

TUNISIA

SUBMISSION FOR
CONSIDERATION BY THE
NATIONAL CONSTITUENT
ASSEMBLY ON THE
GUARANTEE OF CIVIL,
POLITICAL, ECONOMIC,
SOCIAL AND CULTURAL
RIGHTS IN THE NEW
CONSTITUTION

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INTRODUCTION

Members of the newly elected National Constituent Assembly (NCA) have a historic opportunity to write a new constitution for their country. If the oppression of the past is not to be repeated, the new Constitution must enshrine human rights guarantees that protect all Tunisians. It is the document that will guide all Tunisian institutions and as such it should set out the vision for the new Tunisia, one based on human rights and the rule of law, and Tunisians' aspirations for freedom, dignity, equality, and social justice for both themselves and the next generations. The Constitution must guarantee the rights of all Tunisians, not just the majority; indeed, the majority of today might become the minority of tomorrow. It is a document that all Tunisians can look to as the ultimate guarantor at the national level of their protection against abuse.

Amnesty International fully recognizes that it will take more than a new constitution to fully prevent human rights violation. However, a constitution that enshrines human rights and freedoms is a powerful tool and guiding instrument in preventing human rights violations. The drafting of the Constitution should be a first step to mark Tunisia's adherence to the rule of law and human rights. It should be followed by a process of legislative reform to ensure that all the laws are in line with both the Constitution and Tunisia's obligations under international law.

Universality, indivisibility, interdependence and interrelatedness of human rights should be the foundation of the new Constitution.

In particular, the NCA can ensure that the shortcomings of the previous Constitution are addressed, and that it includes a full range of fundamental human rights guarantees, both of which will effectively protect Tunisians against abuses.

Although the previous 1959 Constitution included some human rights provisions, these were routinely flouted and therefore proved inadequate at preventing decades of human rights violations. The Constitution was also amended several times under Zine El Abidine Ben Ali as a way for him to further extend his power and to allow for cosmetic changes. The security forces and the judiciary were part of the state's repressive machinery, rather than protecting the rights of people. Laws were passed to repress rather than protect Tunisians. Human rights defenders and critics were constantly harassed; critical voices faced censorship and imprisonment. Torture and other ill-treatment – particularly of political opponents – were systemic; prison conditions and the treatment of prisoners were notoriously poor. Perpetrators of gross violations of human rights have enjoyed complete impunity. The rhetoric of security and counter terrorism was used to justify such abuses. While the authorities trumpeted their record on women's rights to the international community, in reality discrimination remained entrenched in law and in practice. Tunisia's "economic miracle" was celebrated while trade unionists faced imprisonment and large sectors of Tunisia's population were denied equal enjoyment of economic and social rights including access to basic infrastructure, adequate housing, social and employment services. While diversity of Tunisians was officially celebrated, the cultural rights of minorities, including the Amazigh, were not officially recognized.

To guarantee that there is no repetition of such practices, uphold effective and lasting protection against human rights violations and make certain that Tunisia's economic development benefits everyone, the NCA should ensure that the new Constitution upholds Tunisia's obligations under international human rights law and incorporates effective safeguards that will protect human rights in law and practice.

Tunisia must meet its obligations under the following international human rights treaties to which it is a state party:

- The International Covenant on Civil and Political Rights (ICCPR);
- The First Optional Protocol to the International Covenant on Civil and Political Rights;
- The International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT);
- The International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED);
- The Rome Statute of the International Criminal Court;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- Convention on the Rights of the Child (CRC);
- The 1951 Convention relating to the Status of Refugees and its 1967 Protocol;
- The African Charter on Human and Peoples' Rights (ACHPR);
- The African Charter on the Rights and the Welfare of the Child (ACRWC); and
- The Convention Governing the Specific Aspects of Refugee Problems in Africa.

Tunisia has also signed the 2004 Revised Arab Charter on Human Rights and is consequently required under Article 18 of the Vienna Convention on the Law of Treaties to "refrain from acts which would defeat the object and purpose" of the Arab Charter. Ensuring the Constitution fully complies now with the Arab Charter's requirements will also facilitate Tunisia's future ratification.

In addition to upholding international obligations, the NCA must also ensure that the new Constitution provides for means of enforcing rights and redressing violations. To uphold the

rule of law, the new Constitution should guarantee the separation of powers, equality of all before the law and the independence of judiciary. The rights guaranteed in the Constitution should be enshrined so as to ensure they cannot in any way be undermined by the legislature or executive.

In this spirit, Amnesty International makes a number of recommendations to be considered by the NCA based on Tunisia's international obligations, and the international human rights framework, with the hope that it will contribute to the rich debates within the NCA but also within Tunisian society. One of the first decisions of the new Tunisia was to ratify a number of human rights treaties. The NCA now has the opportunity to ensure these treaties translate into the Constitution.

The organization published in January 2011 *Tunisia: Human Rights Agenda for Change* (Index: MDE 30/008/2011), identifying the key reforms needed to break with the legacy of human rights violations of the past. The recommendations below focus in particular on the relationship between domestic and international law; respect for the rule of law; the principle of non-discrimination; the protection of the rights to freedom of expression, association, assembly, religion and movement; the right to privacy; the independence of the judiciary; the rights to liberty and fair trial; protection of the right to life and from torture and other forms of ill-treatment; an end to impunity; and respect for, and fulfilment of, economic, social and cultural rights.

IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS IN NATIONAL LAW

Article 32 of the last Constitution provided for a procedure for ratification of treaties and stated that:

"Treaties ratified by the President of the Republic and approved by the Chamber of Deputies have a higher authority than that of laws."

Including in the new Constitution a provision that directly gives international human rights law, international humanitarian law and international criminal law – including ratified treaties such as those set out above – the force of law in the domestic legal order of Tunisia, particularly if the provision states that such treaties have a higher authority than any national law, would help ensure Tunisia meets its human rights obligations. It would also reflect the more general rule codified in Article 27 of the Vienna Convention on the Law of Treaties that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Such a provision should be complemented by ensuring as well that all the rights set out in the human rights treaties to which Tunisia is a party are specifically recognised in the

Constitution and that the Constitution makes each of those rights directly enforceable by all individuals as a matter of Tunisian law. For instance, Article 2(2) of the ICCPR states that: “where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”.

The Human Rights Committee has said that it considers that “Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order” and has invited “those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.”¹ Similarly, Article 2(1) of the ICESCR provides that “[e]ach State Party to the present Covenant undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” The Committee on Economic, Social and Cultural Rights has said that direct incorporation of ICESCR provisions in the domestic legal order “avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts”, and that for these reasons, it “strongly encourages formal adoption or incorporation of the Covenant in national law.”²

The Constitution should include:

- A provision stating unequivocally that international law, or at least such rules of international law as are relevant to human rights (e.g. international human rights law, international humanitarian law and international criminal law), including treaties ratified by Tunisia as well as relevant rules of customary international law, has the force of law in the Tunisian domestic order, and that in the case of any contradiction between a provision of domestic Tunisian law and the provisions of such international law, the provisions of international law prevail; and
- Provisions specifically recognising each of the rights set out in the human rights treaties to which Tunisia is a party, and making each of them directly enforceable by all individuals as a matter of Tunisian law.

RESPECT FOR THE RULE OF LAW

Article 5 of the old Constitution declared:

“The Republic of Tunisia shall be founded upon the principles of the rule of law.”

Yet, the executive branch’s complete disregard for the rule of law underpinned pervasive human rights violations of the past. Laws that are inconsistent with human rights norms were

forced through parliament, imposing arbitrary restrictions on the enjoyment of freedom of expression, association and assembly and other human rights. Undue interference of the executive in all state institutions flouted the principles of separation of powers, supremacy of the law, equality before the law, legal certainty and transparency, and fairness in its application. Security forces operated without any effective judicial control or oversight. The judiciary was widely compromised by executive interference, becoming a tool for repressing dissent, while helping to ensure complete impunity for gross violations of human rights by the security forces.

Respect for the rule of law is essential for the enjoyment of human rights by all. This requires a system in which all institutions and persons are accountable to laws which are consistent with international human rights norms and standards, publicly promulgated, equally enforced, and independently adjudicated.

Thus, in order to prevent future human rights violations, it is crucial to guarantee in the Tunisian Constitution respect for the rule of law as the fundamental and overarching principle for the executive, the legislature and the judiciary. State actions that impact upon human rights must be subject to judicial challenge. All police and security services must be subject to independent oversight and scrutiny.

Key to securing respect for human rights is ensuring that the rights are given the force of law and that individuals have an effective means of accessing legal procedures to obtain an effective remedy when their rights have been violated. The Human Rights Committee, for example, has noted that Article 2(3) of the ICCPR requires states to “ensure that individuals also have accessible and effective remedies to vindicate those rights” and has stated that it attaches particular importance to “States Parties’ establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law”.³ In addition to ensuring proper investigations of all such claims, to be effective such procedures must be capable of ensuring that victims receive full reparation for any violation they have suffered. Among the forms of reparation that may be required in any given case are: compensation; restitution; rehabilitation; and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices; and the bringing to justice of those responsible for the violations.⁴

As a minimum, the Constitution should guarantee that:

- The legislature shall respect the Constitution as the supreme law of Tunisia and be bound by its provisions, to the extent that the Constitution is consistent with customary and conventional international human rights law and international criminal law.
- The legislature and executive, as well as the judiciary, must be bound by Tunisia's obligations under international human rights law and the human rights which are to be guaranteed in judicially enforceable provisions of the Constitution.
- No one should be above the law. In particular, the executive and the judiciary should be bound by the law.
- The Constitution should provide that any other national legislation or other sources of

national law that are inconsistent with any of the rights set out in the Constitution are invalid to the extent of the inconsistency.

- Any person whose claims that his or her fundamental human rights have been violated shall have access to an effective remedy, i.e. the possibility to request an independent and impartial investigation and to seek all five forms of reparation: restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. Where such claims are established, the Constitution should provide that the person has an enforceable right to receive full reparation in an appropriate combination of these forms.

NON-DISCRIMINATION

Article 6 of the previous Constitution stated:

“All citizens have the same rights and obligations. All are equal before the law.”

Although Article 6 of the previous Constitution provided for equality for all, it failed to state the prohibited grounds for discrimination. This constitutional provision did not stop the enactment of legislation which ran contrary to the principle of non-discrimination. Existing discriminatory provisions in national law continued to be implemented, in spite of the constitutional provision.

The general principle of non-discrimination is a cornerstone of international human rights law. It is enshrined in key human rights treaties to which Tunisia is a state party, including the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights; the Rome Statute of the International Criminal Court; the African Charter on Human and Peoples' Rights; as well as the Convention on the Elimination of all Forms of Discrimination against Women. The principle of non-discrimination is further detailed in specific provisions of these treaties, such as the provision guaranteeing equality before courts, the equality of spouses as to marriage, during marriage and at its dissolution, and equality before the law.

Several United Nations human rights treaty monitoring bodies have explained the relationship between the rights to equality and non-discrimination, and the essential need to be explicit about both. For example, the Committee on Economic, Social and Cultural Rights notes in its General Comment 16 on the right to equal enjoyment of rights between men and women that the rights to equality and non-discrimination are “integrally related and mutually reinforcing.” The committee further notes that the elimination of discrimination [on all prohibited grounds] is fundamental to the enjoyment of [human] rights on a basis of equality.”⁵

Both the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights contain a clause protecting the equal enjoyment of rights between men and women, as well as a broader provision prohibiting any discrimination in the enjoyment of the human rights recognised in the treaties on any grounds, including (but not limited to) “race, colour, sex, language, religion, political or other opinion, national

or social origin, property, birth or other status.”⁶ The ICCPR includes an even more general provision that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law” and that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁷ Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have repeatedly affirmed that these provisions prohibit discrimination on grounds of sexual orientation.⁸

The new Tunisian Constitution must expand on the previous one by making sure that the general prohibition of discrimination is stated but is also complemented by a non-exhaustive list of specific prohibited grounds, mirroring the formulation contained in the International Covenants, as interpreted by the Human Rights Committee and Committee on Economic, Social and Cultural Rights.

In addition, care should be taken to ensure that the Constitution guarantees full equality of men and women. Statements made by a number of Tunisian officials, as well as some public figures, have been a cause for concern on the authorities’ commitment to enshrining equality between women and men. The caretaker government withdrew its reservations to CEDAW and adopted the principle of gender parity in the October 2011 elections for the NCA. However, continued intimidation and threats against women, some reportedly led by Salafist groups, have led to mounting fears that women’s rights will deteriorate. The authorities now have a chance to show their commitment to equality between men and women, and ensure that the principle is not eroded.

While Tunisian laws have afforded relatively better protection of women’s right to non-discrimination than those of some neighbouring countries, there remain discriminatory provisions especially regarding inheritance and child custody, as well as provisions in the Penal Code, such as articles 227 and 239. With the lifting of their reservations to CEDAW, it now falls on the Tunisian authorities to amend national laws accordingly and enshrine equality of women and men in the Constitution. By enshrining the principle of non-discrimination and equality in the Constitution, the NCA will help send a signal that Tunisia will not tolerate any retrogression on women’s rights.

The Constitution should include provisions to the following effect:

- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law;
- Discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is prohibited;
- All persons are entitled to equal and effective protection against such discrimination, including but not limited as regards the equal enjoyment of their human rights as recognised under the Constitution and under international law; and
- 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 EXPRESSION, ASSEMBLY AND ASSOCIATION

Article 8 of the previous Constitution set out:

“Freedom of opinion, expression, the press, publication, assembly and association are guaranteed and exercised according to the terms defined by the law. The right to organize in trade unions is guaranteed...”

However, the language of this article left almost unbounded discretion to limit such freedoms “according to the terms defined by the law”. This allowed Tunisian law to contravene international law by placing impermissible and severe restrictions on these rights, which were used by authorities to try to silence dissenting voices. Individuals, NGOs and professional bodies that expressed critical opinions were ruthlessly stifled. Associations that raised human rights concerns or showed signs of independence were often denied official registration, their members harassed and in some cases were co-opted by government supporters.

The rights to freedom of expression, assembly and association are guaranteed in Article 19 of the ICCPR, which provides that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”; Article 21, which provides for the right to peaceful assembly⁹ and Article 22, which states that “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” These rights are also provided for in articles 9, 10 and 11 of African Charter on Human and Peoples’ Rights.¹⁰

The ICCPR clearly provides that limitations on rights are permissible only when they are provided by law and are necessary (in a democratic society) for one or more of the aims specified in each article: respect of the rights or reputations of others; protection of national security or public order or of public health or morals; and, for articles 21 and 22, public safety. The Human Rights Committee has clarified that this means that in any given instance the specific restriction must be limited to that which is necessary to achieve the legitimate aim and that the government has an obligation to apply the least restrictive limitation of the right from among a range of possible and effective restrictions. Restrictions must also be proportionate to the legitimate aim, and must not be so extensive as to undermine the right itself.¹¹

The new Tunisian Constitution should recognise the rights provided for in articles 19, 21 and 22 of the ICCPR in terms fully consistent with those articles, including by clearly specifying that the only restrictions of such rights that are permitted by the Constitution are those prescribed by law and demonstrably necessary in a democratic society, enacted for one or more of the aims set out in the relevant article of the ICCPR, and proportionate to those

aims.

FREEDOM OF MOVEMENT

Article 10 of the previous Constitution set out:

“Every citizen has the right to move freely within the country, to leave it, and to take up residence within the limits established by the law...”

Article 11 further stated:

“No citizen can be banished from the country or prevented from returning to it...”

As with other rights, the limits to movement “established by the law” were often abused to prevent people from moving freely within the country and from leaving it. Law 75/40 on Passports gave the Ministry of Interior the power to refuse the granting of passports. This was later amended in 1998 to give judges sole authority in deciding issues of travel bans and granting of passports. Article 13(d) allowed authorities to refuse the issue or renewal of a passport for the sake of “public order and security or if there’s a danger of harming Tunisia’s good reputation.” The power given to authorities under this law was often abused to target opposition figures and former political prisoners and prevent them from leaving the country usually with no justification.

Article 12(1) of the ICCPR provides that “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence” and 12(2) states “Everyone shall be free to leave any country, including his own”. Article 12(3) provides that these rights are “not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.” Similar provisions are found in Article 12 of the African Charter on Human and Peoples’ Rights.¹²

The Human Rights Committee has underlined that restrictions are only permissible in exceptional circumstances, must be in conformity with Article 12(3), and must not impair enjoyment of the essence of the right. The committee has further stated that such restrictions must be consistent with the fundamental principles of equality and non-discrimination. The committee has also affirmed that the right to leave a country must include the right to obtain the necessary travel documents, including passports. Like other restrictions on the right to freedom of movement, processes for obtaining travel documents must comply with international law, in the sense that they cannot be arbitrary, unduly restrictive, discriminatory, or disproportionate to their aim.¹³

The new Constitution should:

- Recognise that everyone lawfully within Tunisia has the right to liberty of movement and freedom to choose his residence and shall be free to leave any country, including his own;

- Provide that these rights shall not be subject to any restrictions except those permitted by Article 12(3) of the ICCPR and which are consistent with other human rights, including equality and non-discrimination;
- Provide that anyone subject to restriction of these rights is entitled to receive reasons for the restriction and a means of challenging the restriction; and
- Provide that no one shall be arbitrarily deprived of the right to enter his own country.

INDEPENDENCE OF THE JUDICIARY

Article 65 of the previous Constitution stated:

“The judicial authority is independent. In exercising their functions, judges are subject only to the authority of the law”.

Article 66 further stated:

“Judges are appointed by presidential decree...The modalities of their recruitment are set by law”.

Article 67 set out:

“The Higher Magistrate Council, whose composition and powers are defined by law, ensures respect of the guarantees granted to judges regarding appointment, transfer and discipline”.

In practice, the judiciary under Zine El Abidine Ben Ali was subservient to the executive branch and lacked any independence. The High Council of Magistrates which is responsible for the appointment, promotion, transfer and discipline – including dismissal – of judges, was headed by the President and the appointment and promotion of judges was largely politicized. The fundamental guarantee of security of tenure for judges (*inamovibilité des magistrats*) was not included in the previous Constitution, leaving judges without protection from interference by the executive and also susceptible to political pressures.

Independence of the judiciary is a fundamental pre-condition for full respect for human rights, both because it is expressly required as an aspect of fair trial rights (for instance under Article 14 of the ICCPR), and because the judiciary is expected to play a crucial role in securing and enforcing respect for human rights more generally and its independence must be guaranteed if it is to fulfil this role effectively.¹⁴

Article 14 of the ICCPR provides that, “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, **independent** and impartial tribunal established by law” [emphasis added]. The Human Rights Committee has explained that:

The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, 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, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures 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.¹⁵

It has further elaborated that:

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. It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. ... 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.¹⁶

An independent and impartial judiciary is also recognised to be an important safeguard against torture and other ill-treatment of prisoners, as required by the UN Convention against Torture.¹⁷

Article 26 of the ACHPR states the duty of states to guarantee the independence of the courts and the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* further specifies requirements of the principle of the independence of the judiciary and the right to a fair trial.¹⁸

Public trust in the judiciary and the rule of law is essential. This can only be established when the Tunisian judiciary, which has routinely failed Tunisians, is able to render justice as an impartial and independent institution and in a manner that effectively protects human rights.

The Constitution should:

- Clearly state that the judiciary is fully independent from the executive;
- 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.

RIGHT TO LIBERTY

Article 12 of the previous Constitution stated in part:

“Police custody shall be subject to judicial control and preventive detention shall be exercised only following judicial instruction. It is forbidden to place any individual in arbitrary police custody or preventive detention.”

Despite this provision, in the past the Tunisian authorities have relied on vaguely worded security related offences to suppress dissent. Those arrested were often held incommunicado for prolonged period of time, in breach of the Tunisian Code of Criminal Procedure. In other instances the authorities denied people's detention or falsified the date of detention. Detainees were in effect denied access to an effective means of challenging the lawfulness of their detention, resulting in arbitrary detention.

Article 9(1) of ICCPR guarantees the right to liberty and personal security and protects against arbitrary arrest or detention, including by prohibition any deprivation of liberty that is not based on such grounds and conducted in accordance with procedures as are established by law. “Arbitrariness” in this article “is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.”¹⁹ Article 9(2) specifies that anyone who is arrested should be informed at the time of arrest of the reasons for their arrest and shall be promptly informed of any charges against them. Article 9(3) requires that anyone arrested or detained on criminal accusations be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It also provides that persons awaiting trial should not, as a general rule, be detained in custody.

An essential guarantee against arbitrary detention is the right for anyone deprived of his or her liberty for any reason to access to an effective means of challenging the lawfulness of their detention before a court, which must decide the question without delay and order the person's release if the detention is found to be unlawful. This right is expressly recognised for by Article 9(4) of the ICCPR and has been held to imply, among other things, a right of confidential access to an independent lawyer immediately after arrest or detention, for the purpose of preparing and bringing such a challenge.²⁰ Finally, as provided for in Article 9(5) of the ICCPR, victims of any unlawful arrest or detention must also have an enforceable right

to compensation.

Similar rights have been held by the African Commission on Human and Peoples' Rights to apply under articles 6 and 7 of the African Charter.²¹

To ensure that Tunisian law complies with its international obligations in relation to the right to liberty, the new Constitution should:

- Recognise the right to liberty and security of person and include a prohibition of arbitrary arrest or detention;
- Prohibit any deprivation of liberty that is not based on grounds and in accordance with procedures specified in advance by law;
- Provide for the right of anyone arrested or otherwise detained on suspicion of criminal offence to be promptly brought before a court, and to have the right to trial within reasonable time or release;
- Provide for the right to access to an effective means of challenging the lawfulness of detention before a court, and being ordered released if the detention is found to be unlawful;
- Provide for the right of all persons 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; and
- Expressly recognise the right of any person who is unlawfully deprived of their liberty.

RIGHT TO FAIR TRIAL

Article 12 of the previous Constitution stated in part:

"...An accused person is presumed innocent until his guilt has been proven through a procedure that offers him the guarantees that are indispensable for his defence."

Again, despite this provision, in practice persons accused of offences, including particularly in cases where vaguely worded offences were relied on to suppress dissent, have frequently been subjected to violations of their rights to fair trial. Detainees were often denied prompt and confidential access to lawyers; their lawyers were prevented from calling witnesses and/or cross-examining witnesses against the accused; had their access to court documents restricted; and were not given adequate time to prepare an effective defence. Judges have routinely failed to order investigations into allegations of torture brought to their attention by the defendants or their lawyers, even when marks of torture were still visible, and have accepted "evidence" extracted under torture to secure convictions.

Article 14 of the ICCPR includes both a general right to fair trial, and a non-exhaustive list of a number of specific rights relevant to fair trial. The general right is to "a fair and public hearing by a competent, independent and impartial tribunal established by law" with only

strictly limited circumstances in which the press and the public may be excluded. All judgements rendered in criminal cases or in suits at law must be made public, except where the interest of juvenile persons requires otherwise, or the proceedings concern matrimonial disputes or the guardianship of children. A number of rights in relation to determination of criminal offences, to be respected "in full equality", are specifically included by articles 14(2) and (3), among them: the presumption of innocence; prompt and detailed notification of the accusations against the person; adequate time and facilities to prepare the defence; completely confidential²² communications and meetings with legal counsel of choice; trial without undue delay; the right to be present at and throughout the trial; the right to legal assistance without payment if the accused cannot afford it; equality of arms, including the right to call witnesses and question them under oath; free interpretation if necessary for the accused to understand or speak during the proceedings; and the right not to be compelled to testify against oneself or to confess guilt.²³ Article 14(4) requires special procedures for the trial of children that take account of their age and promotes their rehabilitation. Other subparagraphs of Article 14 guarantee the right to appeal of conviction and sentence, the right of compensation in cases of miscarriage of justice, and the right not to be tried or punished again for an offence for which they have already been finally convicted or acquitted. The Human Rights Committee has also emphasized that trial of civilians by military or other special courts is generally prohibited.²⁴

Article 7 of the African Charter of Human and Peoples' Rights has been interpreted to contain the rights essentially identical to those listed in Article 14 of the ICCPR.²⁵

To ensure that Tunisian law complies with its international obligations in relation to the right to a fair trial, the new Constitution should, in line with the ICCPR and other human rights standards, recognise the general right to fair and public trial in both criminal and civil matters, and provide for a number of specific guarantees in full equality, including the rights:

- to be presumed innocent until proved guilty according to law;
- to be informed promptly and in detail in a language which the person understands of the nature and cause of the charge against them;
- to have adequate time and facilities for the preparation of the defence and to meet and to communicate with counsel of the person's own choosing, in the fullest confidentiality;
- to be tried without undue delay;
- to be tried in one's presence, and to defend oneself in person or through legal assistance of one's own choosing; to be informed, if the person does not have legal assistance, of this right; and to have legal assistance assigned to the person in any case where the interests of justice so require, and without payment by the person if he or she does not have sufficient means to pay for it;
- to equality of arms between the prosecution and accused, including among other things the right of the accused to examine, or have examined, the witnesses against the person and to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses against the person;

- to have the free assistance of an interpreter if the person cannot understand or speak the language used in court; and
- not to be compelled to testify against himself or herself or to confess guilt.

The Constitution should also expressly provide for:

- The right of all persons 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 right of juvenile persons to be tried under a special procedure that takes account of their age and the desirability of promoting their rehabilitation;
- The right to appeal any conviction and sentence to a higher court, both on the basis of sufficiency of the evidence and of the law;²⁶
- The right of compensation in cases miscarriage of justice; and
- The right not to be tried or punished again for an offence for which they have already been finally convicted or acquitted.

REQUIREMENT OF LEGALITY IN THE DEFINITION OF CRIMINAL OFFENCES

Article 13 of the former Constitution stated in part:

“Sentences are personal and shall be pronounced only by virtue of a law issued prior to the punishable act, except in the case of a more favourable law.”

As was mentioned earlier, Article 12 prohibited arbitrary detention, though without elaborating on the concept of arbitrariness in this regard.

ICCPR Article 15(1) provides in part that: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”²⁷ (Article 15(2) clarifies that this is without prejudice to trial for crimes under international law.) This is a requirement of “legality” that is similar to that required for any deprivation of liberty (Article 9(1) “except on such grounds and in accordance with such procedure as are established by law”), or to any measure (including criminal offences) that restricts other rights such as freedom of expression (e.g. Article 19(3) “only be such as are provided by law”). The Human Rights Committee has specified that the requirement of “legality” means that the legislative provision in question “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly”, it must be made accessible to the public, and it may not confer unfettered discretion.²⁸ Such laws “must also themselves be compatible with

the provisions, aims and objectives of the Covenant".²⁹

Article 15(1) also specifies that no penalty may be imposed that is heavier than the one that was applicable at the time when the criminal offence was committed, but if the law is amended after the offence to provide a lesser penalty the offender is to have the benefit of it.

The Constitution should include provisions to specify that:

- No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed, but for greater clarity this does not prevent the trial and punishment of any person for any act or omission which, at the time when it was committed, constituted a crime under international law;
- No penalty may be imposed that is heavier than that applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

IMPUNITY

The new Constitution should prohibit crimes under international law, including genocide, crimes against humanity, war crimes, torture (see following section), extrajudicial executions and enforced disappearances, and should also include effective guarantees against impunity. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law under Article 17 states:

States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

Zine El Abidine Ben Ali had previously amended the Constitution in 2002 to give himself permanent immunity for all acts linked to his duties. Officials were also generally not held responsible for human rights violations they committed, including for acts such as arbitrary arrests and torture. Tunisians are entitled to see justice carried out for both the human rights violations of the past and ongoing violations. As stated under Principle 19 of the UN Updated Set of Principles to Combat Impunity, it is the state's obligation to ensure that the truth is told and justice done and those responsible for violations held accountable.³⁰ The specific inclusion of provisions in the new Constitution on truth, justice and full reparation will help to end impunity and to promote and protect human rights.

Families of victims of the uprising, and those who were injured, are still waiting for truth, justice and full reparation. The inclusion of a provision to combat impunity in the Constitution would send a strong signal that Tunisia will break with a legacy of impunity.

The Constitution should ensure that immunity from prosecution or civil claims for reparation for former or current Tunisian or foreign officials does not apply to crimes under international law.

TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Although Tunisia's previous Constitution mentions the promotion of human dignity and the inviolability of the human person, it contains no provision proscribing torture.

Article 5 of the previous Constitution stated:

"The Republic of Tunisia shall...strive to promote human dignity and to develop the human personality...The Republic of Tunisia shall guarantee the inviolability of the human person..."

Article 13 stated in part:

"Those deprived of freedom shall be treated humanely and their dignity shall be respected, in compliance with the conditions laid down by law".

Over the years, Amnesty International has documented widespread torture and other cruel, inhuman or degrading treatment or punishment by security forces and the prison administration. Detainees, including political prisoners and those accused under anti-terrorism laws, were subjected to such treatment and the risk was higher for those held in incommunicado detention, or in the period of time before being officially recorded as being in detention. Methods of torture often included beatings, especially on the soles of the feet, suspension by the ankles or extended periods in contorted positions, electric shocks and burning using cigarettes. There have also been allegations of mock executions, sexual abuse and threats of sexual abuse of female relatives.

The right to be free from torture and other cruel, inhuman, or degrading treatment or punishment, as provided for in Article 7 of the ICCPR, is absolute. Article 10 of the ICCPR further provides that anyone deprived of his or her liberty is to be treated with humanity and with respect for the inherent dignity of the human person.³¹

Tunisia is also a state party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which requires states to take a range of further measures for the better prevention, investigation, and prosecution of such abuse, including eliminating certain justifications such as "exceptional circumstances" or "superior orders", prohibiting the transfer of persons to face torture in other countries, criminalization of torture with extraterritorial jurisdiction, investigation, and remedy. The requirement that any

information obtained by torture be excluded as evidence from any kind of proceeding is expressly recognised by the CAT Article 15, and the Human Rights Committee interprets Article 7 of the ICCPR as requiring the exclusion of information obtained by torture or other cruel, inhuman or degrading treatment.³²

Tunisia also recently ratified the optional protocol to CAT (OPCAT) which aims to create a system for the prevention of torture and other ill-treatment through a national and international system of visits by independent expert bodies to all places where anyone may be deprived of their liberty. Tunisia should now follow up to its obligations under OPCAT by establishing in the Constitution a National Preventive Mechanism with specific provision for its independence, necessary expertise, resources and guarantees as required by the OPCAT, including access to conduct regular and unannounced visits to all places of detention, with confidential access to all persons deprived of their liberty, and for the publication of the reports produced by the Mechanism.³³

The Constitution should include provisions to provide that:

- No one shall be subjected to torture or to other cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without their free consent to medical or scientific experimentation;
- A definition of torture that complies with Article 1 of the CAT;
- 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;
- All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person;
- 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;
- A National Preventive Mechanism is established and is provided by the Constitution with institutional and operational guarantees that meet the requirements of the OPCAT as regards independence, expertise and representativeness, resources and operational needs, including by specifying that under the Constitution the Mechanism has a legal right to:
 - Access to all information concerning the number of persons deprived of their liberty, as well as the number of places where people may be deprived of their liberty, and their location;
 - Access to all information referring to the treatment of those persons, as well as their conditions of detention;
 - Immediate access, with or without prior notice, to all places where persons may be deprived of liberty and all parts of such places;

- The opportunity to have private interviews with the persons deprived of their liberty, without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the National Preventive Mechanism believes may supply relevant information;
- The liberty to choose the places they want to visit and the persons they want to interview;
- The right to have contacts with the international Subcommittee on Prevention, to send it information and to meet with it.

STATE OF EMERGENCY/NON-DEROGABLE RIGHTS

Article 46 of the previous Constitution stated:

“Should imminent peril menace the institutions of the Republic, threaten the security and independence of the country and obstruct the proper functioning of public powers, the President of the Republic may take exceptional measures necessitated by the circumstances, after consulting the Prime Minister, the President of the Chamber of Deputies and the President of the Chamber of Advisors...These measures cease to bear effect as soon as the circumstances that produced them come to an end...”

Tunisia has been in a state of emergency since it was initially announced by Zine El Abidine Ben Ali on 14 January 2011. Contrary to what is allowed under Tunisian law, it was extended four times. Further to Article 46 of the previous Constitution which does not clearly identify the rights that are derogable in a time of emergency, Decree 50 of 1978 on the Organization of a state of emergency lists these rights to include limitations on the freedom of expression, assembly, association, privacy and movement.

Derogations from human rights are permitted under Article 4 of the ICCPR only within a defined set of extreme circumstances (“public emergency which threatens the life of the nation and the existence of which is critically proclaimed”) and subject to strict limits.³⁴ 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 ability 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.³⁵ 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.”³⁶

No derogation is permitted from the right of humane treatment and respect for human dignity in Article 10; the prohibitions against taking of hostages, abductions or unacknowledged detention; elements of the protection of the rights of persons belonging to minorities; the prohibition of the deportation or forcible transfer of population, without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means; the prohibition of states' engaging in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence; the obligation to provide an effective remedy for violations of human rights; procedural guarantees necessary for the protection of other non-derogable rights (e.g. the full requirements of Article 14 in a trial leading to the death penalty); the fundamental requirements of fair trial, including the presumption of innocence; or the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention (as provided for by Article 9(4) of the ICCPR).³⁷

Even where the ICCPR permits derogation, discrimination on the ground of race, colour, sex, language, religion or social origin in the application of any derogating measures is expressly prohibited by Article 4(1). Furthermore, only such specific measures as are "strictly required by the exigencies of the situation" are permitted. The Human Rights Committee has explained that this requirement "relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency." Each derogating measure must be justified by the state as meeting this test, which incorporates a requirement of proportionality.³⁸

The African Charter contains no provision to permit derogations and the African Commission on Human and Peoples' Rights has interpreted this to mean that the "existence of war, international or civil, or other emergency situation within the territory of a state party cannot therefore be used to justify violation of any of the rights set out in the Charter," and that all state actions must always "be judged according to the Charter norms, regardless of any turmoil within the State at the time".³⁹

Amnesty International recommends that, in line with the obligations of Tunisia under the African Charter as articulated by the African Commission on Human and Peoples' Rights, that the Constitution should expressly provide that no derogation from any of the human rights provided in the Constitution is permitted at any time.⁴⁰ 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 ICCPR Article 4, the rights listed by the ICCPR and Human Rights Committee as non-derogable, and the limitations upon derogating measures as provided for by ICCPR Article 4 and elaborated by the Human Rights Committee, should be explicitly included in the Constitution.

FREEDOM OF RELIGION

The previous constitution did not provide for the protection of the freedom of religion or belief.

The right to freedom of thought, conscience, religion and belief is recognised under Article

18 of the ICCPR, and Article 8 of the African Charter.⁴¹

The Constitution should expressly guarantee the right to freedom of thought, conscience, religion, and belief. This constitutional guarantee should cover the freedom to have or adopt a religion or belief of one's choice. It should also cover the freedom to manifest one's religion or belief in worship, observance, practice, and teaching, both in public and in private. The freedom to manifest one's religion or belief includes the ability to do so in community with others.

The constitutional guarantee should specify 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. The Human Rights Committee has pointed out that such coercion includes "the use or threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs or congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 [political rights] and other provisions of the [International Covenant on Civil and Political Rights] are similarly inconsistent" with the prohibition on coercion, and this protection is also "enjoyed by holders of all beliefs of a non-religious nature."⁴²

The constitutional guarantee should ensure:

- Respect for the rights and duties of parents and legal guardians to provide direction to their children, in a manner consistent with the children's evolving capacities, in their children's exercise of the right to freedom of thought, conscience, religion, and belief; and
- Constitutional protection of the right to freedom of thought, conscience, religion, and belief makes clear that national law cannot restrict this right, except insofar as is necessary to protect the fundamental rights and freedoms of others, or on the other limited bases set forth in Article 18(3) of the ICCPR.

RIGHT TO PRIVACY

The previous Constitution protected some parts of the right to privacy in Article 9:

"The violability of the home, the confidentiality of correspondence and the inviolability of personal data shall be guaranteed, save in exceptional cases prescribed by law."

The right to privacy of many of those who were critical of the Tunisian authorities under Zine El Abidine Ben Ali was often violated. They and their relatives, including children, were interrogated and harassed. Some lost their jobs. Offices and homes were visited by security officers and ransacked. They were often followed and faced intensive surveillance. Their telephone lines, Internet access and emails were intercepted or blocked. Virulent smear campaigns were used against activists, and both male and female activists were accused of violating the country's traditional view of acceptable sexual behaviour or of serving the interests of foreign governments.

To be consistent with Tunisia's international human rights obligations, the constitutional protection of the right to privacy must make it clear that national law cannot restrict this right in a manner that is incompatible with the essence of this right and with other fundamental rights such as equality and non-discrimination.

The right to privacy is guaranteed by Article 17 of the ICCPR, which establishes the right of every person to be protected against arbitrary or unlawful interference with his or her privacy, family, home or correspondence as well as against unlawful attacks on his or her honour and reputation.⁴³ The covenant requires state parties to adopt all necessary measures for the effective protection of this right. Amnesty International believes that the right to privacy requires a constitutional guarantee to be effective.

The Human Rights Committee has pointed out in its General Comment No. 16 that restrictions on the right to privacy must be predictable and provided for by law, and "that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstance." The committee has further noted that surveillance must be prohibited, and that "searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment."⁴⁴ These principles should be adequately reflected in the Tunisian Constitution.

REFUGEES AND ASYLUM-SEEKERS

Article 17 of the previous constitution stated:

"Political refugees cannot be extradited."

Article 14 of the Universal Declaration of Human Rights states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution." The protection of asylum-seekers and refugees has been further defined in international law by the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (UN Refugee Convention), to which Tunisia is a state party. The UN Refugee Convention prohibits the return or expulsion of a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (Article 33(1)). This is known as the principle of *non-refoulement*; it prohibits actions that directly or indirectly force a person to return to a situation of persecution. Aspects of the principle of *non-refoulement* are also found, among other places, in the CAT and the ICCPED, which provide an absolute prohibition on the transfer of any person to another state where there are "substantial grounds for believing that he would be in danger of being subjected to torture" (CAT, Article 3(1)) or an "enforced disappearance"(ICCPED, Article 16); Article 7 of the ICCPR has been interpreted by the Human Rights Committee similarly to prohibit any transfer to a similar risk of "torture, cruel, inhuman or degrading treatment or punishment" (Article 7).⁴⁵ This applies equally where the risk arises not in the first state to which a person is transferred, but in a third state to which he or she may subsequently be further transferred.⁴⁶

Tunisia is also a state party to the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention). The OAU Refugee Convention contains a similar definition of a refugee to the one contained in the UN Refugee Convention and similarly protects refugees against *refoulement* (articles 1(1) and 2(3)). However, in addition the OAU Refugee Convention broadens the definition of a refugee with the added definition found in Article 1(2), which states that a refugee is:

- Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The new Tunisian Constitution should protect 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.⁴⁷ The provision contained in the previous Constitution is much narrower than Tunisia's international obligations and is not sufficient to enshrine the principle of *non-refoulement* in the Constitution. In addition, the expanded definition of the OAU Refugee Convention should also be reflected in the new Constitution.

THE DEATH PENALTY AND THE RIGHT TO LIFE

The previous Constitution did not contain a provision guaranteeing the right to life. Although nobody has been executed in Tunisia since 1991, and despite a presidential decision to commute 122 death sentences to life imprisonment in January 2012, the following month saw the first death sentence since the uprising. No official moratorium on executions has yet been established.

The right to life is guaranteed by Article 6 of the ICCPR to which Tunisia is a state party. Article 6(2) and Article 6(6)⁴⁸ of the ICCPR in the opinion of the Human Rights Committee "[refer] generally to abolition [of the death penalty] in terms which strongly suggest...that abolition is desirable. The committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life..."⁴⁹ The right to life is also guaranteed under Article 4 of the ACHPR. In 2008, the African Commission on Human and Peoples' Rights adopted a resolution calling for a moratorium on the use of the death penalty.⁵⁰ In 2011, the African Union Commission Chairperson, Jean Ping of Gabon, and the Member of the African Commission on Human and Peoples' Rights and Chairperson of the African Commission's Working Group on the Death Penalty in Africa, Zainabou Sylvie Kayitesi of Rwanda,⁵¹ publicly stated that capital punishment represents a violation of the ACHPR. Tunisia is also a state party to the Rome Statute of the ICC, which rejects the death penalty even for the "most serious crimes of concern to the international community as a whole",

including war crimes, crimes against humanity, genocide and the crime of aggression.

Amnesty International believes that the death penalty should be abolished as it violates the right to life and is the ultimate cruel, inhuman and degrading punishment, and that it is not possible for a country to fully respect human rights and sentence people to death at the same time. The new Constitution presents Tunisia with an opportunity to enshrine in law the growing international consensus that the death penalty is incompatible with human rights. It would thereby follow the examples of a growing number of countries in Africa⁵² and elsewhere to entrench the abolition of the death penalty in constitutional law.

The organization urges the NCA to ensure that the new Constitution positively guarantees the right to life under all circumstances, and explicitly abolishes the death penalty for all crimes. Some constitutions provide for an unqualified right to life, without including an exception for the death penalty. The “right to life” provision of the recent Moroccan Constitution of July 2011⁵³ can be read to imply that the death penalty would be an unjustified infringement of the right to life, and in the opinion of the President of the Committee for the Revision of the Constitution, Abdelatif Mennouni, was meant to put an end to executions.⁵⁴ However, an explicit additional provision prohibiting the death penalty would provide the clarity required to be certain in achieving this aim. Secondly, it should be made clear that these rules also apply in times of war or other states of emergency; Article 4(2) of the ICCPR makes it clear that the right to life is non-derogable. Finally, a provision should be adopted that states that nobody may be extradited or otherwise removed to a state where there is a serious risk that he or she would be subjected to the death penalty. This is in line with common practice between abolitionist and retentionist states,⁵⁵ and was found to be a legal duty in the case law of the Human Rights Committee.⁵⁶ A good example of a comprehensive approach, covering all these aspects even though in different parts of the document, is the Constitution of Angola as amended in 2010.⁵⁷

The right to life also imposes limits on the permissible scope for use of deadly or potentially deadly force by law enforcement and other public officials. For instance, outside of situations of armed conflict, lethal force may only be used when strictly unavoidable in order to protect life.⁵⁸ In situations of armed conflict, use of lethal force that does not comply with the rules of international humanitarian law will also violate the right to life.

Amnesty International recommends to the NCA to include a provision on the right to life in the new Constitution that encompasses these aspects:

- Every human being has the inherent right to life;
- The abolition of the death penalty;
- No person may be extradited or otherwise transferred to a country where they would face a real risk of the death penalty (or for that matter extrajudicial execution) in the requesting country, or a third country to which they might subsequently be transferred; and
- Any deprivation of life that results from the use of lethal or potentially lethal force in a manner that does not comply with international human rights standards or, where applicable, international humanitarian law is absolutely prohibited.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Tunisia's previous Constitution did not provide for any economic, social and cultural rights. However, the international community has increasingly emphasized that economic, social and cultural rights should be given the same status to that of civil and political rights. Tunisia has ratified the ICESCR and it is now accepted at the international and regional level, as well as by many national courts, that economic, social and cultural rights are enforceable by judicial bodies. The constitutional review process offers an important opportunity to enshrine economic, social and cultural rights in Tunisia. In particular, by including a comprehensive set of economic, social and cultural rights in the new Constitution the NCA can ensure that all of the rights contained in the ICESCR are incorporated fully into domestic law as required following ratification, that they are fully justiciable and enforceable before Tunisian courts and that effective remedies for victims of violations are available.

In so doing the NCA can provide a vital means for both victims of economic and social violations to claim their rights and the state to assess its progress on improving living standards for all Tunisians. Although recent decades have seen the country making significant progress in improving the quality of life for many people in areas such as poverty alleviation, universal primary education and infant mortality, these achievements have been far from evenly spread. The centre, west and south of the country have been left far behind in areas such as access to basic infrastructure and essential services, including access to water and sanitation, electricity and adequate housing. These regions also have experienced higher rates of illiteracy and unemployment.

The stark economic and social disparities in Tunisia resulted in a range of popular protests spearheaded by the trade unions which were brutally repressed by the previous regime in 2008. Poverty and unemployment were some of the prime causes of the 2011 uprising. Without the inclusion of economic, social and cultural rights in the new Constitution, Tunisians, particularly the most poor and marginalized, will be denied the opportunity to hold the government to account for their continuing exclusion from Tunisia's development.

Under international human rights law binding on Tunisia, the government is under a duty to progressively realise economic, social and cultural rights for everybody without discrimination within the maximum of resources available to it. Economic, social and cultural rights are enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Tunisia became a state party in 1969. The ICESCR recognises and guarantees, among others, the following rights:

- The right of everyone to the opportunity to gain their living by freely chosen or accepted work and to just and favourable conditions of work (articles 6 and 7);
- The right of everyone to form trade unions and join the trade union of their choice, including the right of trade unions to function freely and the right to strike (Article 8);

- The right to social security (Article 9);
- The right to food (Article 11);⁵⁹
- The right to adequate housing (Article 11)
- The rights to water and sanitation (Article 11);⁶⁰
- The right to the highest attainable standard of health (Article 12);
- The right to education (Articles 13 and 14); and
- The right to take part in cultural life and to benefit from scientific progress (Article 15);

In 2008, the UN General Assembly, where Tunisia was represented, unanimously adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights establishing an individual complaints mechanism and inquiry procedure for violations of these rights. By doing so, the General Assembly confirmed that these rights are justiciable.

In addition Tunisia became party to the African Charter on Human and Peoples' Rights in 1983. Some of the economic, social and cultural rights in this treaty include:

- The right to work under equitable and satisfactory conditions, including equal pay for equal work (Article 15);
- The right to enjoy the best attainable state of physical and mental health (Article 16);
- The right to education (Article 17);
- The right to freely take part in the cultural life of one's community (Article 17);
- The right to protection of the family (Article 18);
- The right of the aged and disabled to special measures of protection (Article 18);
- The right to shelter and housing (Articles 14, 16 and 18);⁶¹
- The right to food (Articles 4, 16 and 22); and⁶²
- The right to a general satisfactory environment favourable to the development of all peoples (Article 24).

Amnesty International urges the Constitutional Assembly to ensure that economic, social and cultural rights are included as legally binding human rights within the new Constitution for the following reasons:

1. Protection of economic, social and cultural rights in the Constitution would help ensure that Tunisia realises its obligations to respect, protect and fulfil economic, social and cultural

rights. It would provide a way to guarantee that legislation and policy measures give full effect to economic, social and cultural rights. The Constitution would therefore be an important tool to protect human rights and reduce levels of poverty in the country.

A constitutional guarantee of economic, social and cultural rights would require respect for these rights. For example, it would require that people are protected from being forcibly evicted from their homes without complying with international standards, such as due process and adequate alternative housing or compensation. It would require steps to ensure that third parties respect economic, social and cultural rights, for example through regulation of private businesses to ensure that employers provide fair conditions of work for employees. It would require progressive steps – using the maximum available resources – to ensure that everyone is able to access the rights to education, food, water, housing and health, putting priority on achieving the minimum essential levels of each of these rights for all.

2. Inclusion of economic, social and cultural rights in the Constitution would help guarantee the aspirations behind the 2011 uprising in a way that is concrete and visible. The Constitution would then help ensure greater equality and social justice for present and future generations of Tunisians.

3. Inclusion of economic, social and cultural rights in the Constitution would reflect Tunisia's commitment to the universality and indivisibility of all human rights and to the realisation of all human rights, including those of primary importance to those living in poverty. It would make tangible the commitment by 170 States, including Tunisia, at the Vienna World Conference on Human Rights of 1993 which stated 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." Tunisia's new Constitution could send an important signal to other states, including in Africa and in the Middle East, that it is now time to protect all forms of human rights, as a goal in itself and as tool to eradicate poverty.

4. Inclusion of these rights in the Constitution would increase the role of Tunisian institutions in securing economic, social and cultural rights, making justice more accessible for the people of Tunisia.

5. Inclusion of these rights would bring Tunisia's Constitution in line with the growing trend among many countries which have recently revised their Constitutions and recognise that economic, social and cultural rights are enforceable. Countries from all regions: Asia, the Americas, Africa and Europe and at various levels of development guarantee the protection of economic, social and cultural rights in their constitutions.

NATIONAL HUMAN RIGHTS INSTITUTIONS

There were no provisions in the previous constitution for a national human rights institution.

The Higher Committee on Human Rights and Fundamental Freedoms (HCHRFF), created in 1991 by presidential decree “to assist the President of the Republic in consolidating and promoting human rights and fundamental freedoms”, was formally mandated to receive complaints about human rights violations. Despite amendments in 2008 to the law organizing the committee with a view to increase representation and enhance communication between the state and civil society, the HCHRFF still did not include independent human rights organizations and continued to lack independence. Its apparent purpose was to improve Tunisia’s human rights image in the international community while the government was internally clamping down on independent human rights organizations, either through harassment or refusing them official registration.

The UN General Assembly adopted in 1993 a set of Principles relating to the Status of National Institutions (known as the “Paris Principles”).⁶³ The principles describe a number of minimum features for such institutions to be effective, including in terms of composition, independence, and powers; the principles state in this regard that the national institution shall be given “as broad a mandate as possible, which shall be clearly set forth in a **constitutional** or legislative text, specifying its composition and its sphere of competence” [emphasis added].

Amnesty International recommends that the national human rights body be given constitutional status and the necessary protections to allow it to function effectively and independently, without pressures and intimidation. The Constitution should grant the national human rights institution the powers it needs to be able to fully protect human rights. This can be done if it has the ability to investigate and remedy abuses, the power to initiate cases in national courts and the mandate to examine and ensure existing legislation complies with Tunisia’s obligations under international human rights law. To be effective, this body must be granted the necessary human and financial resources. It furthermore should be itself accountable to the parliament and the public for the correct fulfilment of its mandate.

ENDNOTES

¹ Human Rights Committee, *General Comment No. 31: ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’* (UN Doc: CCPR/C/21/Rev.1/Add.13), 29 March 2004, para13.

² Committee on Economic, Social and Cultural Rights, *General Comment No. 9: ‘The domestic application of the Covenant’* (UN Doc: E/C.12/1998/24), 3 December 1998, para8.

³ Human Rights Committee, *General Comment No. 31: ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’* (UN Doc: CCPR/C/21/Rev.1/Add.13), 29 March 2004, para15.

⁴ Human Rights Committee, *General Comment No. 31*, para16. See also UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005.

⁵ Committee on Economic Social and Cultural Rights, *General Comment No. 16: 'The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)'* (UN Doc: E/C.12/2005/4), 11 August 2005, para3.

⁶ ICCPR, articles 2(1) and 3; ICESCR, article 2(2). See also articles 2, 3, and 18(3) and articles 3 and 11 of the Revised Arab Charter.

⁷ ICCPR, Article 26.

⁸ E.g. Human Rights Committee, *Toonen v Australia* (UN Doc: CCPR/C/50/D/488/1992), 31 March 1994, para8.7; *Young v Australia* (UN Doc: CCPR/C/78/D/941/2000), 6 August 2003, para10.4; Committee on Economic Social and Cultural Rights, *General Comment 20: 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)'* (UN Doc: E/C.12/GC/20), 2 July 2009, para11.

⁹ ICCPR, Article 21 "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are 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."

¹⁰ See also articles 24 and 32 of the Revised Arab Charter.

¹¹ E.g. Human Rights Committee, *General Comment No. 34 'Article 19: Freedoms of opinion and expression'* (UN Doc: CCPR/C/GC/34), 12 September 2011, in particular para21-36.

¹² See also articles 26 and 27 of the Revised Arab Charter.

¹³ Human Rights Committee, *General Comment No. 27: 'Freedom of movement (Art.12)'* (UN Doc: CCPR/C/21/Rev.1/Add.9), 2 November 1999, para17-18.

¹⁴ See for instance, ICCPR articles 2(3)(b), 9(3) and (4); African Commission on Human and Peoples' Rights, 'Resolution on the Right to Recourse and Fair Trial' (Res 4(XI)92), 1992; and 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (DOC/OS(XXX)247), 2001, "Principle C [Right to an Effective Remedy]". See also Revised Arab Charter articles 12, 13 and 14(5) and (6).

¹⁵ 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), 23 August 2007, para19 (emphasis added).

¹⁶ 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), 23 August 2007, para19-20 (emphasis added).

¹⁷ Committee against Torture, *General Comment No. 2: 'Implementation of article 2 by States parties'* (UN Doc: CAT/C/GC/2), 24 January 2008, para13.

¹⁸ African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (DOC/OS(XXX)247), 2001, Principle A(4) [Independent Tribunal]. See also Article 12 of the Revised Arab Charter.

¹⁹ Human Rights Committee, *Gorji-Dinka v Cameroon* (UN Doc: CCPR/C/83/D/1134/2002), 17 March 2005, para5(1).

²⁰ E.g. Human Rights Committee, *Concluding Observations on Israel* (UN Doc: CCPR/CO/78/ISR), 21 August 2003, para12-13; *Concluding Observations on United Kingdom* (UN Doc: CCPR/CO/73/UK), 6

December 2001, para19; *Paul Kelly v Jamaica* (UN Doc: CCPR/C/41/D/253/1987), 8 April 1991, para5(6); *Berry v Jamaica* (UN Doc: CCPR/C/50/D/330/1988), 7 April 1994, para11(1); *Rafael Marques de Morais v Angola* (UN Doc: CCPR/C/83/D/1128/2002), 29 March 2005 para6.3 and 6.5.

²¹ E.g. African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principles M(2), M(4) and M(5); *Sir Dawda K Jawara v The Gambia*, Nos 147/95 and 149/96, 13th Activity Report, 11 May 2000, para5 and 59; *Liesbeth Zegveld and Messie Ephrem v Eritrea*, No 250/2002, 17th Activity Report, November 2003, para49-57 and first operative paragraph; *Article 19 v Eritrea*, No 275/2003, 22nd Activity Report, May 2007, para81, 82, 90-94, 102 and first operative paragraph; *Institute for Human Rights and Development in Africa v Republic of Angola*, No 292/2004, 24th Activity Report, May 2008, para57-60. See also Article 14 of the Revised Arab Charter.

²² Human Rights Committee, General Comment No. 32, para34; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria*, No 218/98, 14th Activity Report, April/May 2001, para29; *Centre for Free Speech v Nigeria*, No 206/97, 13th Activity Report, 15 November 1999, para14; *Media Rights Agenda and Constitutional Rights Project v Nigeria*, Nos 105/93 and others, 12th Activity Report, 31 October 1998, para56; Resolution on the Right to Recourse and Fair Trial, Res 4(XI)92, 1992, para2(e)(i).

²³ See the elaboration of these rights as described in Human Rights Committee, General Comment No. 32.

²⁴ Human Rights Committee, General Comment No. 32, para22: "Trials of civilians by military or special courts should be exceptional, i.e. 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."

²⁵ E.g. African Commission on Human and Peoples' Rights, '*Resolution on the Right to Recourse and Fair Trial*' (Res 4(XI)92), 1992; and '*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*'. See also Revised Arab Charter articles 11, 12, 13, 16, 17, 19.

²⁶ See Human Rights Committee, General Comment No. 32, para48.

²⁷ African Charter Article 7(2) makes a similar provision, as does Article 15 of the Revised Arab Charter.

²⁸ Human Rights Committee, *General Comment No. 34: 'Article 19 (Freedom of opinion and expression)'* (UN Doc: CCPR/C/GC/34), 12 September 2011, para25.

²⁹ Human Rights Committee, General Comment No. 34, para26.

³⁰ See UN Doc: E/CN.4/2005/102/Add.1, 8 February 2005, and UN Commission on Human Rights Resolution 2005/81 on Impunity, 21 April 2005, para20-22.

³¹ See also African Charter, Article 5 and Revised Arab Charter, articles 8 and 20.

³² Human Rights Committee, *General Comment No. 20: 'Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)'*, 10 March 1992, para12; General Comment No. 34, para6.

³³ See the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms* (UN Doc: CAT/OP/12/5), 9 December 2010.

³⁴ See also Revised Arab Charter, Article 4(1).

³⁵ See also Revised Arab Charter, Article 4(2).

³⁶ General Comment No. 29, para11.

³⁷ General Comment No. 29, para13-16. See also Revised Arab Charter, articles 4(2), 13, 14(6), and 20(1).

³⁸ General Comment No. 29, para4-5.

³⁹ African Commission on Human and Peoples' Rights, *Article 19 v Eritrea*, No 275/2003, 22nd Activity Report, May 2007, para87. See also *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, No 74/92, 9th Activity Report, October 1995, para21; *Media Rights Agenda and Constitutional Rights Project v Nigeria*, Nos 105/93 and others, 12th Activity Report, 31 October 1998, paras67-70; *Amnesty International, Comité Loosli Bachelard and others v Sudan*, Nos 48/90 and others, 13th Activity Report, 1-15 November 1999, para42.

⁴⁰ This would not prevent certain limitation of certain rights insofar as this is more generally permitted – see General Comment No. 29 paragraph 4, and e.g. Article 12 of the ICCPR, stating that the right to freedom of movement and choice of residence in a country is subject to such restrictions as are “provided by law” and “necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.” See similarly articles 18(3), 19(3), 21, 22(2).

⁴¹ See also Article 30 of the Revised Arab Charter.

⁴² Human Rights Committee, *General Comment No. 22: 'The right to freedom of thought, conscience and religion (Art. 18)'* (UN Doc: CCPR/C/21/Rev.1/Add.4), 30 July 1993, para5.

⁴³ See also Revised Arab Charter, Article 21.

⁴⁴ Human Rights Committee, *General Comment No. 16: 'The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)'*, 8 April 1988, para4 and 8.

⁴⁵ Human Rights Committee, *General Comment No. 20: 'Concerning prohibition of torture and cruel treatment or punishment'*, 10 March 1992, para12; General Comment No. 34, para9.

⁴⁶ E.g. Human Rights Committee, *General Comment No. 31: 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant'* (UN Doc: CCPR/C/21/Rev.1/Add.13), 29 March 2004, para12.

⁴⁷ See also the recommendation below regarding abolition of the death penalty in Tunisia and a constitutional prohibition on extradition to face the death penalty.

⁴⁸ Article 6(6): “Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”

⁴⁹ Human Rights Committee, *General Comment No. 6: The Right to Life*, 27 July 1982, para6.

⁵⁰ 44th session of the African Commission, *Resolution calling on State Parties to observe the moratorium on the death penalty* (ACHPR/Res. 136(XXXIII).08), November 2008.

⁵¹ *Report of the Chairperson of the African Commission's Working Group on the Death Penalty in Africa during the 49th Ordinary session of the Commission in Banjul, Gambia, 28 April to 12 May 2011*: <http://www.achpr.org/english/Commissioner%27s%20Activity/49th%20OS/Commissioner/Kayitesi.pdf>.

⁵² See the constitutions of Angola, Cape Verde, Cote d'Ivoire, Djibouti, Guinea-Bissau, Mozambique, Namibia, Sao Tome and Principe, Senegal and Seychelles.

⁵³ Article 20: "The right to life is the first right of any human being. The law protects this right."

⁵⁴ "Maroc: la voie à l'abolition de la peine de mort est ouverte", *Le Figaro*, 30 June 2011, <http://www.lefigaro.fr/international/2011/06/29/01003-20110629ARTFIG00730-maroc-la-voie-a-l-abolition-de-la-peine-de-mortest-ouverte.php> (accessed 28 February 2012).

⁵⁵ The constitutions of Angola, Finland and Portugal encompass this rule explicitly.

⁵⁶ *Judge v Canada*, Communication No. 829/1998, Views of 5 August 2002 (UN Doc: CCPR/C/78/D/829/1998), 2004, 11 IHRR 122; note that the rule was found "irrespective of whether [the State Party] has not yet ratified the Second Optional Protocol" (at para10.6).

⁵⁷ Article 30: "The state shall respect and protect the right to life, which is inviolable." Article 58(5): "Under no circumstances may the declaration of a state of war, siege or emergency affect ... c) The right to life, personal integrity and personal identity." Article 59: "The death penalty shall be prohibited." Article 70(2): "The extradition of foreign citizens for political motives, for charges punishable by the death penalty or in cases where it is justifiably recognised that extradition may lead to the torture, inhumane or cruel treatment of the individual concerned or will result in irreversible damage to their physical integrity under the law of the state applying for extradition, shall not be permitted."

⁵⁸ See for example the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 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, Principles 9 to 14; UN Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979, article 3 and commentary.

⁵⁹ Article 11(1) of the ICESCR recognizes "...the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing...". The UN Human Rights Council regularly adopts resolutions that refer to the terms 'right to food' and 'right to adequate housing'. The UN Committee on Economic, Social and Cultural Rights has adopted General Comments on these rights: *General Comment No. 12: The right to adequate food (Art.11)* (UN Doc: E/C.12/1999/5), 12 May 1999 and *General Comment No. 4: The right to adequate housing (Art.11 (1))*, 13 December 1991.

⁶⁰ Tunisia was one of the 122 States at the UN General Assembly that voted in favour of Resolution 64/292 of July 2010 which "Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights." Tunisia also signed on to the Abuja Declaration adopted at the First Africa-South America Summit (ASA) in Abuja, Nigeria, on 30 November 2006, in which 65 African and South American States committed to "promote the right of our citizens to have access to clean and safe water and sanitation."

Although the ICESCR does not explicitly refer to water and sanitation, its official treaty monitoring body,

the UN Committee on Economic, Social and Cultural Rights, has stated that the rights to water and sanitation are implicitly included within Article 11 of the ICESCR, which recognizes the right of everyone to an adequate standard of living. This is because the rights to water and sanitation are essential for survival and to live in dignity. See UN CESCR, *General Comment No. 15: The right to water* (UN Doc: E/C.12/2002/11), 20 January 2003 and *Statement on the Right to Sanitation* (UN Doc: E/C.12/45/CRP.1), 19 November 2010. The Human Rights Council concurred with this view. On 30 September 2010 the Human Rights Council adopted by consensus Resolution 15/9 which: "Affirms that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity".

⁶¹ The African Commission on Human and Peoples' Rights stated that the combined effect of articles 14 (right to property), 16 (right to health) and 18 (1) (right to protection of the family) reads into the Charter the right to shelter or housing. *The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v. Nigeria*, Communication (155/96 ACHPR/COMM/A044/1), decision made at 30th Ordinary Session, Banjul, The Gambia, from 13th to 27th October 2001, para60.

⁶² In the case of SERAC and CESR v. Nigeria, *ibid*, paras. 63-5, the Commission noted that the right to food is implicit in the African Charter, on the basis of the argument by the communicants that it was contained in the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22).

⁶³ Adopted by General Assembly Resolution 48/134 of 20 December 1993. See also: Amnesty International, "Amnesty International's recommendations for effective protection and promotion of human rights" (Index: IOR 40/007/2001), 1 October 2001; and Office of the High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Professional Training Series No. 4 (Rev. 1), 2010.

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