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Last opportunity for Tunisian lawmakers to enshrine human rights for all in Tunisia's new Constitution

Amnesty International renews its calls on Tunisia's National Constituent Assembly (NCA) to ensure that the new Constitution fully safeguards human rights for all, in accordance with Tunisia's obligations under international human rights law, as the Assembly is expected to vote soon on the draft constitution article by article.

The third draft for Tunisia's new Constitution, first introduced at the NCA on 22 April, was modified following debates among political parties and published on 1 June. As the NCA is expected to vote on the text, article by article, then in its entirety, Amnesty International is urging that it is brought into line with international human rights standards. If the draft as a whole fails to be agreed by at least two-thirds of the NCA, it will eventually be put to a national referendum.

The text maintains guarantees for several economic, social and cultural rights, including provisions on the right to work under equitable conditions, the right to form trade unions, the right to education and the right to health. Restrictions to the right to strike were removed in the 1 June draft. However, Amnesty International is disappointed that the draft does not include the right to adequate housing and a prohibition of forced evictions.

The draft also maintains that there is no statute of limitation for the crime of torture. It contains positive provisions compared to the first and second drafts of August and December 2012, notably by introducing a provision on the right to asylum.

However, despite amendments since 22 April, the current draft still undermines tenets of international human rights law, such as the universality of human rights and the supremacy of international law over domestic law. The notion of freedom of conscience was introduced, but the current draft fails to expressly guarantee the freedom to have or adopt a religion or belief of one's choice, or not to practice any religion and to specify the prohibited grounds for discrimination.

The draft also restricts some basic rights such as the rights to freedom of expression, peaceful assembly and association, and freedom of movement by the inclusion of vaguely worded limitations which are in effect claw-back clauses. It fails to specify which rights cannot be derogated from in a state of emergency, and places limitations on the right to life that fall short of Tunisia's international human rights obligations.

The draft also does not include the necessary guarantees to secure the independence of the judiciary, ensure the right to a fair trial, fully prohibit cruel, inhuman and degrading treatment or punishment and uphold the principle of *non-refoulement*.

Amnesty International urges the NCA to show leadership and uphold in the new Constitution the aspirations of millions of Tunisians who demonstrated in 2011 against repression and injustice. Tunisia's new Constitution should signal a real departure from a past marred by abuses and must become a powerful instrument for the protection of human rights.

The NCA should revise the following draft articles that undermine human rights and address remaining gaps in human rights protection:

1. Universality of human rights, freedom of thought, conscience, belief and religion and non-discrimination

- Universality of human rights and the supremacy of international human rights law over national law

The preamble establishes the foundations of the Constitution on the fundamentals of Islam and its objectives, characterized by openness and moderation, on the sublime human values and on the principles of universal human rights. The provision qualifying the principles of universal human rights according to conformity with “the cultural specificities of the Tunisian people” was removed.

Article 19 of the draft states that international conventions ratified by the parliament are superior to national laws but below the Constitution.

Such provisions could allow Tunisia to renege on its international human rights obligations under the pretext that they are not in line with the Constitution or the fundamentals of Islam.

In addition, Article 141 provides that no constitutional revisions can undermine Islam as the religion of the state, provision which Amnesty International fears could potentially be interpreted to undermine human rights, including the rights to freedom of thought, conscience and belief, and the principle of non-discrimination and equality before the law.

Such provisions contradict the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, which states that:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

They also contravene Article 27 of the Vienna Convention on the Law of Treaties, which states that a State party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

Amnesty International calls on the NCA to include in the Constitution a provision that directly gives ratified international and regional human rights treaties and customary international human rights law the force of law in the domestic legal order of Tunisia. And it must make clear that domestic laws and the constitution are to be interpreted in full conformity with these international human rights obligations.

- Freedom of thought, conscience, belief and religion

The draft presented on 22 April at the NCA has now been modified to include that the state guarantees freedom of conscience as well as freedom of belief and religious practice.

The draft defines the rights to freedom of conscience, belief and religion as a duty of the state but fails to guarantee these rights as every individual's rights.

Amnesty International urges the NCA to ensure that the new Constitution expressly guarantees the right to have or adopt a religion or belief of one's choice, or not to practice any religion,

and specifies that nobody should be subjected to coercion that would impair his or her freedom to have or to adopt a religion or belief of his or her choice.

- Non-discrimination

The current draft includes previous provisions which did not fully guarantee or undermined the principle of non-discrimination. Article 20, which states that “all citizens, male and female, are equal in rights and obligations and are equal before the law without discrimination,” continues to exclude non-Tunisians, which is contrary to Tunisia’s obligations under international human rights law to uphold the human rights of everyone within its territory and subject to its jurisdiction. It also fails, as in previous drafts, to specify other prohibited grounds for discrimination such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 45 contains positive provisions, stating that the state guarantees the protection of women’s rights and supports their acquired rights. It also guarantees equal opportunities between men and women to assume responsibilities and the elimination of all forms of violence against women. However, it does not clearly specify that men and women are equal and are entitled to full equality in law and practice, and in opportunities in all areas of life whether civil, cultural, economic, political or social, as defined in international human rights standards.

The current draft also continues to specify that only a Muslim can become president.

The NCA should ensure that non-discrimination and equality before the law are extended to non-Tunisians and in effect to anyone subject to the jurisdiction of the Tunisian authorities. In addition, the new Constitution should specify the prohibited grounds for discrimination, including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and that women and men are recognised as equal, and are entitled to full equality in law and practice and equal opportunities in all areas of life, including without limitation in the civil, cultural, economic, political and social spheres.

2. Sweeping restrictions and derogations to human rights

While the draft enshrines a number of basic human rights such as the rights to life, free expression, association, assembly, movement, provisions guaranteeing these rights also allow for vaguely-worded restrictions, which can be used to limit arbitrarily the exercise of these fundamental freedoms. The draft also allows for the possibility to derogate from rights in case of a state of emergency. The draft constitution provides that rights and freedoms can be restricted, if their essence is not compromised and the restriction is provided by law, in order to protect the rights of others, for the needs of public safety, national security or public health. But the draft does not state that some rights are non-derogable. And that those that may exceptionally be restricted for a legitimate aim may only be limited when demonstrably necessary and only in a manner that is proportionate to protect that aim.

While the International Covenant on Civil and Political Rights (ICCPR) accepts restrictions to freedom of movement, freedom of expression, assembly and association, such restrictions are only permissible if they are provided by law, are necessary in a democratic society to protect national security, public order, public health or morality, or the rights and freedoms of others, and if they are consistent with other rights recognized by the Covenant.

The Human Rights Committee has also specified, in its General comments Nos. 10, 22, 27 and 34 the conditions under which restrictions to rights are possible.

The current draft also provides for derogations to the right to life “in extreme cases provided for in law”. It also sets out the conditions for declaring a state of emergency, but without

specifying that certain human rights and fundamental freedoms are not derogable at any time, as clarified by the Human Rights Committee in its General comment No. 29.

- Freedom of opinion and expression

Despite guarantees for freedom of association, freedom of assembly and freedom of expression contained in Articles 30, 31, 34 and 36 respectively, provisions in these articles could allow these rights to be arbitrarily restricted in national laws.

Article 30 while guaranteeing the right to freedom of opinion, thought, expression, media and creativity, states that they may not be restricted except by a law protecting the rights, reputation, safety and health of others; Article 31 guarantees the right to access information “without prejudice to national security, public interest, or private information of others”.

Amnesty International is particularly concerned at the failure of the current draft to fully protect freedom of expression, as in the past year journalists, bloggers, critics and artists have been threatened with prosecution or even jailed solely for the peaceful expression of their opinions.

Amnesty International calls on the NCA to revise these articles so that they conform to Tunisia’s obligations under Article 19 of the ICCPR, clarified by the Human Rights Committee in its General comments No. 10 and 34, which require that any restrictions to these rights must be specified by law, for the purpose of protecting a legitimate aim and demonstrably necessary and proportionate to protect that aim.

- Freedom of assembly and association

Article 34 states that the law regulates procedures for the constitution of parties, syndicates and associations. Article 36 similarly states that the right to peaceful assembly shall be practiced according to the procedures provided for by law.

As regards peaceful assembly, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association specified that “the exercise of fundamental freedoms should not be subject to previous authorization by the authorities ...but at the most to a prior notification procedure.” He has called on states to explicitly enshrine this presumption in favour of the right to peaceful assembly in law.

Amnesty International calls on the NCA to reflect this presumption in the constitution and ensure that any restrictions to the right to freedom of assembly and association are strictly necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

- Freedom of movement

Article 23 provides that the state must protect the right to choose one’s place of residence, to move freely within the country, and the right to leave the country. However, the draft allows for limitation of these rights as long as they are prescribed by law and subject to a court decision. But it fails to specify that any such restrictions must be exceptional, strictly limited to those permitted in Article 12(3) of the ICCPR, and must not undermine the essence of the right to freedom of movement.

The Human Rights Committee, in para.13 of General Comment No.27 on freedom of movement, states that:

“In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right

(cf. art. 5, para. 1); the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.”

Amnesty International calls on the NCA to include in the Constitution that any restrictions to the right to freedom of movement conform fully to Article 12(3) of the ICCPR and be consistent with other human rights, particularly equality and non-discrimination; and that it provides that anyone subject to restriction of the right to freedom of movement is entitled to receive reasons for the restriction and a means of challenging that restriction.

- The right to life

Article 21 states that the right to life is sacred and can only be limited in extreme cases provided for in law, and therefore fails to fully uphold the right to life. Tunisian law still allows for the death penalty as a punishment for 21 offences, some with no lethal consequences. Tunisia responded to recommendations in its Universal Periodic Review (UPR) at the UN Human Rights Council in September 2012 to abolish the death penalty by saying that this issue should first be the subject of a national debate.

Amnesty International calls on the NCA to amend this provision and fully guarantee the right to life in the new Constitution.

- The state of emergency

The current draft, under Article 79, allows the President to impose a state of emergency under certain conditions but still fails to conform to international standards on states of emergency.

The circumstances for such derogation as circumscribed by Article 4 of the ICCPR, the rights listed by the ICCPR and Human Rights Committee as non-derogable, and the limitations upon derogating measures as provided for by Article 4 of the ICCPR and elaborated by the Human Rights Committee, should be explicitly included in the Constitution.

Article 4 of the ICCPR expressly specifies a number of provisions from which there can be no derogation at any time, including: the right to life; to be free from torture and other ill-treatment; to be free from slavery; to not be arrested because of an inability to fulfil a contractual obligation; the principle of legality in the field of criminal law; the recognition of everyone as a person before the law; and freedom of thought, conscience and religion.

Human Rights Committee General Comment No. 29 explains that a number of other provisions of the ICCPR are also non-derogable by implication. For instance, “States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.”

The NCA must ensure that the new Constitution explicitly specifies the rights which are not derogable in a state of emergency.

3. Insufficient guarantees for the independence of the judiciary, fair trial, and for the protection against torture and other forms of ill-treatment

- Independence of the judiciary

Independence of the judiciary is a fundamental pre-condition for the full respect for human rights, both because it is expressly required as a component of the right to a fair trial but also because the judiciary is expected to play a crucial role in securing and enforcing respect for

human rights more generally and their independence must be guaranteed if they are to fulfil this role effectively.

Amnesty International is particularly concerned about the composition of the Supreme Judicial Council and that essential principles of security of tenure of judges and key fair trial guarantees are not explicitly guaranteed.

Chapter 5 of the draft relating to the judiciary provides that the judiciary is independent and that judges are independent and only subjected in the practice of their functions to the Constitution and the law.

However, it does not state clearly that the judiciary is fully independent from the executive branch and the legislature. And it fails to include the sufficient guarantees, particularly regarding judges' appointment, tenure, promotion and discipline, to ensure that the judiciary is truly independent and impartial. The key principle of security of tenure (*inamovibilité*) of judges is not enshrined in the current draft.

Article 101 states that judges must be neutral, competent and have integrity and Article 102 provides that judges benefit from judicial immunity, which can only be lifted by the Supreme Judicial Council. Article 104 states that judges cannot be transferred without their agreement and cannot be dismissed, suspended or be subjected to disciplinary sanctions except in cases and according to guarantees provided for in law and a justified recommendation of the Supreme Judicial Council.

While the current draft provides procedures for the appointment, tenure, promotion, suspension and dismissal of judges, it fails to specify objective criteria and to fully conform with the requirements of the ICCPR, as explained by the Human Rights Committee, and the UN Basic Principles on the Independence of the Judiciary. It also fails to specify that judges should be appointed based on ability, training and qualifications with no discrimination.

Chapter 5 also sets out certain guarantees and functions of the Supreme Judicial Council, the body that recommends the appointment and oversees the work of judges. But the relevant articles in the draft fall short of guaranteeing this body's independence from the executive and legislative branch. In addition, the criteria and procedures for the appointment of members, including some judges and individuals who are not judges, who together would compose more than half of the membership of the Supreme Judicial Council, are not specified. This leaves open the possibility that a majority of the membership of the Supreme Judicial Council could be controlled by the executive, thereby undermining the independence of the judiciary.

Article 108 provides that the three Councils part of the Supreme Judicial Council have powers of decision on issues related to careers and disciplinary matters for judges. The draft fails to specify the grounds for disciplinary proceedings against judges, and that disciplinary procedures must be fair, objective and impartial, and subject to an independent review, in line with international human rights standards on the independence of the judiciary.

The judiciary under the rule of former President Ben Ali was subservient to the executive branch and lacked independence, and consequently the trust of the Tunisians in the ability of the judiciary to render justice impartially and independently and the rule of law was seriously eroded. It is therefore essential for the new Constitution to fully guarantee the independence of the judiciary and the impartiality of justice. Amnesty International urges the NCA to ensure that provisions in the new Constitution:

- Clearly state that the judiciary is fully independent from the executive and guarantee the independence of the Supreme Judicial Council
- Specify judges' security of tenure (*inamovibilité*)

- Contain clear and fair 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 that comply with the requirements of the ICCPR, as explained by the Human Rights Committee;
- Provide for a process whereby adequate judicial remuneration, conditions of service, pensions and age of retirement are determined by a body and process that is itself independent of the executive; and
- Include provisions whereby judges are appointed based on ability, training and qualifications with no discrimination, including on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status.
 - The right to liberty and the right to a fair trial

Articles 26 to 28 provides certain guarantees to protect the right to liberty and the right to a fair trial but the current draft still fails to include specific guarantees contained in Article 14 of the ICCPR. Furthermore, shortcomings in the constitutional guarantees of the independence of the judiciary also threaten the right to fair trial.

The new Constitution should specify further guarantees, including the right to be promptly brought before a court, and to trial within reasonable time or release; guarantees of access to effective means of challenging the lawfulness of detention before a court and being ordered released if the detention is found to be unlawful; the right to access to an independent lawyer immediately following any deprivation of liberty; and the right to trial by an ordinary civilian court (excepting, at most, the trial of members of the military on matters of purely internal military discipline).

- The prohibition against torture

Amnesty International is concerned that the draft still fails to contain a definition of torture that complies with Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which Tunisia is a party and that the draft does not explicitly prohibit other cruel, inhuman or degrading treatment or punishment.

Given the widespread use of torture and other cruel, inhuman or degrading treatment and punishment by security forces and the prison administration documented under Ben Ali's rule, and reports of recent cases of torture and other forms of ill-treatment, the new Constitution must fully protect against such crimes.

The current draft should be amended to provide for a definition of torture that complies with Article 1 of the CAT, including: an explicit prohibition of all cruel, inhuman or degrading treatment and punishment, including corporal judicial punishments; specifying that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, nor any order from a superior official or officer, justify any such act; and to guarantee that no information of any kind obtained through torture or other cruel, inhuman or degrading treatment may be admitted in evidence in any proceedings of any nature, except against a person accused of torture as evidence that the statement was made.

- Refugees, asylum-seekers, and the principle of *non-refoulement*

Amnesty International welcomes the inclusion in the third draft of Article 25, which guarantees the right to political asylum and prohibits the forcible return of political refugees.

Amnesty International calls on the NCA to build on the present formulation of Article 25 so as to ensure that the Constitution enshrines the right to seek and enjoy the right to asylum from persecution or other forms of serious harm, consistent with Tunisia's obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (UN Refugee

Convention) and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention).

Furthermore, the organization urges the NCA to ensure that the Constitution enshrines the right to be protected against *refoulement*, the protection against expulsion, extradition, deportation, transfer or any other type of judicial or extrajudicial removal to any country or territory where the person concerned would face a real risk of serious human rights violations or abuses. The principle of *non-refoulement* is the cornerstone of the international protection system and it is enshrined in various treaties to which Tunisia is a party, including the UN Refugee Convention, the OAU Refugee Convention, the CAT and the ICCPR.