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Tunisia's new Constitution must fully protect human rights for all

Amnesty International is calling on Tunisia's National Constituent Assembly (NCA) to ensure that the new Constitution fully safeguards human rights and conforms to Tunisia's obligations under international human rights law.

As a second draft for the new Constitution was made available in December 2012, and is due to be discussed on 13 January 2013, members of the Assembly should seize the opportunity to enshrine in the Constitution the highest level of protection of the rights of everyone in Tunisia and signal that there will be no turning back on human rights.

Amnesty International welcomes the removal in the current draft of previous proposals that undermined gender equality, by including ambiguous wording on the complementary roles within the family, and freedom of expression, by criminalizing attacks against religion and "sacred values".

However, Amnesty International remains concerned at several provisions in the current draft which fail to uphold international human rights principles and standards. For instance, the supremacy of international human rights law over national law is undermined by Article 15 of the current draft. Amnesty International fears that this could allow Tunisia to renege on its international human rights obligations, and calls for the inclusion in the Constitution of a provision recognizing that Tunisia must uphold the human rights guaranteed in the international human rights treaties it has ratified.

Article 16 of the current draft which guarantees the right to life within the limit of Tunisian law also fails to fully uphold the right to life, as Tunisian law still allows for the death penalty.

Amnesty International is further concerned that several clauses in the draft are worded in a vague or ambiguous way, and that some human rights guarantees are not fully defined. In the past year, freedom of expression has been under attack and women's rights undermined in Tunisia. It is therefore crucial for the new Constitution to fully protect these rights.

In April last year, Amnesty International made a submission to the National Constituent Assembly with detailed recommendations for the future Constitution to guarantee non-discrimination, fundamental human rights such as freedom of opinion and expression, safeguards such as protection against torture, and the independence of the judiciary. Today, Amnesty International reiterates the following recommendations to the National Constituent Assembly, already highlighted in its April submission:

- Non-discrimination

Article 5 of the current draft, which states: "All citizens, males and females alike, shall have equal rights and obligations and shall be equal before the law, without discrimination of any kind", undermines the principle of non-discrimination.

Non-discrimination and equality before the law should be extended to non-Tunisians and in effect to anyone under the jurisdiction of the Tunisian authorities. In addition, the draft should be amended to 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.

In addition, ambiguous wording in Article 37, which states “The state shall guarantee the provision of equal opportunities between men and women in the bearing of various responsibilities.” and wording in Article 8 in relation to the family may undermine equality between women and men and do not further define “equal opportunities”. The Constitution should include a provision specifying 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.

- Freedom of opinion and expression

The right to freedom of opinion and expression should be fully protected by ensuring that the provisions of Article 36 are fully consistent with Article 19 of the International Covenant on Civil and Political Rights (ICCPR), and include that any restrictions to the right of freedom of expression must be demonstrably necessary in a democratic society and proportionate to the aims of the restrictions.

- Independence of the judiciary

Chapter 5 of the current draft relating to the judiciary provides for certain guarantees of the independence of the judiciary, and spells out some procedures and criteria for the tenure of judges, and for the Supreme Judicial Council, the body that will oversee judges. However, these provisions are not fully consistent with the requirements of the ICCPR, as explained by the Human Rights Committee, and the UN Basic Principles on the Independence of the Judiciary. Amnesty International urges the National Constituent Assembly to ensure that provisions in the new Constitution:

- Clearly state that the judiciary is fully independent from the executive, including members of the Supreme Judicial Council;
- 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;
- Specify judges’ term of office, independence and security of tenure;
- 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 status.

- The right to liberty and the right to a fair trial

The current draft provides certain guarantees to protect the right to liberty and the right to a fair trial in Articles 18, 20 and 21 but omits specific guarantees contained in Article 14 of the ICCPR. The National Constituent Assembly should specify further guarantees, including but not limited to 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 have confidential access to an independent lawyer immediately following any deprivation of liberty, in order that the right to challenge the lawfulness of detention is accessible and effective in practice; the right to be presumed innocent until proven guilty according to law; 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

Articles 17 and 23 protect against torture and other forms of ill-treatment. However, the current draft should be amended to provide for a definition of torture that complies with Article 1 of the Convention Against Torture and Other Cruel, Cruel, Inhuman, or Degrading Treatment of Punishment , including: an explicit prohibition of 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.

- The state of emergency

Article 73 of the current draft allows the President to impose a state of emergency under certain conditions. However, the article does not fully conform to international standards on states of emergency. Amnesty International calls on the National Constituent Assembly to ensure that the Constitution expressly provides that no derogation from any of the human rights provided in the Constitution is permitted at any time. If, however, Tunisia decides to provide in the Constitution for any derogation from the rights provided in it, 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.

- Freedom of movement

Although Article 18 of the current draft guarantees the right to move freely within the country, and the right to leave the country, it does not fully conform to Article 12(3) of the ICCPR which protects freedom of movement.

Amnesty International calls on the National Constituent Assembly to ensure that in the Constitution, any restrictions to the right to freedom of movement conform fully to Article 12(3) of the ICCPR and in a manner consistent with other human rights, including equality and non-discrimination; 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; and that no one shall be arbitrarily deprived of the right to enter his or her own country.

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

The current draft does not include any provision providing for the right to seek asylum, and to protect individuals from being transferred to a country where they would be at risk of persecution.

Amnesty International condemned the extradition by the Tunisian authorities in June 2012 of Al-Baghdadi al-Mahmoudi, former Libyan prime minister, to Libya, which put him at risk of serious human rights violations and contravened Tunisia's obligations under the UN Convention Against Torture. It is crucial that the new Tunisian Constitution contains provisions protecting any individual from transfer in any form, direct or indirect, to a country where they would be at risk of persecution. In line with Tunisia's human rights obligations, this protection should also extend to those who may not qualify for refugee status under the definition of the UN Refugee Convention but who need international protection due to a risk of human rights violations such as torture or other ill-treatment or enforced disappearance, whether in the country of transfer or a third country to which they may subsequently be transferred.