinafter "Bordeaux Declaration"), Explanatory Note, para. 27.

Furthermore it states that even if prosecutors are located within a government hierarchy, they must “enjoy complete functional independence in the discharge of their legal roles”. In order to “ensure their accountability and prevent proceedings being instituted in an arbitrary or inconsistent manner, public prosecutors must provide clear and transparent guidelines as regards the exercise of their prosecution powers”.²⁹⁷

The Bordeaux Declaration states that to ensure that public prosecutors have independent status, their position and activities should not be “subject to influence or interference from any source outside the prosecution service itself”.²⁹⁸ Furthermore, “their recruitment, career development, security of tenure including transfer” should be effected only according to the law or by their consent, and their remuneration should be “safeguarded through guarantees provided by the law”.²⁹⁹ The Bordeaux Declaration recognizes that in some States the prosecution service is hierarchical. In such cases there should be transparent lines of authority, accountability, and responsibility. Furthermore, directions to public prosecutors “should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria. Any review according to the law of a decision by the public prosecutor to prosecute or not to prosecute should be carried out impartially and objectively.”³⁰⁰

The Special Rapporteur on the independence of judges and lawyers recommends that prosecutors should have the right to challenge instructions received, especially when they deem the instructions unlawful or contrary to professional standards or ethics.³⁰¹

The UN Guidelines make clear that the “office of prosecutors shall be strictly separated from judicial functions”.³⁰² Regional standards are in agreement on this point.³⁰³ The CoM Recommendation (2000)19 provides: “States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge.”³⁰⁴

The Special Rapporteur on the independence of judges and lawyers has noted that the opportunity for judges and prosecutors to switch careers, which may happen if the prosecution service is part of the judiciary, “could potentially affect their independence and impartiality”.³⁰⁵

The Explanatory Note to the Bordeaux Declaration acknowledges that in continental law systems judges and prosecutors may both be part of the judicial corps and that the public prosecution’s autonomy from the executive may be limited. Nevertheless it states that there must be a guarantee of separate functions.³⁰⁶ The Explanatory Note clarifies that: “The independence of the public prosecution service constitutes an indispensable corollary to the independence of the judiciary. The role of the

²⁹⁷ Bordeaux Declaration, Explanatory Note, para. 29.

²⁹⁸ Bordeaux Declaration, para. 8.

²⁹⁹ Bordeaux Declaration, para. 8.

³⁰⁰ Bordeaux Declaration, para. 9.

³⁰¹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 116.

³⁰² UN Guidelines on the Role of Prosecutors, para. 10.

³⁰³ ACHPR Principles and Guidelines, Section A, Principle F(f); CoM Recommendation (2000)19, para. 17; Bordeaux Declaration, para. 3.

³⁰⁴ CoM Recommendation (2000)19, para. 17.

³⁰⁵ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 39.

³⁰⁶ Bordeaux Declaration, Explanatory Note, paras. 6-9.

prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the executive and the legislature and where the distinct role of judges and prosecutors is correctly observed.³⁰⁷

The UN Guidelines and the ACHPR Principles and Guidelines both specify the need for "adequate remuneration" for prosecutors.³⁰⁸ Recommendation (2000)19 provides greater detail on these and other requirements: "States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal".³⁰⁹ Similarly, the Bordeaux Declaration states that "Adequate organisational, financial, material and human resources should be put at the disposal of justice".³¹⁰

Prosecutors, like judges, are entitled to enjoy the right of all persons to freedom of expression and association. The UN Guidelines clarify that, in particular, prosecutors have the right to "take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering" any professional disadvantage.³¹¹ They also underscore that prosecutors should always "conduct themselves in accordance with the law and the recognized standards and ethics of their profession".³¹² The ACHPR Principles and Guidelines and the CoM Recommendation (2000)19 contain a similar provision.³¹³

2. The current Office of the Public Prosecutor

i) Organization

Under the 1974 Statute for Judges, prosecutors are judges. They are subject to the same procedures relating to the selection, appointment, promotion and discipline, unless the law provides otherwise.

As described at Section A above, oversight of the procedures for selection, appointment, promotion, transfer and discipline of prosecutors, as members of the judiciary, rests largely with the executive and not the CSM. In addition, other provisions of the Moroccan legal framework further undermine the independence of prosecutors and give the executive wide powers to manage and influence their careers.

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". They can be reassigned by royal decree on the proposal of the Minister of Justice, after consulting with the CSM. The Minister of Justice is not required to follow the CSM's recommendations. Prosecutors-General at the Court of Appeal are also rated by the Minister of Justice.³¹⁴ Their advancement and promotion depend on this rating.

³⁰⁷ Bordeaux Declaration, Explanatory Note, para. 10.

³⁰⁸ UN Guidelines on the Role of Prosecutors, para. 6; ACHPR Principles and Guidelines, Section A, Principle F(b).

³⁰⁹ CoM Recommendation (2000)19, para. 4.

³¹⁰ See also the Bordeaux Declaration, para. 8.

³¹¹ UN Guidelines on the Role of Prosecutors, paras. 8 & 9.

³¹² UN Guidelines on the Role of Prosecutors, para. 8.

³¹³ ACHPR Principles and Guidelines, Section A, Principle F(d) & (e); CoM Recommendation (2000)19, para. 6.

³¹⁴ Article 3 of Decree No. 2-75-883 of 23 December 1975 determining the conditions and modalities of rating judges and their advancement in grade and echelon.

Furthermore, the Law on the Organisation of the Judiciary provides that the Prosecutor-General of the Court of Cassation can send instructions and observations to the Prosecutors-General at the Court of Appeal and First Instance and is required to report to the Minister of Justice "failings that come to his attention on the part of all prosecutors".³¹⁵

The Directorate of Criminal Affairs and Pardons, which is a department within the Ministry of Justice, is empowered to "implement government policy on criminal matters and ensures control of the activity of public prosecutors in criminal cases".³¹⁶

ii) Functions

The functions of the public prosecutor are primarily set out in the Code of Criminal Procedure.³¹⁷ Under the Code, the Minister of Justice is granted key powers in relation to the work of individual prosecutors and the Office of the Public Prosecutor as a whole.

In relation to the Prosecutor-General attached to the Court of Appeal, Article 48 of the Code of Criminal Procedure provides, "The Minister of Justice can inform the Prosecutor-General of crimes under the criminal law of which he has knowledge, directing him to initiate, to prosecute or to refer to the competent jurisdiction such written requests as the Minister considers appropriate". The Prosecutor-General is obliged to transmit these and other reports and complaints to the relevant prosecutor, together with instructions.³¹⁸ Article 36 of the Criminal Code of Procedure requires the Office of the Public Prosecutor to comply with written instructions that are given "within the conditions laid down by Article 48". In effect, this provision consolidates the authority of the Minister of Justice to issue written instructions to prosecutors as a whole.

3. Assessment of national law in light of international standards

International law requires that prosecutors are able to perform their functions with objectivity and impartiality. Even if structurally included within the executive branch, they should be able to operate independently and impartially. In Morocco, however, prosecutors, while nominally part of the judiciary, do not enjoy requisite safeguards for their independence. The executive has a dominant role not only in their appointment, promotion and discipline but also in the direction of individual cases. These features of the current system are not consistent with international law.

According to the UN Guidelines on the Role of Prosecutors, the selection and promotion of prosecutors should be based on objective criteria and should exclude appointments for improper motives. Prosecutors have a duty not to continue a prosecution if an impartial investigation shows the charge to be unfounded. They must refuse to use evidence known or believed to have been obtained by unlawful means. At the same time, prosecutors should give due attention to crimes committed by public officials, including corruption and violations of human rights. Case-specific instructions to prosecutors are to be avoided, but where they exist they must be in writing and in conformity with clear rules of transparency and equity.

In Morocco, prosecutors do not enjoy the same guarantee of security of tenure as judges. They are under the hierarchical authority of the Minister of Justice and can be reassigned by the Minister of Justice. Moreover their promotions depend on the ratings that they receive from the Minister of Justice. The Minister of Justice also has

³¹⁵ Law No.1-74-338, Article 16.

³¹⁶ Decree No. 2-10-310 of 11 April 2011, Article 7.

³¹⁷ Code of Criminal Procedure.

³¹⁸ Code of Criminal Procedure, Article 49.

the authority to direct the Prosecutor-General to initiate investigations or prosecutions. These provisions undermine the ability of prosecutors to perform their functions independently and impartially. They also weaken public confidence in the ability of the public prosecutor to investigate offences, including human rights violations, and to bring perpetrators to justice. Regardless of institutional structure, the prosecution service should be able to function independently of the executive. This will increase both the effectiveness of the criminal justice system and its credibility in the eyes of the public.

Prosecutors will be governed by the new organic law on the Statute for Judges. There are key reforms that the new law should include in order to enhance and ensure the independence of prosecutors.

i) Appointment, promotion, tenure and disciplinary proceedings

Under Article 113 of the 2011 Constitution, the CSPJ will oversee all issues relating to the appointment and conditions of tenure for judges, including prosecutors. Consistent with international standards, the organic law on the CSPJ and on the Statute for Judges should require that prosecutors be selected on the basis of objective criteria, including their knowledge of and training on national and human rights law, their integrity and appreciation of their ethical and other duties.

Since prosecutors are considered to be judges in the national system and in order to protect them from arbitrary dismissals or proceedings when exercising their functions, in particular the investigation and prosecution of human rights violations, prosecutors should enjoy the same guarantees of security of tenure as judges.³¹⁹ The new organic law should ensure that prosecutors have guaranteed tenure that is set out in the law, that they may not be removed or suspended from office during their tenure except for misconduct on grounds and in accordance with procedures prescribed by law or reassigned without their consent and according to procedures established by law. Decisions concerning promotion should be taken by the CSPJ rather than the Minister of Justice. Transfers between posts should not be used as a threat or a reward.

Where prosecutors are subject to disciplinary action, it should be based on clear rules or codes of conduct and prosecutors, like judges, should have the right to a fair hearing and be able to appeal any decision. With regard to the evaluation of prosecutors, Article 116 of the 2011 Constitution provides that the CSPJ will take into consideration evaluation reports done by the authorities to which they are subject. Article 56 of the Statute for Judges provides that prosecutors are under the authority of the Minister of Justice and under the control and direction of their superiors. The new law on the Statute for Judges should clarify the authorities to which prosecutors are subject and which authorities have the authority to evaluate the work of individual prosecutors and to submit evaluation reports to the CSPJ about them. In addition, the law should provide that evaluation reports are to be disclosed to the individual prosecutor and set out a procedure for Prosecutors to challenge the content of such reports. The law should also specify the permissible uses of such reports and the procedures in which they will be used. Establishing clear lines for the accountability of prosecutors in the law will prevent the disciplinary system being used as a form of pressure.

ii) Relationship with the executive

The new organic law should guarantee the independence of prosecutors in carrying out their functions and should ensure that they are not under the authority of the Minister of Justice. The ICJ is concerned that the subordination of the Office of the Public Prosecutor to the executive has resulted in a lack of effective investigations and

³¹⁹ Currently under Article 108 only judges (“magistrats du siège”) are irremovable.

prosecutions in cases involving human rights abuses. The new organic law should therefore specifically state that prosecutors should carry out their functions independently, impartially and with objectivity, and should also require and establish necessary safeguards to ensure that they are protected from intimidation, harassment or improper interference with their duties.

The 2011 Constitution requires prosecutors to comply with written instructions in conformity with the law from their hierarchical superiors.³²⁰ The phrase "hierarchical superiors" is not defined and under the current legal framework prosecutors are under the authority of the Minister of Justice and under the control and direction of their superiors.

As the Special Rapporteur on the independence of judges and lawyers has cautioned, "case-specific instructions to prosecutors from external organs are not desirable" and "should be formally recorded and carefully circumscribed to avoid undue interference or pressure".³²¹ The CoM Recommendation (2000)19 and the Bordeaux Declaration both contain specific guidance on such a situation. In particular, any instructions must be in writing and in compliance both with the law and with clearly established prosecution criteria. CoM Recommendation (2000)19 further provides that any instruction *not* to prosecute should be either prohibited or exceptional.

In keeping with these standards, the new organic law should limit the circumstances in which case-specific instructions from the Ministry of Justice are permitted. The law should define "higher authorities" to include only direct supervisors within the Office of the Public Prosecutor. It should make clear that any instructions must be consistent with the law and established prosecution criteria, follow the principles of equity and transparency and may not be politically motivated. It should prohibit any instruction to cease the investigation or prosecution of a case. The law should give prosecutors the right to challenge any instruction if they deem it unlawful or contrary to professional standards or ethics.

A number of regional and international standards discuss the importance of adequate remuneration. The new organic law on the Statute for Judges or the law on the organisation of the judiciary must guarantee that the Office of the Public Prosecutor has adequate resources as well as financial autonomy.

iii) Relationship with the judiciary

Consistent with international standards aimed at safeguarding the independence of judges and the fair administration of justice, the new organic law should establish that judges and prosecutors have distinctly separate roles and are independent from the executive and legislative branches as well as each other. One of the reasons why the Office of the Public Prosecutor should be strictly separated from judicial functions is to ensure that the criminal justice system is fair for all and the right to a fair trial is guaranteed in all circumstances. The right to be tried by an independent and impartial court is a *sine qua non* to ensuring a fair trial. Thus the functions of the judge and the prosecutor must be distinct. Furthermore, 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 judicial corps and exercise both prosecutorial and judicial functions.

³²⁰ 2011 Constitution, Article 110.

³²¹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 75.

iv) Other elements

Article 111 of the 2011 Constitution guarantees both judges and prosecutors freedom of expression and enshrines a qualified right to freedom of association. In particular the Constitution prohibits judges and prosecutors from joining trade unions or political parties. Article 111 also envisages other "conditions provided for by the law" that may operate to restrict the right to freedom of association. Under Article 22 of the ICCPR such restrictions are only permissible if they are necessary and proportionate to a legitimate prescribed purpose related to national security, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Implementing legislation should be consistent with these obligations prescribed in Article 22 of the ICCPR.

4. Recommendations

In light of the above, the Moroccan authorities must ensure that the organic law on the Statute for Judges, the organic law on the CSPJ and the law on the organisation of the judiciary, as appropriate:

- i. Divest the authority of the Minister of Justice over the OPP, including the ability to control and influence the career of prosecutors;**
- ii. Define the "relevant higher authorities" set out in Article 110 and 116 of the Constitution in a manner that excludes the Minister of Justice;**
- iii. Remove the Minister of Justice's authority to direct prosecutors to initiate, prosecute or refer to the competent jurisdiction such written requests as the Minister of Justice considers appropriate (Articles 36, 48 and 49 of the CCP);**
- iv. Define in law the nature and scope of any power of the executive to issue written instructions to the public prosecutor, and include a prohibition on the executive issuing instructions not to prosecute or requiring prosecution in a specific case, and specify that the issuance of written instructions shall not preclude the prosecutor from submitting any legal arguments of their choice;**
- v. Require that any power to issue written instructions is exercised transparently, in accordance with international and national law, and that any instructions are in writing, published adequately, are included in the case file where they relate to a specific case and are made available to other parties, and that other parties to the case are entitled to comment on the written instructions;**
- vi. Grant prosecutors the right to challenge any written instructions received, especially when they deem the instructions unlawful or contrary to professional standards or ethics;**
- vii. Ensure that any decision by the public prosecutor not to prosecute may be challenged, including before a court in the context of an independent and impartial judicial review;**
- viii. Ensure that functions of the Office of the Public Prosecutor and prosecutors are separated from judicial functions and, to this end, include specific safeguards to ensure the independence of prosecutors from the judiciary;**
- ix. Require prosecutors to carry out their functions independently, impartially, with objectivity and in defence of and in a manner which respects human rights and, to this end, among other things, prohibit any influence or interference from any source outside the OPP itself as well as any attempts to undermine the independence and impartiality of prosecutors;**

- x. **Require prosecutors to refuse to use any evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods and to take all necessary steps to ensure that those responsible for using such methods are brought to justice;**
- xi. **Provide for decisions relating to the recruitment, appointment, classification, training, promotion and transfer of prosecutors to be determined by the CSPJ;**
- xii. **Provide for any decisions relating to the appointment, or promotion of prosecutors to be based on objective criteria relating to qualifications, integrity, ability, efficiency and experience, without discrimination on any ground;**
- xiii. **Since prosecutors are judges under the Statute for Judges, and in order to protect them from any form of arbitrary proceedings while exercising their prosecutorial functions, in particular the investigation and prosecution of cases of human rights violations, extend guarantees of security of tenure to prosecutors;**
- xiv. **Guarantee conditions of tenure for prosecutors, including adequate working conditions and remuneration, including provision for health and other social benefits and a pension on retirement;**
- xv. **Guarantee the rights of prosecutors to freedom of expression and association, including the right to form and join associations aimed at representing their interests, promoting their professional training and protecting their independence in a manner consistent with international law and standards. No restrictions may be placed on the exercise of these rights other than those provided for by articles 19 and 22 of the ICCPR;**
- xvi. **Empower the general Judicial Inspection Service to carry out inspections of the work of prosecutors and is overseen in this work by the CSPJ;**
- xvii. **Set out the disciplinary procedure applicable to prosecutors and, to this end, includes provision for an independent disciplinary procedure under the auspices of the CSPJ, which ensures that decisions are based on law, the code of professional conduct and standards and ethics which are consistent with international standards, as well as a fair hearing and due process guarantees for the prosecutor concerned, including the ability to appeal against a decision and sanction to an independent body;**
- xviii. **In consultation with prosecutors, establish a code of ethics for prosecutors which is consistent with international standards; and**
- xix. **Enshrine in law safeguards to ensure sufficient resources and financial and organisational autonomy for the OPP.**

F. The Constitutional Court

The 1996 Constitution provided for a Constitutional Council and outlined its basic composition and functions.³²² Organic Law No. 29-93 contains detailed provisions on the Constitutional Council.³²³ In accordance with the 2011 Constitution, the Constitutional Council is to be replaced by a Constitutional Court.³²⁴ The 2011 Constitution details the jurisdiction of this Court. A new organic law will determine the organization and functioning of the Court, as well as the procedures to be followed

³²² 1996 Constitution, Articles 78-81.

³²³ Law No. 1-94-124 of 25 February 1994, promulgating Organic Law No. 29-93 on the Constitutional Council, as amended.

³²⁴ 2011 Constitution, Article 129.

before it and the conditions of tenure of its judges.³²⁵ Until the Constitutional Court is established, the Constitutional Council will continue to exercise its functions.³²⁶

This section will discuss the current Constitutional Council and the new Constitutional Court in light of the previously highlighted standards requiring and safeguarding the independence and impartiality of the judiciary.

1. The Constitutional Council

i) Competencies of the Council

The Constitutional Council is granted competency to:

- rule on the validity of parliamentary elections and referendums;³²⁷
- rule on the constitutionality of organic laws, before their promulgation;³²⁸
- rule on the constitutionality of regulations of each House of Parliament, before their implementation;³²⁹
- rule on the constitutionality of laws, prior to promulgation, that are referred to the Council by the King, the Prime Minister, the President of the House of Representatives, the President of the House of Counsellors or one-fourth of the members of either House;³³⁰
- rule on whether a legislative proposal or amendment by Parliament is outside the legislative power, upon a request by the government or either House of Parliament;³³¹ and
- grant consent for the amendment by decree of legislative texts.³³²

As a general rule, the Constitutional Council has one month to decide upon the validity of laws and regulations, except in emergency cases where the deadline can be reduced to eight days.³³³

The Constitutional Council's review is limited to the *ex ante* review of laws. It is not mandated or competent to review the constitutionality of legislation after promulgation (*ex post* review). In addition, there is no possibility for individuals to directly or indirectly petition the Constitutional Council regarding an alleged prospective or retrospective violation of the Constitution.

Laws or provisions declared unconstitutional are not promulgated. Decisions of the Council cannot be appealed and are not subject to any form of review. They are binding upon all public authorities, including administrative and judicial authorities.³³⁴ In addition to declaring the whole of a prospective law or regulation unconstitutional, the Council can also decide that specific provisions of a prospective law are unconstitutional and require that the specific unconstitutional provisions be severed, while allowing the remainder to be promulgated.³³⁵

ii) Composition and appointment of members

³²⁵ 2011 Constitution, Article 131.

³²⁶ 2011 Constitution, Article 177.

³²⁷ 1996 Constitution, Article 81

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*, Article 53.

³³² *Id.*, Article 48. Law No. 29-93, Article 25, provides that the Prime Minister has the competence to seize the Constitutional Council of such matters.

³³³ 1996 Constitution, Article 81.

³³⁴ 1996 Constitution, Article 81.

³³⁵ Law No. 29-93, Article 24.

The Council is made up of 12 members, 6 of whom are appointed by the King.³³⁶ Following consultation with parliamentary groups, three other members are appointed by the President of the House of Representatives, and the remaining three are appointed by the President of the House of Counsellors.³³⁷ The President of the Council, who is designated by the King, is responsible for calling sessions and overseeing the general administration of the Council.

No conditions or objective criteria are laid out in the 1996 Constitution or Organic Law No. 29-93 for the appointment of candidates as members of the Council. In practice however, since 1994, most of the individuals who have been appointed to the Council as members have had a legal background and have been either academics or politicians. A smaller number were judges or lawyers. Since 1994, only two women have been appointed to the Council.³³⁸

iii) Conditions and security of tenure

Under the 1996 Constitution, each member of the Council serves a nine-year term, which is non-renewable.³³⁹ No other details concerning the conditions and security of tenure for the members of the Council are enshrined in the 1996 Constitution. Instead, Article 80 states that these details are to be set out in the organic law.³⁴⁰ Law No. 29-93, sets out certain provisions on the conditions and termination of tenure for Council members.

A Council member's term can be terminated early on various grounds, both voluntarily and involuntarily.³⁴¹ Mandatory resignation is required where the member exercises an activity, function or office incompatible with membership on the Council; loses enjoyment of civil and political rights; has a permanent incapacity; or breaches the obligation to act with independence and dignity or the prohibition of taking up of public positions, contrary to Article 7.³⁴² Mandatory resignation has to be noted by the Constitutional Council, upon referral to it by the President of the Constitutional Council, Speaker of the House of Representatives, the President of the House of Counsellors, the Minister of Justice or the President of the Court of Auditors. Law No. 29-93 is silent on the procedure to be followed in cases of mandatory resignations, including as to whether the member concerned has the opportunity to contest the decision.

In terms of financial remuneration, Article 13 states that members will receive an allowance equal to that of parliamentarians, while the President will receive an allowance equal to the President of the House of Representatives.

Members of the Council are explicitly prohibited from taking public positions or consulting on matters that have been the subject of a decision by the Council.³⁴³ They cannot hold other public positions, including governmental or parliamentary positions, membership on the Economic and Social Council or employment in companies with more than 50 per cent public ownership.³⁴⁴ They are also prohibited from occupying a position of responsibility or management in a political party, trade union or other

³³⁶ 1996 Constitution, Article 79, and Organic Law No. 29-93, Article 1.

³³⁷ *Id.*

³³⁸ For a list of members of the Council and their backgrounds see <http://www.conseil-constitutionnel.ma/FR/Etablissement.php?P=Membre&R=Etablissement> last accessed 8 March 2013.

³³⁹ 1996 Constitution, Article 79, and Organic Law No. 29-93, Article 2. One third of the Council is reconstituted every three years.

³⁴⁰ 1996 Constitution, Article 80.

³⁴¹ Law No. 29-93, Articles 9 and 10.

³⁴² *Id.*, Article 10(4).

³⁴³ *Id.*

³⁴⁴ *Id.*, Articles 4 and 5.

political group or union.³⁴⁵ Members are required to declare business assets and activities, including management positions, and their personal assets and income, before, during and upon termination of their office.³⁴⁶ There are procedures before the Court of Auditors to verify declarations of assets and to handle potential conflicts.³⁴⁷ Finally, members are required to “refrain from anything that might compromise their independence and the dignity of their office”.³⁴⁸

2. The new Constitutional Court

Articles 132 and 133 of the 2011 Constitution detail the competencies of the Constitutional Court, which include ruling on:

- the validity of parliamentary elections and referendums;³⁴⁹
- the constitutionality of all organic laws, prior to their promulgation;³⁵⁰
- the internal regulations of the houses of parliament, prior to their implementation;³⁵¹
- the constitutionality of laws referred prior to their promulgation by the King, Prime Minister, the President of the House of Representatives, the President of the House of Councillors, one-fifth of the members of the Chamber of Representatives or one-fourth of the members of the Chamber of Councillors;³⁵²
- questions of unconstitutionality raised in the course of litigation by one of the parties to a case on grounds that a “law on which the issue of the litigation depends, infringes the rights and freedoms guaranteed by the Constitution”.³⁵³

The ability to determine the constitutionality of laws that infringe constitutionally guaranteed rights and freedoms, if raised by a party during the course of a trial, represents a positive development from the previous position under the Constitutional Council. The precise conditions and procedures for the exercise of jurisdiction under Article 133 are to be established in a new organic law.³⁵⁴ As is the case with the Constitutional Council, the Constitutional Court will be the only court in Morocco empowered to rule on the constitutionality of a law.³⁵⁵

A provision declared unconstitutional in the Court’s exercise of its jurisdiction under Article 132 will not be promulgated or implemented. A provision declared unconstitutional under Article 133 is abrogated as of the date specified by the Court.³⁵⁶ Furthermore, Constitutional Court decisions are final and binding on all authorities.³⁵⁷

³⁴⁵ *Id.*, Article 7.

³⁴⁶ *Id.*, Articles 8bis and 8ter, inserted by Law No. 49-07.

³⁴⁷ *Id.* The President of the Court of Auditors appoints a Secretary-General from that Court, while the First President of the Court of Cassation appoints two counsellors from the First Chamber of the Court of Cassation and two from the Administrative Chamber of the Court of Cassation, to assist the body reviewing asset declarations.

³⁴⁸ *Id.*, Article 7.

³⁴⁹ 2011 Constitution, Article 132. Disputes regarding the validity of Parliamentary elections must be decided on within one year. This time limit can be extended where the Court gives a reasoned decision and the number or nature of the dispute so requires.

³⁵⁰ *Id.* All laws and regulations must be reviewed within one month of their referral to the Court, unless the Government declares the matter is urgent, in which case a decision must be made within eight days.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ 2011 Constitution, Article 133.

³⁵⁴ *Id.*

³⁵⁵ Civil Procedure Code, Article 25.

³⁵⁶ 2011 Constitution, Article 134.

³⁵⁷ 2011 Constitution, Article 134.

Under the 2011 Constitution, the 12-member Court will be composed of 6 individuals appointed by the King, 1 of whom will be proposed by the Secretary-General of the High Council of Muslim Scholars.³⁵⁸ The other 6 members will be elected by the 2 Chambers of Parliament (3 members by each Chamber), through a secret ballot, from a list of candidates presented by the bureau of each Chamber.³⁵⁹ The President of the Court will be appointed by the King from among any of the members of the Court.³⁶⁰

The 2011 Constitution establishes criteria for the qualifications of the members of the Constitutional Court. They must be chosen from among persons possessing "a high attainment of knowledge in the legal field and a judicial competence, doctrinal or administrative, having exercised their profession for more than fifteen years, and be recognized for their impartiality and their probity."³⁶¹

3. Assessment of national law in light of international standards

Article 14 of the ICCPR guarantees to everyone the right to "a fair and public hearing by a competent, independent and impartial tribunal established by law" in "the determination of any criminal charge" or of "rights and obligations in a suit at law". Since Article 133 of the 2011 Constitution provides that the new Constitutional Court has jurisdiction to determine the constitutionality of laws if raised by a party during the course of a trial, compliance with Article 14 of the ICCPR will require the Constitutional Court to be independent and impartial.

The requirements of independence and impartiality mean that members of the Court need to be free from both political and private influences. This requires among other things respect for the of separation of powers, which means that the Constitutional Court as an institution and its judges must be independent from the executive and legislative branches of the state. As the Inter-American Court of Human Rights stated in a case concerning Peru: "Under the rule of law, the independence of all judges must be guaranteed and, in particular, that of constitutional judges, owing to the nature of the matters submitted to their consideration".³⁶²

The new organic law should set out guarantees and safeguards for the independence of the Court as an institution and for the members of the Constitutional Court.

It should also require the allocation of sufficient financial, administrative and human resources and organizational autonomy to ensure the Court's institutional independence.

As with ordinary courts, the conditions and security of tenure for the members of the Constitutional Court are key to ensuring their individual independence and impartiality. The 2011 Constitution contains no explicit provisions on the conditions of tenure for members of the Constitutional Court. In order to ensure consistency with the requirements of independence and impartiality, the organic law should set forth the conditions of tenure. Procedures for resignation, suspension, removal and impeachment must also be set out in the organic law. Any disciplinary decisions must be based on established standards of judicial conduct which should be enshrined in the code of conduct that is drafted by or at least in consultation with judges and enshrined in law. Disciplinary procedures applicable to members of the Constitutional Court should be conducted by an impartial and independent body in proceedings that

³⁵⁸ Compare 1996 Constitution, Article 79, with 2011 Constitution, Article 130.

³⁵⁹ 2011 Constitution, Article 130.

³⁶⁰ *Id.* As compared to Article 79 of the 1996 Constitution.

³⁶¹ 2011 Constitution, Article 130

³⁶² *Judgment of 31 January 2004*, Inter-American Court of Human Rights, *Constitutional Court v. Peru*, para. 75.

meet the standards of fairness and guarantee due process as set out above in Sections B and C in relation to judges of other courts.³⁶³

The addition in the 2011 Constitution of a degree of *ex post* review of legislation, as well as the *ex ante* review and other powers currently granted to the Constitutional Council, is a welcome departure from the former system.

Although Article 133 grants the Constitutional Court jurisdiction over challenges to the constitutionality of laws raised during the course of litigation by one of the parties, it does not set forth the procedure for raising such a claim or for the referral of the matter to the Constitutional Court. The scope of constitutional review is also not clear. Article 133 refers to reviewing "laws", without specifying whether this also includes organic laws, royal decrees and other regulations and decrees issued by the executive. Presumably an assessment of whether a law infringes constitutional rights and freedoms guaranteed by the Constitution would include the Preamble and its reference to international law. Restrictive standards and procedures, however, could greatly undermine the scope of this review and consequently the role of the Constitutional Court.

What is clear from Article 133 is that there is no direct access for individuals to the Constitutional Court, nor does the Court have the competence to consider the constitutionality of acts or decisions of public bodies that do not amount to a law. Although Morocco is not unique in prohibiting direct access to the Constitutional Court by individuals, such a system necessarily requires reliance on other courts to evaluate Article 133 demands and to refer them, as appropriate, to the Constitutional Court. Access to constitutional review thus depends on the lower courts.

The organic law establishing the conditions and procedures for Article 133 cases must therefore detail the procedure to be used for the transfer of cases to the Constitutional Court, the standard to be applied by lower courts in deciding on whether to refer cases to the Constitutional Court and the procedure that applies before the Constitutional Court. These procedures should be transparent, fair and timely and allow for the possibility for interested parties (including those not party to the underlying case) to address the Court as *amicus curiae* or intervener. The law should also clarify which laws can be subject to *ex post* review by the Court and ensure that the Court can hear cases concerning any right or freedom enshrined in the Constitution or recognised in international law.

Another important element relating to the effectiveness of constitutional review, is the consequences of the Constitutional Court's decisions. In order to uphold the rule of law and the principle of legal certainty, Constitutional Court decisions should be binding and final and must be enforced by public authorities. It is therefore to be welcomed that the 2011 Constitution maintains the binding and final nature of Constitutional Court decisions. Further, Article 134 specifically prevents the promulgation or implementation of draft legislation that is found to be unconstitutional under Article 132 and abrogates, from the date of the Court's decision or a date decided by the court in its decision, legislation that is declared unconstitutional under Article 133. However, the 2011 Constitution does not explicitly refer to the requirement on public authorities to enforce the decisions of the Constitutional Court, which is a necessary corollary to their binding nature and a crucial requirement for the realisation of rights and freedoms in practice. The law therefore should make this clear.

4. Recommendations

³⁶³ See Section B (Statute for Judges).

The organic laws on the Constitutional Court and the procedure under Article 133 are of critical importance in terms of ensuring the Court's competence, independence and impartiality, as well as its effectiveness in upholding the rule of law and protecting and enforcing human rights.

Therefore the organic laws should:

- i. Enshrine the principle of the independence and impartiality of the Court as an institution and its members and, to this end, prohibit any interference by other branches of the State and private parties in the work or functioning of the Court;**
- ii. Include provisions which ensure the financial independence of the Court, including mechanisms that guarantee sufficient material and human resources are allocated to the Court and that the Court exercises control over these resources;**
- iii. Ensure that all members of the Constitutional Court, including those appointed by the king, are appointed only on the basis of merit and objective criteria that are consistent with international standards aiming to safeguard the independence of the judiciary;**
- iv. Ensure members are guaranteed adequate conditions of tenure, including adequate remuneration and pensions;**
- v. Guarantee the rights of judges to freedom of expression and association, including the right to form and join associations aimed at representing their interests, promoting their professional training and protecting their judicial independence in a manner consistent with international law and standards. No restrictions may be placed on the exercise of these rights other than those provided for by articles 19 and 22 of the ICCPR;**
- vi. Require members of the Court to exercise their functions with independence and impartiality, with due regard for the need to demonstrate both actual impartiality and the appearance of impartiality and, to this end, include an obligation on members to recuse themselves where the situation requires;**
- vii. Guarantee security of tenure for members of the Court, except for incapacity or for criminal offences or serious infringements of established standards of judicial conduct enshrined in law;**
- viii. Provide for a clear, fair, timely and transparent procedure for Article 133 cases to be heard by the Constitutional Court where questions concerning the constitutionality of legislation have been raised in the course of litigation;**
- ix. Ensure the standard for the referral of cases to the Constitutional Court pursuant to Article 133 is not unduly restrictive;**
- x. Detail which laws can be subject to ex post review by the Constitutional Court;**
- xi. Ensure that the parties to the underlying case are provided with an opportunity to make submissions to the Court before a decision is reached and ensure that other interested (third) parties, are granted a fair and adequate opportunity to be heard before the Constitutional Court, prior to a decision being reached;**
- xii. Require the Constitutional Court to issue a reasoned decision in a timely manner;**
- xiii. Set out the scope of review by the Constitutional Court and, to this end, ensure that the Court has competence to hear cases concerning any right or freedom enshrined in the Constitution or part of Morocco's international legal obligations recognized in international law, including as reflected in the jurisprudence of international human rights bodies; and**

- xiv. Include a provision requiring all public authorities and bodies to respect and enforce decisions of the Constitutional Court.**

ICJ Commission Members

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