CONSTITUTION REPORT ☆

The Constitution-Making Process in Tunisia

Final Report

2011–2014

THE
CARTER CENTER

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Foreword

Three years following the fall of the Ben Ali regime and more than two years after the 2011 election of the National Constituent Assembly, Tunisians took a decisive step in their quest to break from the country's authoritarian past, adopting a new constitution on Jan. 27, 2014. Though the road to the constitution was challenging, a spirit of openness to compromise and consensus-building prevailed, ensuring that Tunisia could reach this historic milestone. By engaging in dialogue and compromise, Tunisians made a powerful statement that is reverberating across the region.

Tunisia has an illustrious constitutional tradition that dates back 3,000 years. Carthage, the powerful Phoenician city–state located in the Gulf of Tunis, had its own constitution. Many centuries later, the 1857 Declaration of Rights gave all residents of the kingdom of Tunisia certain rights and freedoms, regardless of religion, language, or color. The constitution of 1861, considered the first written constitution in the Arab world, would soon follow. Nearly a century later, shortly after the country gained its independence from France, Tunisians opted to form a National Constituent Assembly to draft a new constitution, which was adopted on June 1, 1959. In the decades that followed, the constitution was amended several times in order to strengthen presidential powers, first of Habib Bourguiba, who maintained power for 31 years, and then of his successor, Zine El Abidine Ben Ali.

Although the 1959 constitution enshrined certain rights and freedoms, its association with the Ben Ali regime led Tunisians to opt to suspend the 1959 constitution soon after the revolution and to elect another Constituent Assembly to draft a new constitution with the hope that it would represent all Tunisians and chart a path for the country's transition from authoritarianism to democracy and equality.

The election of the 217-member National Constituent Assembly (NCA) took place on Oct. 23, 2011, and was largely peaceful and credible. Although the NCA faced many challenges, including the tragic assassinations of opposition leader Chokri Belaïd in February 2013 and of assembly member Mohamed Brahmi in July of the same year, Tunisia's political actors showed commitment to moving the constitutional process and the country forward. In the fall and winter of 2013, they engaged in a national dialogue that played an important role in resolving the political deadlock and paved the way for the constitution's adoption in January 2014. The new constitution lays a strong foundation for the guarantee of human rights and creates institutions to ensure respect for the rule of the law in the country.

The NCA's work was an achievement marked by dedication, compromise, and democratic engagement. It represents the best of the social movement and goals of Tunisia's revolution and the Arab Spring, providing a concrete path for Tunisia to re-establish democratic institutions, strengthen the rule of law, and promote respect for fundamental human liberties.

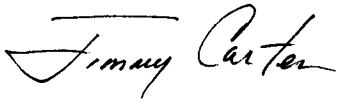
The Tunisian experience offers rich lessons for other countries in the region engaging in

constitution-building projects, especially those experiencing political transitions. But the story is not finished yet.

The constitution's adoption opened the door for the legislative and presidential elections that occurred in 2014, as mandated by the constitution's transitional provisions. Tunisians have grown weary of interim state structures and desire permanent institutions that can tackle the significant economic and security challenges that face their country. With a newly elected assembly and president in office, Tunisians must focus on bringing Tunisia's laws and regulations, most of which date from the prerevolution era, into alignment with the human rights commitments provided by the constitution.

The Carter Center is inspired by the eagerness of Tunisian citizens as they move forward on their path to democracy. We hope to support Tunisia's progress by highlighting the recommendations laid out in this report. Our foremost recommendation is that the government of Tunisia reform the existing legal framework to ensure that Tunisia's laws are consistent with international commitments to human rights and those rights protected by the new constitution. In addition, we urge the judicial system to protect the freedoms of religion and speech, the Assembly of the Representatives to make information about their work readily available to the public, and civil society to continue to participate actively in the construction of new institutions. A steadfast commitment to the core principles found in the new constitution will ensure that Tunisia's democratic future is protected.

We wish the Tunisian people and its leaders continued success in these endeavors.



Former U.S. President Jimmy Carter
Founder of The Carter Center

Executive Summary

Following a popular uprising—dubbed "the Jasmine Revolution"—in December 2010 and January 2011, which ended the 23-year rule of President Zine El Abidine Ben Ali, Foued Mebazaâ, the interim president of the republic, suspended the 1959 constitution, and Tunisia opted to write a new constitution. The first step in the constitution-making process was the election of a 217-member National Constituent Assembly on Oct. 23, 2011, tasked with drafting and adopting the new constitution. The NCA approved the constitution on Jan. 26, 2014. On Jan. 27, the constitution was officially adopted by the president of the republic, the president of the NCA, and the prime minister, following a challenging and complex process that seemed at times on the brink of collapse, notably due to an economic crisis, deteriorating security conditions, and two political assassinations in 2013.

Even though the process on the whole was positive, the NCA fell short in several key areas, not the least of which were planning, communication, public participation, and transparency.

The Carter Center monitored the constitution-making process in Tunisia from February 2012, when the NCA first began working on the document, to May 2014, when the assembly launched a countrywide tour to raise awareness of the new constitution and the rights and freedoms enshrined therein. Throughout this period, the Center issued public reports on the content of the various drafts as well as the drafting process, including its inclusiveness and the extent to which it upheld principles of transparency and participation of citizens in the public affairs of their country.

The main goals of the Carter Center's work were to help make the constitution-making process more transparent and accessible to the public and to raise awareness among NCA members regarding Tunisia's international human rights obligations, with a view to ensuring that these commitments were fully reflected in the new constitution. During the period it monitored the work of the NCA, The Carter Center released 17 statements on the situation in Tunisia, out of which nine specifically concerned developments regarding the new constitution. The statements on the constitution recommended improvements to the process and highlighted issues where further work was needed to ensure that constitutional provisions were in line with Tunisia's international commitments.

The final draft of the constitution, as approved, contained significant changes from the initial versions, which were often consistent with recommendations made by The Carter Center, notably in regard to strengthening women's rights, improving the guarantees for an independent judiciary, removing excessive restrictions on rights and freedoms from most provisions, and strengthening fundamental political and civil liberties as well as granting the Constitutional Court full power

immediately upon its creation. In line with recommendations made by The Carter Center, the NCA refined its communication with the public and interaction with the media and created a formal method for civil society to attend the article-by-article vote on the final draft of the constitution. The Center commended efforts by the NCA to increase transparency during the months preceding the adoption of the constitution.

Although there remains work to be done, The Carter Center hopes that this final report assessing both the content and constitution-making process will support Tunisia's efforts to strengthen the rights contained in the new constitution.

Tunisia's experience offers rich lessons in constitution-making, particularly for countries undergoing political transitions: It is a stark reminder that process matters as much as outcome. The strength of the Tunisian model lies in the tireless work of the NCA and the political parties to overcome divisions and build consensus, resulting in the adoption of a constitution backed by the vast majority of deputies in an otherwise highly divided assembly.

The assembly's constituent commissions—the cross-party bodies entrusted with drafting various sections of the constitution—followed an approach that included consultation with national and international experts, scholars, and civil society organizations. The fruits of this consultation can be found in the final text of the constitution, which to a large extent lays a strong foundation for the guarantee of human rights and the rule of the law in the country.

Even though the process on the whole was positive, the NCA fell short in several key areas, not the least of which were planning, communication, public participation, and transparency. Many of the problems in the drafting process were the teething problems of a new democracy. The NCA's leadership, deputies, and administrative staff were not accustomed to working in a democratic environment and often failed to recognize the need for transparency toward citizens, public outreach, media relations, and civil society consultation. These factors weakened the relationship of the NCA with the Tunisian people, leading to widespread public frustration and a perception that the assembly operated with little accountability to the voters who elected them.

Deborah Hakes

A poll worker assists an elderly woman to vote in Tunisia on Oct. 23, 2011. "Today is the first time I have voted in my life," she said. "It didn't matter before, but this is for our children and our grandchildren's future, for them to live free."

Organization of the Drafting Process

At the time of the NCA's election, the expectation of most political stakeholders and the public was that the constitution-making process and adoption would take place in one year. Given that the NCA decided to redraft the constitution entirely rather than to amend the 1959 constitution and that it also assumed a legislative role, this time frame was very ambitious if not unrealistic from the outset. As such, in addition to its main task of drafting a constitution, the NCA was responsible for establishing the necessary legal framework for legislative and presidential elections and carrying out other electoral initiatives during the transition period. The process lasted twice as long as anticipated, finally ending with the publication of the adopted text in the official gazette of the Tunisian Republic on Feb. 10, 2014.

The extended drafting and adoption period is not surprising—experiences from other countries where participatory constitution-making processes have taken place show that time frames vary, with most falling in the range of 18 to 24 months—especially since the NCA balanced the constitution-drafting with other urgent legislative work. In addition, many of the delays, especially at the end of the process, were caused by political considerations and blockages.

Many civil society organizations lobbied for greater transparency, and one in particular, Al Bawsala, played an important role in enhancing transparency by publishing NCA documents and posting on social media the attendance records of deputies and their individual votes during plenary sessions.

It is easy to understand, however, why the Tunisian public perceived two years as a serious delay in the process. The NCA lacked a realistic road map throughout much of the process. The joint coordination and drafting committee, created early on to oversee the process, was noticeably weak in coordination. For example, it did not hold regular meetings until September 2012, seven months after the start of the drafting process. Until then, the constituent commissions, each of which dealt with a specific section of the constitution, worked without a joint plan, regular meetings, agreed-upon deadlines, or a common methodology. A complicating factor was that political allegiances in the assembly were constantly shifting, with deputies migrating easily in and out of different blocs and with new parties formed on a regular basis. This was compounded by the assembly's rules of procedure, which were sparse and lacking in detail and which were amended four times during the process to meet the exigencies of the situation.

These issues created tensions within the assembly that were greatly heightened by a deteriorating economic and security environment. The second year of the process was the most difficult: Two political assassinations occurred within six months of each other, the second targeting an NCA member, Mohamed Brahmi. With Brahmi's assassination, the assembly fell into an even deeper crisis that further delayed the process.

Instead of tackling delays through more realistic planning, however, the NCA responded to growing public dissatisfaction with the pace of progress by continually announcing unrealistic deadlines. In late 2013, a road map was eventually adopted through a national dialogue mediated by four nonstate organizations. Known as the Quartet, the group helped resolve the political deadlock in the wake of the second assassination and pressured the NCA into concluding the constitution-making process.

Communication and Outreach to the Public

While the NCA should be commended for its internal deliberative and consultative approach and its successes in producing the constitution, its members were not successful in communicating to external audiences and conducting public outreach. Throughout the process, citizens appeared ill-informed of the content of various drafts of the constitution and the issues at stake.

The NCA did not have a communication department, and the interaction of its leadership with the media was irregular and insufficient. The assembly invested slightly more effort in its relationship with citizens and civil society. However, the interparty working group within the assembly tasked with liaising with the public and civil society organizations lacked logistical means and, to a certain extent, internal backing. The participation of civil society organizations in the process never assumed the importance it could have for the NCA. In addition, the few opportunities put in place for citizen involvement were not widely publicized and thus remained largely unknown to the general public.

The lack of outreach, communication, or serious attempts to publicize or explain the process to citizens, coupled with repetitive delays and

infighting at the assembly, played an important role in the public's loss of trust in the NCA. This feeling peaked with demonstrations in front of the assembly's building, the Bardo, in August 2013, requesting the dissolution of the institution after the assassination of NCA member Mohamed Brahmi. The crisis of confidence was further aggravated by controversies around the issue of compensation of and absenteeism by assembly members.

Transparency and Accountability

There is no doubt that the long-drawn-out process was more strenuous and stressful than many NCA members imagined it would be when they were elected. In some instances, it required a great degree of personal sacrifice on their part, not to mention on the part of citizens who waited as deadline after deadline was missed while the country sank deeper into an economic crisis. Many deputies remained dedicated to the task, despite the personal cost. However absenteeism, both in commission meetings and during plenary sessions, was a major issue during the entire constitution-making process. It led to considerable delays in the work of the assembly and deeply affected the NCA's credibility. At a crucial time in the transitional period, the NCA failed to enforce its own accountability, while it had the means to do so, to the people that had elected it. Greater efforts in this regard, even later in the process, could have helped restore citizens' trust in the assembly. The NCA as an institution failed to take action against absent members, which was needed to demonstrate that public officials were being held accountable for their actions. Tellingly, in the entire two-year process, only the final vote on the constitution succeeded in drawing all deputies to a session.

Despite an implied commitment to transparency and accessibility in the provisions of the NCA's rules of procedure and by some individual members, many members, including the assembly's leadership, appeared reluctant to release key NCA documents to the public and to allow civil society to play a significant role in the process. For instance, the NCA never revealed how individual assembly members voted, despite having the means to do so. This lack of transparency was exacerbated by the limited logistical and human resources. Many civil society organizations lobbied for greater transparency, and one in particular, Al Bawsala, played an important role in enhancing transparency by publishing NCA documents and posting on social media the attendance records of deputies and their individual votes during plenary sessions.

External Engagement in the Process

Civil society organizations also played a role in the constitution-making process by engaging in multiple initiatives: Some organized town hall meetings and information sessions across the country encouraging dialogue between citizens and NCA members, while others conducted awareness campaigns or conferences. Such events contributed to a dynamic public debate around key issues in the constitution and underlined numerous insufficiencies and inconsistencies in the drafts. But, as the political context in Tunisia became more polarized, conferences and other events hosted by civil society organizations tended to draw participants from the same ideological orientation and generally preached to the converted. They were also concentrated mostly in the capital and, therefore, reinforced at times the elite and Tunis-centric nature of the process.

Civil society and other players also shaped the debate around the constitution by engaging in protests and strikes to make their claims heard. For instance, after the release of the first draft, groups defending women's rights organized large protests to demand that the NCA redraft an article that spoke of the "complementary roles of men and women inside the family" without reference to the equality of men and women. In January 2014, during the article-by-article vote, a delegation of imams also tried to exercise pressure on deputies by protesting against provisions enshrining the freedom of conscience and by distributing leaflets inside the NCA building condemning these provisions. On the other hand, direct lobbying activities with NCA members by civil society groups were rare, despite being sorely needed at times, such as during the critical discussions in November 2013

by the Consensus Commission on the remaining contentious issues in the draft constitution.

Although political parties played a role in the overall process by educating their supporters on the mandate of the NCA and their positions on issues under consideration, they largely failed to conduct a regular and nationwide outreach. This was a missed opportunity for the parties, as they could have used the process to increase their visibility, solidify their bases, and attract new members.

Even though the constitution-making process in Tunisia was mainly nationally driven and owned, numerous international actors engaged in it, including multilateral and regional organizations such as the United Nations and the European Union as well as individual country governments and international nongovernmental organizations. Many of these provided valuable expertise and resources and, at times, engaged in advocacy on specific issues. However, better coordination between these organizations could have helped relieve pressure on the assembly and maximized the positive impact of their support for the process.

The NCA's openness to external input and advice was a particular strength of the Tunisian process, and its internal consultative and participative mechanisms were largely effective in moving the drafting, and later the adoption, of the constitution forward. However, the process would have benefited from a more formalized role for experts and greater clarity regarding their mandate in the Rules of Procedure. In constitution-making processes, legal expertise is important, but so is the input of linguists, which was minimal in the

Thierry Bresillon

In January 2014, religious groups demonstrated against Article 6 of the constitution that guarantees freedom of conscience and prohibits appeals to *takfir,* or labeling another Muslim an unbeliever.

Tunisian case. The lack of a fully functional secretariat at the NCA also meant that the assembly's legal counselors were not always used in the most effective manner.

Key Issues in the Constitution

Over the course of the two-year process, the text of the constitution evolved significantly from the first draft to the adopted text, in many instances toward greater clarity and a higher degree of protection for fundamental freedoms and human rights. The constitution offers many protections for rights and freedoms; guarantees many economic, social, and cultural rights; and puts in place strong guarantees for an independent judiciary, thus breaking away decisively from past practices.

However, some concerns remain. For instance, while the new constitution clearly prohibits discrimination based on disabilities (Article 48) and on gender for Tunisian citizens (Article 21), it fails to prohibit all forms of discrimination, explicitly including such categories as race, color, language, religion, political or other opinion, national or social origin, property, or birth. Further, the protections afforded do not apply to noncitizens.

Many economic, social, and cultural rights in the constitution are not spelled out with further explanation as to how they are to be exercised and achieved. In addition, the constitution does not obligate the state to realize these rights to the maximum of its available resources and in a progressive manner, as stipulated in the International Covenant on Economic, Social, and Cultural Rights to which Tunisia is a party. Moreover, the constitution does not provide for safeguards for fundamental freedoms during a state of emergency. Finally, various provisions in the constitution are broadly worded and risk being interpreted in ways that contradict other provisions of the text.

Furthermore, while the constitution's adoption represents a key step in the country's transition from authoritarianism to democracy, it is not sufficient to guarantee a successful transition. The implementation phase—specifically the process of bringing Tunisia's laws and regulations into alignment with the human rights commitments laid down in the constitution—will be important in securing a strong foundation for the respect of these commitments. This process should be carried out in a way that provides the highest degree of protection of human rights for citizens of Tunisia and non-Tunisian residents of the country alike.

The implementation phase—specifically the process of bringing Tunisia's laws and regulations into alignment with the human rights commitments laid down in the constitution—will be important in securing a strong foundation for the respect of these commitments.

Conclusions and Recommendations

The process of constitution-making adopted by the NCA was highly sensitive to internal and external political dynamics in that it allowed for deliberation and extensive consultation and constantly sought consensus within the assembly on contentious issues. This, more than anything, is the strength of the Tunisian model and, though time-consuming, has proved its value. The challenges faced by the NCA and Tunisia in general were immense in terms of economy and security but also in following a democratic path after decades of authoritarian rule. Moreover, the ability to bridge policy and religious divides and produce a consensus document is in itself an enormous achievement.

The assembly was successful in producing a text that not only is generally sound on key human rights issues but is also overwhelmingly backed by deputies from many political ideologies. This was of critical symbolic value during a political transition of this kind. However, the Tunisian model also offers lessons regarding what to avoid when engaging in constitution making, from a process standpoint.

Thierry Bresillon

NCA members sing the national anthem minutes after the passage of the constitution.

Based on the Carter Center's observation of the constitution-making process as outlined in this report, and in a spirit of respect and support, the Center offers the recommendations below to the NCA, the Assembly of the Representatives of the People, Tunisian civil society, and policymakers and scholars engaged in constitution-making processes elsewhere in the region and beyond.

Implementation of the Constitution

The Tunisian government and the Assembly of the Representatives of the People should consider the following:

Rights

- Review and reform Tunisia's existing legal framework to ensure that domestic law and regulations reflect and respect the country's international commitments on human rights and the rights enshrined in the new constitution.
- Prohibit discrimination on the grounds of race, color, language, religion, political or other opinion, national or social origin, property, birth, and other statuses. Ensure that these rights apply to all people in Tunisia, citizens and foreigners alike, in accordance with international law.
- Commit to fight not only violence against women but all kinds of discrimination against women. To this end, adopt concrete measures within the assembly to protect women's rights and to advance gender parity in elected assemblies.
- Specify in relevant legislation Tunisia's obligation to adopt specific mechanisms to guarantee the progressive realization of economic, social, and cultural rights to the maximum of the country's available resources.

Enforcement

- Judges should interpret the law, including the constitution, to favor the enforcement of a right or fundamental freedom and to take into account the interpretation of human rights' treaties by international or regional courts and commissions, as a minimum standard.
- Judges and legislators should protect the freedom of religion or belief, including the freedom to adopt, change, or renounce a religion or belief, to ensure that any limitations are consistent with the general limitations clause, which delineates how rights should be interpreted in their application.
- In the event that a state of emergency is declared, ensure that any restrictions to rights and freedoms are specific, necessary, proportionate, and subject to judicial review and that they will expire after a defined period of time. Furthermore, specify that rights considered absolute in international law remain protected and ban their restriction under emergency powers.

Tunisian Institutions

- Incorporate provisions into the legal framework to ensure the independence of the judiciary with regard to appointment, promotion, and discipline, including the security of tenure. The removal of judges should be restricted to cases of serious misconduct, following a fair trial, and in accordance with the constitution, by reasoned decision of the High Judicial Council following its establishment.
- Put in place and implement a medium- to long-term plan to educate the public about the constitution.

To the Assembly of the Representatives of the People

- Conduct extensive lessons-learned exercises before drafting Rules of Procedure.
- Consider enabling the Commission on Rules of Procedure to meet on a regular basis— not just at times of crisis—to evaluate the functioning and application of the rules.
- Ensure that the Rules of Procedure provisions on attendance and participation are clear and detailed and implement these provisions in a rigorous and transparent manner.
- Consider giving the Provisional Commission to Review the Constitutionality of Draft Laws the mandate to review the new assembly's Rules of Procedure.
- Ensure that the assembly's secretariat offers appropriate logistical and administrative support to the commissions. Ensure that legal advisers are able to focus on research and drafting rather than on logistical support.
- Consider stating in unequivocal terms in the Rules of Procedure that commission meetings as well as plenary sessions are open to the general public. The assembly should establish formal and fair criteria and procedures to grant access and observer status to civil society organizations and interested citizens.
- Establish a communication department and devote sufficient resources to devising and implementing a communication strategy and to liaising with the media. Such a strategy should include a website with important information and documentation; sufficient resources to disseminate information on the assembly's work, including through social media; and official staff representatives and communication experts.
- Create an interparty working group in charge of liaising with civil society, the media, and the international community and prepare strategic plans and budgets to present to potential donors.
- Fully commit to the principle of transparency and the right to information enshrined in the constitution by publishing and disseminating in a timely manner all official assembly documents such as minutes, reports, decisions, submissions, attendance records, and details of the votes, including posting them on the assembly's website.
- Plan and pursue mechanisms to genuinely engage the public in the legislative process and the work of the assembly at large. Deputies should be provided with logistical and administrative backstopping to conduct outreach.

- Consider putting in place informal, issue-based caucuses. Experiences from other countries suggest that such groups can help to build trust between political groups in the assembly, increase the visibility of certain issues, and contribute to better legislative and policy agendas. The assembly should also consider providing both political blocs and these informal groups with logistical and administrative support to increase their effectiveness.

To the International Community

- Continue to support the capacity of media, civil society, and constituent and legislative bodies in conducting outreach and communication in a coordinated and responsive manner.
- To avoid duplication, improve coordination among international actors working with constituent bodies and legislative assemblies. Be sensitive to the rhythm of the institution and its priorities and workload.
- Ensure sufficient support to civil society work outside the capital and encourage regionally sensitive projects and initiatives.

To Tunisian Civil Society

- Build capacity in lobbying and monitoring the work of the Assembly of the Representatives of the People and other state institutions.
- Conduct awareness-raising on the constitution in all parts of the country.

To Constitution-Making Bodies in Other Countries

- Devote careful thought to the Rules of Procedure and internal decision-making processes.
- Consider putting in place detailed provisions regarding participation of members in assembly work and enforce sanctions fairly, transparently, and consistently.
- Formalize the role of legal and linguistic experts in the Rules of Procedure to ensure greater clarity of their role and maximize their impact.
- At the very beginning of the process, establish a detailed work plan and time table for the adoption of the constitution to ensure realistic planning and progress as well as to provide the public with greater visibility on the way forward.
- Design comprehensive public participation mechanisms in the drafting process and put in place the means necessary for its effective realization.
- Plan and implement awareness-raising and information campaigns on a regular basis using the full range of media and other tools available. Campaigns also should present the limitations of public participation in order to avoid disappointment and frustration.
- Set up a formal procedure to analyze, process, and record inputs made during consultations with civil society and the public.
- Appoint people at the constitution-making body in charge of liaising with civil society, the media, and the international community and prepare strategic plans and budgets to present to potential donors.
- Conduct extensive hearings prior to and while drafting the constitution and integrate consensus-building mechanisms in the process from the outset.
- Open to the public the debates and discussions within the constitution-making body. Establish formal and objective procedures to grant access and observer status to media, civil society organizations, and interested citizens.
- Publish and disseminate all important documentation in a timely manner. This requires devoting thought and resources to logistical and administrative issues.
- Develop outreach activities once the constitution is adopted and use all means available, including in-person meetings, to engage the public in the content of the constitution and to respond to questions.
- Consider putting in place informal, issue-based caucuses. Experiences from other

countries suggest that such groups can help build trust between political groups in the assembly, increase the visibility of certain issues, and contribute to better legislative and policy agendas.

A detailed description of the Carter Center's recommendations to the NCA, the Assembly of the Representatives of the People, and policy-makers engaged in constitution making in other parts of the world can be found in the final section of this report.

The Carter Center in Tunisia

The Carter Center opened its offices in Tunisia in July 2011 following an invitation from the elections management body, the Instance Supérieure Indépendante pour les Elections or ISIE, to observe the 2011 National Constituent Assembly elections. The Center's observation mission aimed to provide an impartial assessment of the overall quality of the electoral process, promote an inclusive process for all Tunisians, and demonstrate international support for the country's democratic transition. This mission represented the Center's first engagement in Tunisia.

The report is intended to be of use to government policymakers, civil society members, constitution-making practitioners, constitutional experts, and scholars both inside Tunisia and elsewhere in the world where constitution-making processes are underway.

During the election period, The Carter Center observed voter registration; campaigning; polling, counting, and tabulation processes; the announcement of final results; and the formation of the transitional government. The Center issued statements at key stages of the electoral process and published its final report on the election observation mission in May 2012.[1] Following its observation of the NCA elections, The Carter Center maintained a presence in Tunisia to assess the constitution-making process and preparations for the next electoral cycle.

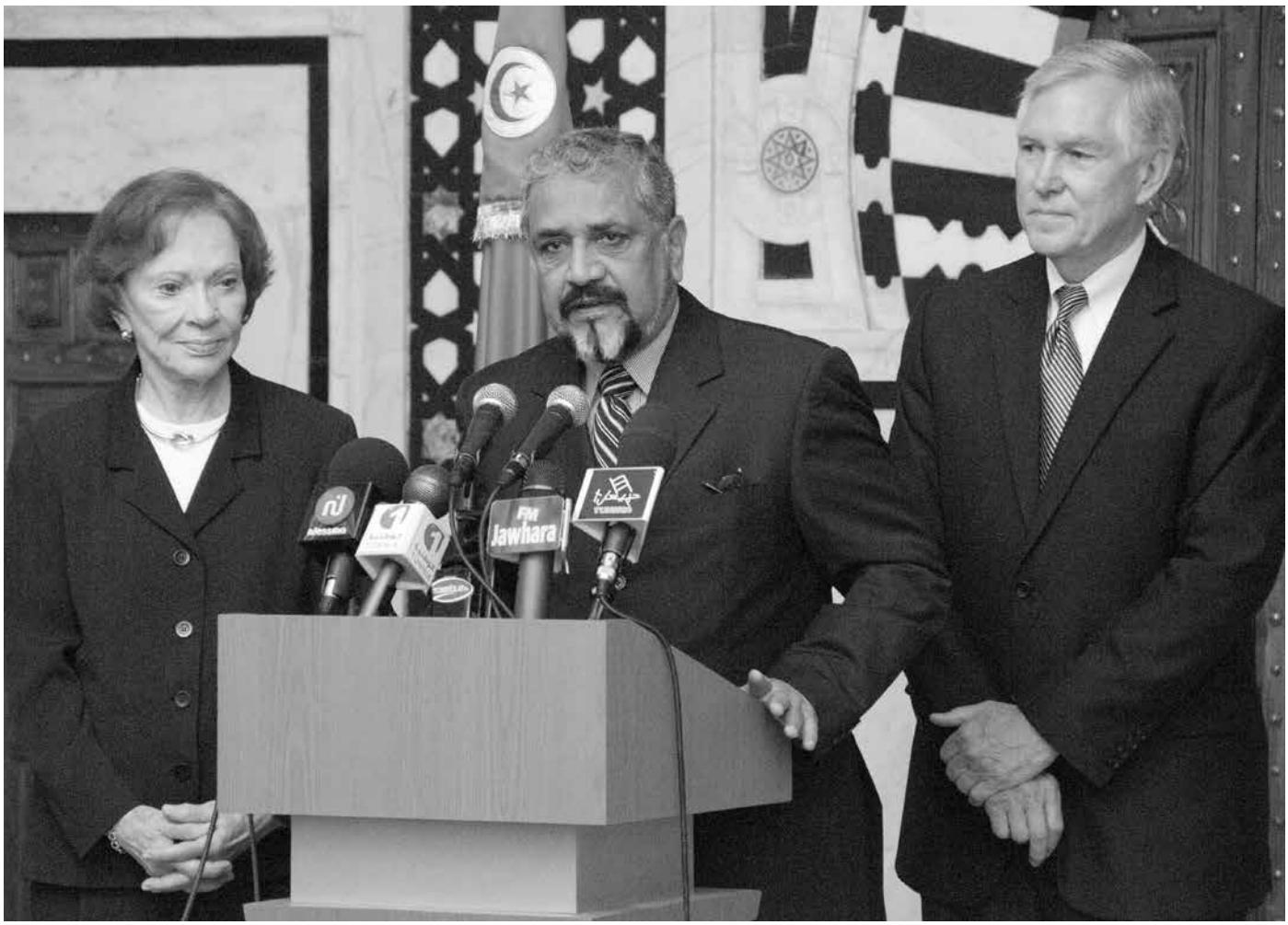
Constitution-Making Process Observation Methodology

The material in this report is based on the Carter Center's extensive meetings with stakeholders and direct observation of the constitution-making process in Tunisia, particularly its observation of the day-to-day work of the National Constituent Assembly's constituent commissions, ad hoc commissions, and plenary sessions between 2012 and 2014. It also draws on official NCA documentation, meetings, and reports with and by other organizations that commented on the process and lessons on constitution-making and parliamentary work from elsewhere in the world.

The report is intended to be of use to government policymakers, civil society members, constitution-making practitioners, constitutional experts, and scholars both inside Tunisia and elsewhere in the world where constitution-making processes are underway. It documents aspects of the process and offers observations

1 "Final Report: Observing the Oct. 23, 2011, National Constituent Assembly Elections in Tunisia," May 24, 2012. http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/tunisia-final-Oct2011.pdf

Deborah Hakes



The 2011 election observation mission was led by former First Lady Rosalynn Carter, former President Cassam Uteem of Mauritius (center), and Carter Center President and CEO Dr. John Hardman.

and recommendations with regard to particular themes, such as the extent to which the public was engaged in the process, communication by the assembly with the media, and the involvement of expert and technical advisers in the process. The report also analyzes the evolution of key substantive issues in the constitution, particularly around human rights, from the first draft to the adopted text, always with Tunisia's international obligations as a frame of reference.

Tunisia has ratified a series of international and regional human rights treaties whose provisions are relevant to the constitution-making process. These treaties include the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of People With Disabilities, and the African Charter on Human and Peoples' Rights (AfCHPR), among others. Table 1 provides an overview of the international treaties to which Tunisia has acceded, signed, or ratified.[2]

In addition to evaluating the content of the text against the country's international

2 Signing a treaty does not impose obligations under the treaty on states but obliges them to refrain from acts that would defeat the object and purpose of the treaty. By ratifying a treaty, states establish consent to be bound by the treaty. To accede to a treaty has the same legal effect as ratification but is not preceded by an act of signature.

Table 1: Tunisia – Status of Ratifications

Treaty/Declaration	Status	Date
Universal Declaration of Human Rights	Persuasive Upon[3]	1948
International Convention on the Elimination of All Forms of Racial Discrimination	Acceded	1967
Convention on the Political Rights of Women	Acceded	1968
International Covenant on Civil and Political Rights	Acceded	1969
African Charter on Human and Peoples' Rights	Acceded	1983
Convention on the Elimination of Discrimination Against Women	Acceded	1985 (with reservations) 2014 (full ratification with notification[4])
Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment	Ratified	1988
Convention on the Rights of the Child	Acceded	1992
United Nations Convention Against Corruption	Acceded	2008
Convention on the Rights of People With Disabilities	Acceded	2008
Venice Commission – Council of Europe	Ratified/Acceded	2010
Rome Statute establishing the International Criminal Court	Acceded	2011
International Convention for the Protection of All People From Enforced Disappearance	Ratified	2011
Optional Protocol to the International Covenant on Civil and Political Rights	Acceded	2011

obligations, the Center also monitored the process regarding its inclusiveness and the extent to which it upheld principles of transparency and participation of citizens in the public affairs of their country.[5] The Center also assessed the process against best practices as described in various documents such as the "Guidance Note of the Secretary-General on United Nations' Assistance to Constitution-Making Processes," the handbook on "Constitution-Making and Reform: Options for the Process" published by Interpeace (2011), and the paper "Lessons Learned From Constitution-Making: Processes With Broad Based Public Participation" released by Democracy Reporting International (2011).

During the two-year process, the Center met regularly with a broad range of Tunisian political

3 Nonbinding instruments such as declarations and resolutions can serve as evidence of state practice or "political commitments." State practice can become the basis of binding customary international law when it is followed consistently over time (the period of time can be relatively short), where it is widely followed (but not necessarily universally), and where there is evidence (which may be a matter of inference) that the practice is considered obligatory as a matter of law. Once accepted as customary international law, all states are bound unless they have expressed a valid objection to the norm, irrespective of any formal consent.

4 The decree lifting the reservations was issued by the government of Béji Caïd Essebsi on Aug. 16, 2011, but was only submitted to the U.N. on April 17, 2014. The reservations removed pertain to Articles 15(4), 9(2), 16(C), (D), (F), (G), (H) AND 29(1), which deal with equal rights for men and women to pass on nationality to their children; to move within the country and chose their residence freely; and in matters pertaining to marriage, family, adoption and property rights. Tunisia's notification to the U.N., however, makes clear the state will not take any measures it deems in conflict with the provisions of Chapter I of the Tunisian Constitution.

5 Article 25 of the International Covenant on Civil and Political Rights (ratified by Tunisia on March 18, 1969) states that "every citizen shall have the right and the opportunity (…) to take part in the conduct of public affairs, directly or through freely chosen representatives…"

and civic stakeholders, including NCA members and administrative staff, civil society organizations, political parties' representatives, and Tunisian academics to understand the work of the NCA and to identify the strengths and weaknesses of the constitution-making process. The Center observed dozens of commission meetings as well as all relevant plenary sessions and followed public debates on the constitution-making process.[6] Carter Center observers also attended a number of national and international civil society workshops and conferences related to the process.

Outreach activities by the NCA, political parties, and civil society were also followed closely by Carter Center staff. The Center observed, for example, the NCA's two-day dialogue session with civil society on the content of the draft constitution in September 2012, in addition to almost half of the national public consultation sessions held in different governorates around the country from December 2012 to February 2013.[7] After the adoption of the constitution, and at the NCA's invitation, the Center attended two of the regional information sessions organized by the NCA in May 2014 and designed to raise awareness about the content of the new constitution.

Furthermore, the Center had regular contact with international organizations monitoring or supporting the process, including Human Rights Watch (HRW); Amnesty International; Democracy Reporting International (DRI); the International Institute for Democracy and Electoral Assistance (International IDEA); the United Nations Development Program (UNDP); the Office of the High Commissioner for Human Rights in Tunisia (OHCHR); and the United Nations Educational, Scientific, and Cultural Organization (UNESCO).

The Center also observed some outreach activities by political parties, such as information sessions held in April–May 2013 on the content of the constitution, organized by Ennahdha, Nidaa Tounes, Al-Joumhouri, and Al-Massar for their respective sympathizers. The Carter Center further attended several awareness-raising initiatives by civil society organizations, including forums held in the regions by the Association Tunisienne pour l'Intégrité et la Démocratie des Elections (ATIDE) and Al Bawsala to give the public an opportunity to meet and interact with NCA members on matters related to the constitution-making process.

The Carter Center issued nine statements at key stages of the two-year constitution-making process. In May 2012, early on in the process, the Center encouraged the NCA to increase transparency and facilitate public participation.[8] In September 2012, following the release of the first draft of the constitution, the Center published a statement to reiterate its calls for increased public participation, outreach, and transparency.[9] After the release of the fourth and final draft of the constitution in June 2013, The Carter Center congratulated the NCA on progress made but urged it to put in place stricter safeguards for human rights in the constitution.[10] Following the adoption of the constitution in January 2014, the Center commended the NCA on its historic achievement,[11] and in April 2014, it offered an analysis of the content of the new constitution, welcoming strengthened rights guarantees, highlighting areas of concern, and calling for immediate steps for the constitution's implementation.[12]

The Carter Center released three additional statements jointly with Human Rights Watch, Amnesty International, and Al Bawsala: one in July 2013 following the release of the final draft of the constitution and two in January 2014 during the adoption phase. These statements reflected recommendations for greater compliance with

6 Carter Center observers, like other civil society organizations, did not have equal access to all commissions' meetings. The level of access varied depending on the interpretation of the Rules of Procedure by the presidents of the six constituent commissions.

7 The Carter Center observed the national consultations held in the governorates of Tunis, Sfax, Sousse, Monastir, Gabès, Beja, Zaghouan, Nabeul, Ben Arous, Ariana, Medenine, and Tozeur.

8 "The Carter Center Encourages Increased Transparency and Public Participation in Tunisia's Constitution Drafting Process," May 11, 2012

9 "The Carter Center Recognizes Tunisia's National Constituent Assembly Progress; Calls for Increased Public Participation, Outreach, and Transparency," Sept. 26, 2012

10 "The Carter Center Congratulates Tunisia's NCA Assembly on Final Draft of Constitution and Urges Safeguards for Human Rights," June 12, 2013

11 "The Carter Center Commends Tunisian Assembly on Historic Achievement," Jan. 29, 2014

12 "The Carter Center Welcomes Strengthened Rights Guarantees in Tunisia's New Constitution; Urges Immediate Steps for Its Implementation," April 10, 2014

Tunisia's commitments to international norms, including recognition of the universality of human rights, the inclusion of stronger anti-discrimination provisions in the text, and unequivocal commitment to the principle of equality between men and women in all its facets.[13]

Finally, following the tragic assassinations of Chokri Belaïd in February 2013 and of NCA member Mohamed Brahmi in July 2013, the Center issued statements strongly condemning these murders, urging restraint and nonviolence and calling on the Tunisian government to condemn all acts of political violence and to investigate and take appropriate measures in response.[14]

Throughout its two-year observation, The Carter Center has greatly appreciated the openness of interlocutors to discussion, dialogue, and information-sharing.

13 "Tunisia: Strengthen New Constitution's Rights Protection," July 24, 2013; "Tunisia: Strengthen New Constitution's Human Rights Protection Guarantee Equality for All; Affirm International Law Obligations," Jan. 3, 2014; and "Tunisia: Improve Guarantees for Judicial Independence Ensure Judiciary Has Powers to Protect Human Rights," Jan. 14, 2014

14 "Carter Center Statement on the Assassination of Chokri Belaïd", Feb. 8, 2013, and "The Carter Center Statement on the Assassination of NCA Deputy Mohamed Brahmi," July 26, 2013

The Constitution-Making Process

Historical and Political Background: Political Context Prior to 2011

Since gaining independence in 1956 and until the January 2011 revolution, Tunisia was a one-party state, with power centered on the person of the president. Tunisians were ruled by only two presidents between 1956 and 2011: Habib Bourguiba, often referred to as the "Father of Independence," and Zine El Abidine Ben Ali, who served as Bourguiba's interior minister and then prime minister. Ben Ali removed the former president from power in a bloodless coup d'état in 1987. Political life after Ben Ali's ascension to power was dominated by his party, the Democratic Constitutional Rally (Rassemblement Constitutionnel Démocratique or RCD), and marked by recurrent abuses of human rights, restrictions on the media, and widespread corruption.

Electoral processes, which were tightly controlled by the RCD and the Ministry of Interior, were conducted within a legal framework designed to ensure the RCD's dominance. Elections were characterized by a lack of competition due to the absence of political space, viable opposition political parties, and candidates. During the Ben Ali era, there were several legal opposition parties, although most did not function freely and had little hope of winning seats in Parliament or running a strong presidential candidate against Ben Ali. Some political parties ostensibly served as "artificial" opponents, giving the regime a veneer of legitimacy when, in fact, elections were effectively plebiscites for the system in place. Although it enjoyed significant support, the Islamist opposition movement Ennahdha was persecuted and largely forced to operate underground during the Ben Ali years, returning to the political scene only after his fall.

The revolution of January 2011 was a significant break from a half-century of an oppressive system characterized by authoritarian control and political repression.

The Revolution of January 2011

The revolution of January 2011 was a significant break from a half-century of an oppressive system characterized by authoritarian control and political repression. While social unrest was already tangible in the years preceding the revolution, the self-immolation of a young street vendor, Mohamed Bouazizi, in the city of Sidi Bouzid on Dec. 17, 2010, sparked a political revolt that quickly spread across the country, culminating in citizens of all ages and social classes demanding an end to the dictatorial regime. On Jan. 14, 2011, with the protests reaching their peak of intensity, Ben Ali fled to Saudi Arabia.

Widely seen as the inspiration for Arab Spring movements elsewhere in the region, the Tunisian revolution was organic in many respects. By

and large, it was a popular movement of citizens fighting against poverty, marginalization, and inequality and for justice and dignity, without discernible political or ideological leaders. The movement was also notably civilian: The army did not directly participate in the revolution but rather was broadly perceived as one of its key guarantors. Moreover, in comparison with neighboring countries, Tunisia subsequently experienced a largely peaceful transition to democracy, with relatively few victims falling to violence and an institutional infrastructure that continued to function more or less efficiently in the interim period prior to the Constituent Assembly elections.[15]

While few parties had existed during the Ben Ali era, more than 100 new political parties emerged in the weeks following the revolution.

The Immediate Post-revolution Period

The suddenness and speed of the collapse of the Ben Ali regime resulted in a political vacuum, requiring a transition to a new form of governance and the creation of new institutions. In line with Article 57 of the 1959 constitution, which addressed the possibility "of vacancy of the presidency of the Republic due to death, resignation, or absolute incapacity," Foued Mebazaâ, the speaker and head of the dissolved Parliament, became interim president and tasked Prime Minister Mohamed Ghannouchi with forming a new government. A political reform commission, also known as the Ben Achour Commission, was appointed by the government in January 2011.

While few parties had existed during the Ben Ali era, more than 100 new political parties emerged in the weeks following the revolution. A sizable number of the newly formed parties opposed the interim government on the basis of its inclusion of numerous RCD members. A period of intense political polarization ensued, pitting the transitional government, which saw its main task as ensuring constitutional continuity, against the opposition, which relied on its "revolutionary legitimacy" to demand a genuine rupture with the past.

This "revolutionary" opposition created the Council for the Protection of the Revolution (Conseil de Sauvegarde de la Révolution or CSR) on Feb. 11, 2011, led by the left-oriented January 14 Front. It was composed of 28 organizations, including political parties, civil society organizations, and unions, among them the powerful national trade union, the Union Générale Tunisienne du Travail (UGTT). During the Kasbah I sit-in — the first of two demonstrations in Tunis challenging the transitional government — protesters demanded that institutions inherited from the old regime be dissolved and that the CSR take on a decision-making role, sharing responsibility for transition with the government.[16]

The Cabinet reshuffle that resulted from the demands of the Kasbah I demonstrations as well as the announcement by the government of the suspension of the RCD's activities in the lead-up to the party's full dissolution were, however, not enough to satisfy the protesters.[17] They returned to the streets on Feb. 21 and organized the Kasbah II sit-in, where close to 100,000 demonstrators converged in central Tunis to call for the dismissal of interim Prime Minister Mohamed Ghannouchi and the election of a constituent assembly. Ghannouchi had little choice but to resign, which he did on Feb. 27. Ghannouchi and his Cabinet were replaced by a new government headed by Béji Caïd Essebsi, a former adviser and minister under Bourguiba.

15 The national commission in charge of investigating abuses committed since Dec. 17, 2010 (Commission nationale charge d'enquêter sur les abus commis depuis le 17 décembre 2010), reported in May 2012 that 388 people were killed and more than 2,174 injured. At the time, the commission indicated that the figures were not final, but it has not released another report at the time of writing.

16 The name of the sit-in comes from the square where it was organized, the Kasbah Square in the old town of Tunis, where numerous ministries, including the Prime Ministry building, are located.

17 The decision to suspend activities of the RCD was taken by the minister of interior at the time, Farhat Rajhi, on Feb. 10, 2011. It was officially dissolved by a court decision pronounced on March 9, 2011.

Deborah Hakes

A sign put up by the Independent High Authority for Elections encouraged Tunisians to vote. Election news broke at the organization's media center in Tunis, and many journalists camped out to hear the latest. The center gave journalists many resources, including computers and conference rooms.

To meet the opposition's demands, the Ben Achour Commission merged with the CSR to create an expanded transitional institution named the High Authority for the Realization of the Objectives of the Revolution, Political Reform, and Democratic Transition (subsequently referred to as the High Commission). The commission's 72-member composition was contested early on, as it was deemed unrepresentative of youth and political actors from Tunisia's interior regions. As a result, the commission's membership was later expanded to 155 members.[18]

The High Commission outlined several possible postrevolution courses of action: to hold presidential elections (whereby the president dissolves Parliament and calls for legislative elections), to hold presidential and legislative elections simultaneously, or to elect a body to rewrite the constitution.

Interim President Mebazaâ announced on March 3 that a National Constituent Assembly should be elected to draft a constitution, setting in motion a process that entailed elections on July 24 that were later postponed to Oct. 23. The newly elected National Constituent Assembly would elect an interim president and prime minister to govern the country while a new constitution was being drafted. In his speech, Mebazaâ also announced the partial suspension of the 1959 constitution. The 1959 constitution was partially suspended under a decree law adopted on March 23. (This dissolved instructions such as the Parliament and the Constitutional Council.) It was then fully repealed under the constituent law relating to the provisional organization of authorities that was adopted by the NCA on Dec. 23.

While the government remained the sole executive and decision-making power, the High Commission was authorized to submit draft legislation to the Council of Ministers and the Presidency of the Republic for approval by decree, and de facto, acted as a legislative body.[19] One of its main responsibilities was to draft a new electoral law and to set up an independent body in charge of organizing the elections, the Instance Supérieure Indépendante pour les Elections (ISIE).[20]

As preparations advanced, the government postponed the polls from July to October 2011 to accommodate logistical planning and widespread concerns that the newly formed ISIE would face difficulty in administering operational aspects of the election in a compressed time frame.

Constituent Assembly Elections of October 2011

The elections commission, the ISIE, was created in April 2011 to organize Tunisia's first competitive elections. The ISIE's mandate was to prepare, supervise, and monitor the NCA elections and to ensure that the electoral process was "democratic, pluralistic, fair, and transparent."[21]

Polling was held on Oct. 23, 2011, in a peaceful and orderly atmosphere. Insufficient public outreach and civic education—and limited knowledge by the public of parties and

18 Twelve parties and 18 trade unions and associations were subsequently represented on the High Commission as well as independent national figures, youth representatives, members drawn from the interior provinces, families of the victims of state security, and a representative of the Tunisian Diaspora in France.

19 The High Commission also adopted new laws on political parties, on associations, and on the media. It concluded its work on Oct. 13, 2011.

20 Decree Law 27 creating the ISIE was voted on April 12 and promulgated on April 18, 2011. The High Commission chose the ISIE commissioners to reflect some diversity of stakeholders in the Tunisian political process, drawing from the judiciary, academia, and civil society and also including a notary, bailiff, certified public accountant, information technology expert, and a journalist.

21 Decree Law No. 2011–27, Article 2

Marion Volkmann

Tunisian women display their inked fingers after casting their vote on Oct. 23, 2011.

candidates—contributed to a turnout of only around 50 percent of voters. However, those who showed up to the polling stations were eager to exercise their right to vote in the country's first competitive elections.

The ISIE announced preliminary election results on Oct. 27, 2011, and final election results were released on Nov. 14. The NCA elections were held using a closed-list proportional system, with the largest remainders in 33 multimember constituencies. Nineteen parties and coalitions as well as 16 independent lists obtained representation in the Constituent Assembly.[22] The Islamist party Ennahdha won the greatest number of seats, securing 89 of the assembly's 217 seats.

Provisions in the electoral law to encourage the nomination of female candidates (vertical parity on candidates' lists) bore fruit, with 65 women being elected to the Constituent Assembly—equivalent to 29.9 percent of the assembly's members. Forty of them represented Ennahdha.[23] Youth also managed to secure representation at the NCA, with approximately 10 percent of NCA members being 30 years of age or younger. This result was enabled in part by a provision of the electoral law requiring that each candidate list contain at least one candidate below the age of 30.[24] Final results issued by the ISIE indicated that 4.3 million out of 8.2 million estimated eligible voters participated, 52 percent of the eligible electorate.

The Postelectoral Period (2011–2014): Three Years of Transition

The October 2011 elections ushered in a new phase of the transition and put in place new structures of governance. Initially planned to last one

22 ISIE official final results: Ennahdha: 89 seats; Congress of the Republic (CPR): 29 seats; Al-Aridha Al-Chaabia (Popular Petition): 26 seats; Ettakatol: 20 seats; Democratic Progressive Party (PDP): 16 seats; Al-Moubadra (The Initiative): 5 seats; the Democratic Modernist Pole: 5 seats; Afek Tounes: 4 seats; Al-Badil Athawri (The Revolutionary Alternative): 3 seats; the Democratic Socialist Movement (MDS): 2 seats; Harakat Achaab (The Movement of the People): 2 seats; 16 independent lists: 1 seat each.

23 Decree Law No. 2011-35, Article 16

24 Decree Law No. 2011-35, Article 33

year, the second transitional period—including the drafting of Tunisia's new constitution and the holding of general elections—proved lengthy and rife with challenges and pitfalls.[25] Despite these challenges, this phase of the transition largely achieved its objectives.

The NCA Assumes Power

The NCA's newly elected members were officially sworn in during the inaugural session of the assembly held Nov. 22, 2011. Following its electoral victory, Ennahdha formed a power-sharing agreement with two secular former opposition parties to Ben Ali, the Congrès pour la République (CPR) and the Forum Démocratique pour le Travail et les Libertés (usually referred to as Ettakatol), which had obtained a significant number of seats at the assembly. The governing coalition that resulted became known as the Troika. Ettakatol's Secretary-General Mustapha Ben Jaâfar was elected president of the assembly during its inaugural session, while CPR's President Mohamed Moncef Marzouki (a former human rights activist exiled under Ben Ali) was chosen by the NCA as interim president of the republic on Dec. 12, 2011.[26] The secretary-general of Ennahdha, Hamadi Jebali, was designated head of the government.

In the absence of a legal framework to regulate the government's functioning, the NCA immediately set about drafting and adopting a law on the Provisional Organization of Public Authorities (known by its French name, Organisation Provisoire des Pouvoirs Publics or OPPP).[27] This law stipulated that the government must receive a vote of confidence by the NCA before assuming power, which Hamadi Jebali's government did easily on Dec. 23, 2011.[28]

Following its initial sessions, two important aspects of the NCA's work became evident: Assembly members, elected to draft a constitution, felt that it was more appropriate to draft the new document from scratch rather than use language from the 1959 constitution as a base. They also considered that, as the sole elected officials, the NCA should also serve as a legislative body to draft, debate, and pass legislation to govern the country during the interim period.

Together, these decisions had a substantial impact on the constitution-drafting process. NCA members had to address pressing legislative issues, including the annual state budget, a transitional justice law, the legal framework for the formation of a permanent election management body, and subsequent legislative and presidential elections, while drafting the new constitution.

Assembly members, elected to draft a constitution, felt that it was more appropriate to draft the new document from scratch rather than use language from the 1959 constitution as a base. They also considered that, as the sole elected officials, the NCA should also serve as a legislative body to draft, debate, and pass legislation to govern the country during the interim period.

An Eventful Year Under Jebali's Leadership

The upheaval generated by the revolution had a negative impact on the Tunisian economy, which had previously suffered from corruption and poor management of public funds by political elites. The revolution also coincided with an economic downturn in Europe, Tunisia's largest trade partner. The new government's inability to contain the economic crisis and its failure to

25 Eleven of the 12 political parties represented on the High Commission signed a "Declaration on the Transitional Process" on Sept. 15, 2011. Although not legally binding, this document aimed to establish a road map to define the operating rules of the NCA and to limit its mandate to no more than one year. (See the section titled "Timing and Sequencing" for more information.). Moreover, the decree 1086 dated Aug. 3, 2011, calling for the elections of the NCA in its Article 6, explicitly gave the NCA a mandate of one year to complete the drafting of the constitution.

26 Mustapha Ben Jaâfar was running against Maya Jribi, secretary-general of the centrist PDP party at this time, and was elected by 145 votes against 68 votes for Maya Jribi. Two ballots were invalid, and there were two absents among the NCA members. Running against nine other candidates, Mohamed Moncef Marzouki obtained the support of 153 NCA members of the 202 voting.

27 Constitutional Act No. 2011–6 dated Dec. 16, 2011, related to the provisional organization of public authorities.

28 Article 15 of the OPPP provides that an absolute majority of votes (109) is required for the NCA to grant a government confidence.

tackle unemployment, the main issues underlying the Tunisian revolution, led to growing public discontent. Though the economy eventually showed signs of a tentative recovery, it was insufficient to compensate for high inflation. Strikes and social unrest, which continued to a lesser extent after the elections—particularly in the marginalized towns of the south and center of the country—did not help assuage the fears of foreign investors regarding the stability of the country.

On the security front, the emergence of extremist armed groups and the trafficking of weapons in the country—tied in part to the porosity of Tunisia's borders with Algeria and Libya—presented a new challenge and compelled the authorities to extend the state of emergency established in the aftermath of the revolution.[29]

On Feb. 6, 2013, the leftist political leader and human rights activist Chokri Belaïd was gunned down by unknown assailants. Months-long negotiations on a Cabinet reshuffle had already eroded the Troika coalition, but the assassination sent shock waves through Tunisian society and the political class.

The postelection period also saw important shifts in the political landscape. Disappointed by their respective parties' alliance with Ennahdha, many members and supporters of Ettakatol and CPR defected to join other parties. Learning from the experience of the 2011 elections, when the vote was split between several parties, some opposition groups moved to form new alliances and coalitions. Notably PDP, Afek Tounes, and the Parti Républicain merged to form Al Joumhouri party. Parties that were unable to register in 2011, such as the Salafist party Hizb Al Tahrir, were legalized, while new parties emerged. One such party, Nidaa Tounes, would later become a major player in the political scene. Avowedly secular, Nidaa Tounes brought together diverse groups and agendas—leftists, unionists, businessmen, and people affiliated with Bourguiba's Neo-Destour party and Ben Ali's RCD—under the leadership of former Prime Minister Béji Caïd Essebsi, with one goal in common: to challenge Ennahdha's dominance in the Tunisian political scene.

As the date of the first anniversary of the Constituent Assembly elections approached, the NCA was far from adopting a constitution. The slow progress on the constitution could be attributed to several factors, including the body's decision to draft the new constitution from scratch and the fact that the constitutional commissions only started working on the document in February. In addition, assembly members, assuming legislative responsibilities in addition to their constitutional mandate, did not have a clear plan or common methodology in the initial stages to tackle the drafting of the constitution.

While the decree calling for the NCA election had set its mandate at one year, the OPPP law, which has primacy over all other laws, made no such provision, thus raising a debate as to whether the NCA would remain legitimate following the expiration of its one-year mandate.[30] Public perceptions, nurtured by some opposition members, remained fixated, however, on a quick transition, and the fragile state of the economy contributed to rising frustration with the slow pace of progress.

Sensing the mounting tension, the UGTT launched the first of a series of national dialogues aimed at easing political tensions. The dialogue, which started on Oct. 16, 2012, brought together 50 parties and 22 associations to chart a way forward for the country. Ennahdha, the CPR, and Al-Wafa (a party formed by CPR dissidents) boycotted the process and refused to sit at the same table with Nidaa Tounes. Nevertheless, the sessions helped briefly defuse the crisis. Participants agreed on a new date for the completion and adoption of the constitution (the beginning of 2013) and elections (June 23, 2013).

29 The state of emergency was established in Tunisia on Jan.15, 2011, just after the departure of President Ben Ali, by Decree Law No. 2011–184. It was lifted on March 5, 2014.

30 Decree Law No. 2011–1086, dated Aug. 3, 2011, Article 6

From Belaïd to Brahmi: Tunisia in the Grip of Political Violence

On Dec. 4, 2012, two months after the national dialogue, UGTT members clashed violently with members of the self-titled Leagues for the Protection of the Revolution (Ligues de Protection de la Révolution or LPRs) around the union's headquarters in the capital. What the UGTT considered as "premeditated attacks" from the LPRs reopened an unresolved debate around the entities' dissolution. The LPRs had been created at the neighborhood level during the revolution, mainly to address the security vacuum left by the collapse of the regime's apparatus. Though order was restored in the months following the revolution, the leagues were never dissolved and grew in militancy over time. Though Ennahdha denied the allegations, UGTT and some of the opposition parties claimed that the party aided and abetted the LPRs and used them to intimidate political opponents. The controversy did little to ease pressures on the embattled Jebali government.

On Feb. 6, 2013, the leftist political leader and human rights activist Chokri Belaïd was gunned down by unknown assailants. Months-long negotiations on a Cabinet reshuffle had already eroded the Troika coalition, but the assassination sent shock waves through Tunisian society and the political class. Coming as the culmination of a series of violent, unsanctioned attacks targeting political parties' offices and members, the assassination led to sharp recriminations against Ennahdha for its handling of the mounting political violence in the country.

Reacting to the crisis, the UGTT called for a general strike in the country, while the NCA temporarily suspended its activities. Thousands of Tunisians took to the streets in protest. The same night, Prime Minister Jebali announced the resignation of his Cabinet and its replacement by a "technocratic" one. This put Jebali at odds with the Troika, including his own party, which rejected the proposition, insisting on its "electoral legitimacy" to form the government. These tensions eventually led to Jebali's resignation from the position of head of government on Feb. 19, 2013.

Thierry Bresillon

On Jan 8, 2014, after a long and complex process, the National Constituent Assembly plenary elected by secret ballot the nine members of the Independent High Authority for Elections.

After weeks of negotiations, the Troika and the opposition reached an agreement to maintain a political government without key ministries — Interior, Foreign Affairs, Justice, and Defense — that would be headed by independent ministers not affiliated with any particular political party. Controversially, Ali Laârayedh, Jebali's minister of interior and a senior Ennahdha figure, was chosen to lead the new government.[31]

Belaïd's assassination resulted in an increased polarization of the political scene as well as an atmosphere of fear among Tunisians. This brought new urgency to the task of bringing the transitional period to an end by adopting the constitution and holding general elections. Laârayedh committed to holding elections by the end of 2013, but political and security realities made this difficult. Repetitive delays and in-fighting at the NCA did not help matters.

In order to smooth political tensions and ease popular discontent, President Marzouki launched a new national dialogue on April 15, 2013, that gathered some of the main political parties and

31 Ali Laârayedh's government obtained the confidence of the NCA during the plenary session of March 13, 2013, by 139 votes in favor, 46 votes against, and 13 abstentions.

brought Ennahdha and Nidaa Tounes around the same table for the first time. Participants tackled contentious issues of the constitution-drafting process (such as the form of the new political system) as well as obstacles to the establishment of a new elections management body and the drafting of the electoral law. Though some opposition parties and the UGTT boycotted the dialogue, the discussions were successful in addressing numerous contentious issues regarding the political regime and the elections. Following the president's efforts, the UGTT launched another dialogue process on May 16, focusing primarily on pressing socio-economic and security issues.[32]

On June 1, 2013, before the conclusion of the dialogue and agreement over all remaining contentious points in the constitution, NCA President Ben Jaâfar released the fourth and final draft of the constitution. This draft stirred controversy. Many NCA members felt that it did not respect the work of the constituent commissions that had debated and developed the various sections.

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Meanwhile, the security situation rapidly deteriorated. From May 2013 onward, Tunisian military forces engaged in open armed confrontation with extremist groups. The epicenter of the fight was the region of Mount Chaambi on the Algerian border, which served as a base for terrorist groups.

The removal of Egyptian President Mohamed Morsi by the Egyptian army on July 3, 2013, following mass protests added a regional dimension to the Tunisian crisis. The removal of Morsi, a leader of the Muslim Brotherhood, drew sharp denunciations from Ennahdha, which labeled the army takeover a "coup against legitimacy." Segments of the opposition were emboldened by the swift downfall of the Islamists in Egypt — leading some, including Nidaa Tounes and the leftist coalition the Popular Front — to call for dissolving the NCA and replacing it with a committee of experts to finalize the constitution.

Only days later, on July 25, NCA deputy Mohamed Brahmi, the general coordinator of the People's Movement (Movement du People) elected from Sidi Bouzid, was gunned down in front of his home in Tunis. The date appeared to have been chosen for its symbolic value, coinciding with celebrations of the 56th anniversary of the proclamation of the Tunisian Republic. Like Belaïd, Brahmi was a member of the Front Populaire coalition. Six months after the former's assassination, the government had not shed any light on its circumstances.

After the killing of Brahmi, 42 NCA deputies immediately withdrew from the assembly. They were joined by others in the following days, reaching a total of approximately 65–70 at the peak of the crisis. Nidaa Tounes and the Popular Front coalition, as well as several other parties and civil society groups, came together to form the National Salvation Front (NSF). They strategized to end the Troika's rule and bring an end to the transitional period. The NSF and some of the withdrawn deputies held an open sit-in at Bardo Square in front of the NCA buildings. Though the number of protesters ebbed and flowed, with only a few camping permanently in the square, organizers managed on several occasions to mobilize thousands of marchers, particularly during the *errahil* (the departure) campaign Aug. 24–31. Supporters of the NSF, who called for the NCA's dissolution and the government's resignation, traded accusations with the "legitimacy" camp (mainly composed of Ennahdha and CPR supporters), who also held street protests and

32 Nidaa Tounes also decided to suspend its participation in the dialogue after the first session.

strenuously defended the NCA as the country's solely elected and, therefore, legitimate, institution.[33] In view of the situation, the NCA president took a unilateral decision on Aug. 6 to suspend NCA activities until the start of direct negotiations between the conflicting parties. This decision was widely condemned by the "legitimacy" camp within the assembly.

A Cautious Compromise Is Reached

As the *errahil* demonstrations began to lose steam, negotiation and mediation initiatives multiplied behind the scenes to find a way out of the crisis. The UGTT, along with the Tunisian Union for Industry, Trade, and Handicraft (UTICA); the Tunisian League for Human Rights (Ligue Tunisienne des Droits de l'Homme or LTDH); and the Bar Association (which became known as the Quartet), eventually emerged as the lead mediator. On Sept. 17, the Quartet presented a road map that laid out the next and "final" steps of the transition. The road map identified three tracks—electoral, constitutional, and governmental—and provided conditions and deadlines for their completion. The Quartet also announced the launch of renewed dialogue to oversee the successful completion of the road map. The NCA resumed its work on Sept. 12, 2013, though some of the withdrawn opposition deputies refused to return to the assembly until the dialogue formally began.

The Quartet launched the new discussions among the key actors on Oct. 5. Political parties were obliged to sign the road map as a precondition. Though some parties, including Ennahdha, had reservations regarding some of the road map's provisions, most signed it. The CPR, Al-Wafa, and Al-Mahabba (formerly Al-Aridha) parties boycotted the process.

The three tracks outlined by the Quartet's road map were completed as planned, though much later than the initial deadline of Jan. 14, 2014, the third anniversary of the revolution.

In the constitution track, the long-delayed article-by-article vote on the constitution started Jan. 3, 2014, and was completed Jan. 26 when the constitution was adopted with overwhelming support, with 200 out of 216 votes.[34]

In the electoral track, the assembly finally confirmed the commissioners of the new electoral management body, the ISIE, on Jan. 8, 2014. Their selection had been beset by delays and controversy for nearly a year. On May 1, 2014, the NCA adopted an electoral law, another step in the road map.

The governmental track proved to be the most challenging. Parties found it difficult to identify and agree on a prime minister to head a new technocratic government. Following intense negotiations, and despite lingering resistance by some of the opposition parties, Mehdi Jomâa, minister of industry in Laârayedh's government, was eventually selected to head the new government on Dec. 14, 2013. The parties voted to confirm Jomâa's Cabinet on Jan. 28, 2014, two days following the adoption of the constitution.[35] The completion of all three steps of the road map paved the way for parliamentary and presidential elections, which took place respectively on Oct. 26 and Nov. 23, with a presidential runoff on Dec. 21, 2014.[36]

33 NCA members and parties' positions tended to hold one of three broad positions on the issue of the dissolution of the assembly. Most withdrawn deputies affiliated with the NSF (Nidaa Tounes, Al-Massar, the Popular Front, etc.) called for the NCA's dissolution from the beginning of the crisis. This camp proposed the continuation of the constituent process by a High Council of National Salvation, assisted by experts, in order to complete the drafting of the constitution and submit it to referendum. Other deputies (from the Democratic Alliance notably) suspended their activities at the NCA in solidarity with their withdrawn colleagues but were against the proposition to dissolve the NCA. The Troika parties categorically refused the dissolution of the NCA, which they considered as a "red line." For more details on political parties and their alliances see the section "Representation and the Politics of Shifting Alliances."

34 Mohamed Allouche, deputy from the Third Path Party, died from a heart attack on Jan. 22, 2014, before the final vote on the constitution.

35 Following a long and intense plenary session held Jan. 28, 2014, Jomâa's Cabinet eventually obtained the confidence of the NCA by 149 votes in favor, 20 votes against, and 24 abstentions.

36 Article 148, para. 3 of the adopted constitution stipulates that the elections be held before the end of 2014.

The Framework for the Constitution-Making Process

The Legal Framework

Two texts governed the constitution-making process: the Provisional Organization of Public Authorities law (commonly referred to using the French acronym OPPP or as the "little constitution") and the NCA's Rules of Procedure.[37]

Several bodies within the NCA contributed to the constitution-making process. The bureau of the NCA, the plenary of the assembly, and the Conference of the Heads of Blocs all played an important role in the process, although their mandates extended beyond constitution-making to other areas.

The OPPP law, adopted by the NCA on Dec. 16, 2011, dedicated only one article to the "constituent power." The article focused solely on requirements for the adoption of the constitution and specified that an absolute majority of NCA members was required to adopt each article and that a two-thirds majority was needed for the adoption of the constitution in its entirety. In addition, Article 3 stipulated that if the NCA failed to reach the required majority during the first reading, the vote would be repeated within one month. Should the plenary fail to adopt the constitution once again with the required two-thirds majority, the draft constitution would be subject to a referendum requiring an absolute majority to be adopted. The OPPP law was silent on how to deal with a scenario in which a referendum resulted in a negative outcome.

The OPPP law thus set a relatively high threshold of support in order to adopt the constitution. This ultimately proved to be an important factor, as no party or alliance of parties held a majority of deputies. This threshold created an overall environment of discussion and compromise and, eventually, a considerable degree of consensus among deputies.

Unlike the OPPP law, the NCA's Rules of Procedure did not have the status of law but provided the framework for the work of the assembly, including the rights and duties of its members. The text was developed on the basis of the OPPP and adopted by the NCA's plenary on Jan. 20, 2012. The Rules of Procedure underwent four amendments after its initial passage, reflecting procedural challenges faced by the assembly at various moments of the constitution-making process.[38]

Some of the Rules of Procedure were dedicated specifically to the drafting and adoption of the

37 Constitutional Act No. 2011–6, dated Dec. 16, 2011, related to the Provisional Organization of Public Authorities

38 At the time of writing in May 2014, the NCA had amended the Rules of Procedure four times. For more details, see the Inadequacy of the Rules of Procedure section in this report.

constitution. They detail, for example, the organization of six permanent constituent commissions, the procedures they should follow, and their relationship to the Joint Coordination and Drafting Committee as well as to the NCA's plenary.[39]

The Rules of Procedure also contained several provisions concerning the voting process. The NCA's voting procedures were regulated by the general section of the Rules of Procedure relative to the plenary (Articles 83–93), a section relative to attaining a quorum in plenary votes (Articles 94–97), and a chapter dedicated entirely to the review and adoption of the constitution (Articles 103–107). Article 107 stated that the adoption of the draft constitution shall be in accordance with Article 3 of the OPPP law.

The Organizational Structure

Several bodies within the NCA contributed to the constitution-making process. The bureau of the NCA, the plenary of the assembly, and the Conference of the Heads of Blocs all played an important role in the process, although their mandates extended beyond constitution-making to other areas. In contrast, the constituent commissions, the Joint Coordination and Drafting Committee, and the Consensus Commission were formed to work specifically on the constitution. Their roles effectively ended once they completed their tasks. The Special Commission on Rules of Procedure and Immunity also deserves a mention as the lead body charged with negotiating and drafting successive amendments to the Rules of Procedure over the two-year process.

The NCA Bureau

The NCA bureau was the executive organ of the assembly and made its decisions by an absolute majority of its members. The bureau was headed by NCA President Mustapha Ben Jaâfar (Ettakatol), First Vice President Meherzia Laâbidi (Ennahdha), Second Vice President Arbi Abid (formerly CPR, then Ettakatol), and seven other members who have the rank of deputy to the president. The bureau was responsible for ensuring that NCA members exercise their rights and duties effectively and in accordance with the Rules of Procedure. It also set the assembly's calendar and made decisions on timing and sequencing of the NCA's work, including the various phases of the constitution-making process.[40] Four of the deputies divided among themselves the tasks of legislative affairs and relations with the government and the presidency of the republic; relationship with citizens, civil society, and Tunisians abroad; external relations; and, finally, communication and relations with the media. The three remaining deputies were entrusted with budgetary and administrative oversight.[41]

Conference of the Heads of Blocs

Any 10 NCA deputies or more could form a political bloc. Deputies were barred from joining more than one bloc.[42] The Conference of the Heads of Blocs was a consultative coordination mechanism that brought together the heads of blocs with the leadership of the NCA bureau and the presidents of relevant NCA commissions, depending on the topic at hand. The NCA president could invite anyone to attend this meeting, should her or his input have been deemed of potential value to the discussion. The Conference of the Heads of Blocs played an important role in resolving conflict around various contentious issues in the constitution, particularly during the last stage of the process, namely the article-by-article vote and the overall vote on the constitution.

The NCA Plenary

The NCA president convened plenary sessions of the NCA to examine draft laws, review and adopt the state budget, and question the government

39 See the Organizational Structure section for a description of these bodies. Further details regarding the Rules of Procedure regarding various structures and aspects of the process (e.g. public participation) are available in various sections of this report.

40 Rules of Procedure, Chapter 3, Part 2

41 Respectively: Samira Merai (Afek Tounes); Badreddine Abdelkefi (Ennahdha); Mohamed Salah Chairat (formerly Al-Aridha, later Freedom and Dignity, then independent); Karima Souid (formerly Ettakatol, later Al-Massar); Hèla Hammi (Ennahdha); Hatem Klaii (formerly Al-Aridha, later Al-Amen); and Dhamir Mannai (formerly CPR, later Nidaa Tounes, then independent)

42 Rules of Procedure, Articles 16 and 17

on its activities, among other things. The NCA president or one of the two vice presidents presided over the sessions. Plenary sessions were held to discuss and debate drafts of the constitution, vote on the final draft article by article, and adopt the final text. Non-NCA members (citizens, civil society members, journalists, and others) were entitled to observe the sessions according to "arrangements set by the NCA bureau."[43] At the request of the NCA president, one of the heads of blocs, or 10 or more deputies with support of an absolute majority of NCA members, the NCA could also hold closed sessions, with the exception of sessions dedicated to the constitution, which had to remain open to the public.[44]

The NCA created six permanent constituent commissions, each responsible for studying a particular theme and drafting articles under specific chapters of the future constitution.

The Special Commission on Rules of Procedure and Immunity

The Special Commission on Rules of Procedure and Immunity, a body composed of 22 members, oversaw the implementation of the NCA's Rules of Procedure and examined all matters related to the immunity of deputies. It also interpreted the rules for the assembly.[45] The commission played the lead role in the negotiation and drafting of the successive amendments of the Rules of Procedure, which, among other matters, sought to clarify the relationship between the constituent commissions and the Joint Coordination and Drafting Committee to organize and accelerate the adoption process.

The Permanent Constituent Commissions

The NCA created six permanent constituent commissions, each responsible for studying a particular theme and drafting articles under specific chapters of the future constitution.[46] The six themes were: 1) the preamble, fundamental principles, constitutional review; 2) rights and freedoms; 3) legislative and executive powers and the relationship between the two powers; 4) judicial, administrative, financial, and constitutional justice; 5) constitutional bodies; and 6) regional and local public authorities.

Each of the six commissions was composed of 22 members. Seats were proportionally allocated based on the political division of power within the NCA at the time of the commissions' formation.[47] Commission membership was allocated as follows: nine members from Ennahdha, three from the Democratic bloc, three from CPR, two from Ettakatol, two from the Liberty and Democracy bloc, one from the Liberty and Dignity bloc, one from Al-Aridha, and one nonaffiliated member. Members were not allowed to take part in more than one constituent commission. They were, however, allowed to join other nonconstituent commissions such as legislative or special commissions.[48] Only one of the six commissions, the Rights and Freedoms Commission, was presided over by a woman. Three female deputies were elected as vice presidents and six as rapporteurs. Each commission was also assigned advisers (*conseillers*) to provide legal counsel on issues under consideration and to draft records of the meetings.

The NCA's Rules of Procedure stipulated the obligatory attendance of commission members during meetings. Members who were absent without authorization for more than three consecutive sessions could be disqualified from participation.[49] The president of each commission was tasked with facilitating the work of his or her

43 Rules of Procedure, Article 76. Though the Rules of Procedure referred to procedures for access to the NCA, no such procedures were established by the NCA bureau until late 2013.

44 Rules of Procedure, Article 78

45 Rules of Procedure, Article 71

46 Rules of Procedure, Article 65

47 Rules of Procedure, Article 42

48 Rules of Procedure Article 48 allows NCA members to join more than one commission as long as they do not fall within the same category. The categories are constituent commissions, legislative commissions (for example, the general legislation commission or the finance commission), and specialized commissions (for example, the Rules of Procedure and Immunity commission).

49 Rules of Procedure, Article 53

commission broadly and, in particular, helping the various political blocs reach consensus on key issues.[50] A commission was also entitled to task one of its members to conduct in-depth research or establish a working group and prepare a report on a specific issue.[51] Commissions could also consult experts, such as representatives of government, institutions, civil society, or academics, on any given issue.[52] Decisions were taken by a majority of those present.[53] Other NCA members were allowed to attend commission sessions and to express their views but were not permitted to vote.[54] Most constituent commission meetings were open without restriction to media observers, though civil society organizations were rarely allowed to attend.[55] In total, around 60 percent of the NCA members participated in the constituent commissions. The remaining deputies participated in the process through plenary discussions, discussions within blocs, and in the final article-by-article vote as well as the vote on the constitution in its entirety.

The Joint Coordination and Drafting Committee

In parallel with the constituent commissions, the NCA established a Joint Coordination and Drafting Committee tasked with coordinating the constituent commissions' work, preparing a general report on the constitution prior to its submission to the plenary, and producing a final version of the constitution.[56] The drafting committee was composed of NCA President Mustapha Ben Jaâfar, NCA General Rapporteur Habib Khedher, two NCA members who acted as deputies to Khedher, and the presidents and rapporteurs of the constituent commissions.[57] As such, the drafting committee did not reflect precisely the political division of power within the NCA, even at its formation, as it overrepresented the Troika parties. Drafting committee meetings were closed to all observers, including the media.

The Consensus Commission

In July 2013, following the release of the final draft of the constitution, the NCA devised a 23-member ad hoc commission to address the remaining points of divergence. The commission, chaired by NCA President Mustapha Ben Jaâfar, was named the Consensus Commission and included representatives from the various political blocs at the time as well as some independent NCA members.[58] The NCA did not follow a proportional representation formula to determine the membership of this commission, as it did with others, but relied instead on a delicate negotiation process to arrive at the commission's final composition. This was mainly due to the commission's unique role, namely to identify and reach agreement on contentious issues in the final draft, thus paving the road for the adoption of the constitution with as broad support as possible. As the Rules of Procedure did not foresee the Consensus Commission, they were amended on Jan. 3, 2014, to give the commission formal status.[59] As with the drafting committee, the Consensus Commission's meetings were closed to outside individuals.

50 Rules of Procedure, Article 57

51 Rules of Procedure, Article 58

52 Rules of Procedure, Article 59

53 Rules of Procedure, Article 60

54 Rules of Procedure, Article 55

55 Rules of Procedure, Article 54. This article stipulates that commissions' meetings are public. See section titled Transparency and Accessibility of the Process for more information on civil society access to commission meetings.

56 Rules of Procedure, Article 104

57 Rules of Procedure, Article 103

58 The Consensus Commission was composed of: NCA President Mustapha Ben Jaâfar (Ettakatol); rapporteur general of the constitution Habib Khedher (Ennahdha member, though in his capacity as rapporteur general); Sahbi Atig, Imed Hammami, Farida Laâbidi, Zied Laadhari, and Latifa Habbachi from Ennahdha; Mouldi Erriahi and Lobna Jribi from Ettakatol; Samia Abbou and Ikbal Msadâa from CPR; Selma Mabrouk, Rym Mahjoub, and Mongi Rahoui from the Democratic bloc; Mohamed Tahar Ilahi and Abderrazak Khallouli from the Liberty and Dignity bloc; Mohamed Gabech from the Democratic Alliance; and nonaffiliated deputies Ahmed Essefi (Popular Front), Rabii Abdi (Al-Wafa), Iskander Bouallègue (Al-Mahabba), Hasna Marsit (independent), Hasni Badri (Movement for the Republic), and Mohamed Ali Nasri (Nidaa Tounes). The Liberty and Dignity bloc was dissolved at a later stage, and Sami Abbou left CPR to join the Democratic Current Party.

59 Rules of Procedure, Article 41, as amended on Jan. 3, 2014, gave the NCA president the right to form a Consensus Commission around the constitution exempt from the composition and procedures of other commissions. Article 106 (bis) details the role of the commission and the status of the agreements reached within it.

Constitution-Making and Adoption Process

The Lead-Up to the First Draft

Members of the NCA began the constitution-drafting process on Feb. 13, 2012. The six constituent commissions conducted several hearings with Tunisian and international experts, representatives of the government, civil society, and academics and studied relevant texts addressing constitutional issues and comparative drafting processes. Some NCA members also undertook study trips to learn more about constitutional law in countries that had experienced similar constitution-making experiences.

The release of the first draft generated a strong reaction from Tunisian civil society organizations, opposition members, constitutional experts, and international actors. They expressed concerns on many issues, including language in the text pertaining to the status of women, inadequate protection of the freedoms of belief and speech, and the structure of the political system.

The drafting committee's coordination role was noticeably weak from the outset, which greatly affected the work of commissions and the consistency of their output. For example, the committee did not hold regular meetings until September 2012, seven months after the start of the drafting process. Until then, the commissions worked independently from one another, without a common methodology or work plan. For many months, the NCA failed to set a deadline for the submission of the first draft. Such a deadline would likely have helped the commissions to organize themselves.

In May 2012, The Carter Center issued its first statement on the constitution-making process.[60] The Center considered that issues of transparency and public participation were coming to the forefront and recommended the establishment of a detailed work plan and timeline to help structure NCA work and increase visibility on the process and accountability to stated objectives.

In June, mounting public criticism of the NCA — whose work was neither well-known nor well-understood — led NCA President Ben Jaâfar to announce a July 15, 2012, deadline for the commissions to submit the first draft of their respective chapters. This took some NCA members, including many commission members, by surprise, since different commissions were at different stages of completion.

The NCA commissions accelerated the drafting process considerably to meet Ben Jaâfar's deadline at the expense of finding consensus on controversial and sensitive matters. Not all the

60 "The Carter Center Encourages Increased Transparency and Public Participation in Tunisia's Constitution Drafting Process," May 11, 2012

commissions met the deadline. On July 28, the drafting committee authorized the Legislative and Executive Powers Commission to submit multiple versions of articles related to the structure of the political system, since no consensus had been reached on them. Aiming at moving the process forward and avoiding blockage, several other commissions adopted the same approach to difficult issues. As a result, each of the six commissions followed one of two procedures: Some presented multiple formulations of controversial articles, while others presented only articles that had received a majority of votes from commission members.[61] By Aug. 10, 2012, all of the commissions had submitted their drafts to the drafting committee. The compilation of the work—the first draft of the constitution—was released Aug. 14, 2012. Thirty articles included from two to five options.

The First Draft

The release of the first draft generated a strong reaction from Tunisian civil society organizations, opposition members, constitutional experts, and international actors. They expressed concerns on many issues, including language in the text pertaining to the status of women, inadequate protection of the freedoms of belief and speech, and the structure of the political system. The issue of women's rights in particular—specifically the wording of Article 28, which defined men and women's relationship as "complementary"—provoked a firestorm of criticism from local and international civil society and many in the media. Before the draft was released in Arabic, mistranslations of the wording of the article led many to believe that it defined women as "men's complements," which was not accurate. The language of the article was nonetheless problematic as it did not clearly affirm the equality of men and women.

A sit-in was organized on Aug. 8, 2012, in front of the Bardo, where the NCA building is located. On Aug. 13, the anniversary of the passage of the personal status code (Code du Statut Personnel) of 1956—considered the most progressive in the Arab world for the relative equality it granted men and women in matters of marriage and divorce—large protests were organized in Tunis to demand that the NCA explicitly acknowledge in the constitution the equality of women and men.[62] NCA deputy Selma Mabrouk (Ettakatol, later Al-Massar) also launched an online petition to denounce the article and advocate for equality between men and women.[63]

In September 2012, the Center published a statement welcoming the NCA's progress in introducing a constitutional draft.[64] The Center also urged the NCA drafting commissions to ensure that the future constitution uphold Tunisia's international treaty obligations on human rights and fundamental freedoms, including equality between men and women. It further reiterated its calls for increased public participation, outreach, and transparency.

After its release, the entire draft was quickly reviewed by the drafting committee, which highlighted inconsistencies, gaps, repetitions, and unclear phrasing. The committee refrained from making substantive changes to the content of the articles and sent the draft back to the commissions for review.

Meanwhile, in September 2012, the NCA organized a two-day dialogue session on the content of the draft constitution, which drew 300 civil society organizations. The NCA also launched a consultative mechanism on its official website to allow citizens to make suggestions on constitutional issues.[65] The first anniversary of the Oct. 23,

61 Thirty articles of the first draft were submitted with alternative language, ranging from two to five options for a single article.

62 Among other things, the 1956 Personal Status Code established relative equality between women and men, abolished polygamy and the practice of repudiation, instituted judicial divorce, and required mutual consent of both parties for marriage.

63 The petition can be viewed online. Though the wording of the article was revised in the subsequent draft, the petition continued to receive signatures throughout the process. At the time of writing of this report, it had garnered more than 27,000 signatures. https://secure.avaaz.org/fr/petition/Protegez_les_droits_de_citoyennete_de_la_femme_en_Tunisie//?tta

64 "The Carter Center Recognizes Tunisia's National Constituent Assembly Progress; Calls for Increased Public Participation, Outreach, and Transparency," Sept. 26, 2012

65 See the section of this report titled Transparency, Accessibility, and Public Participation for more information on the effectiveness of the NCA's Web-based consultative mechanism.

2011, elections was marked by general discussion in the NCA plenary about the draft constitution's preamble and general principles.

Between the end of September and mid-December 2012, each commission released an updated draft of its chapters, several of which addressed issues of concern raised by civil society as well as demands of protesters, including those supporting women's rights.

The Second Draft and Draft 2bis

A second draft of the constitution was released on Dec. 14, 2012, two days before the launch of a national consultation process. Public consultations started with two sessions with students' representatives in Tunis and Sfax. They were followed by public sessions held through January 2013 in Tunisia's 24 governorates, at a rate of six governorates each weekend. Meetings with Tunisian expatriate constituencies in France and Italy were also organized in January and February 2013.[66]

While national consultations took place from December 2012 to February 2013, the NCA held general debates on the various chapters of the draft constitution, enabling NCA members, including those who did not participate in the six constituent commissions, to present their views.

New urgency was injected into the drafting process by a governmental crisis, the perceived lack of improvement in the economy, and increasing political violence, which culminated in the assassination of political party leader Chokri Belaïd on Feb. 6, 2013.[67] Confronted with a political crisis, the NCA accelerated the drafting process, including revising the Rules of Procedure in March 2013 to clarify the prerogatives of the drafting committee. In addition, they streamlined the procedures for debate by limiting the number of amendments to the draft constitution that could be proposed in plenary sessions. The NCA also assigned the constituent commissions the task of studying the comments and recommendations made on the draft during plenary sessions, the dialogue with civil society held in September 2012, and the national consultations.[68]

From March 21 to April 10, 2013, the six constituent commissions reviewed these suggestions, and on April 10 each commission sent an updated draft to the drafting committee. This draft, referred to in this report as draft 2bis, was never officially released by the NCA, as it was superseded by a new version that included additional changes made by the drafting committee.

The Third Draft

The drafting committee reviewed the drafts of the six commissions (draft 2bis), making substantive changes to articles that had been finalized within the commissions. It also decided among various proposals for the design of the political system. This was very controversial since the Commission on Executive and Legislative Powers had left the question of the political system — the only one remaining that had not been resolved by the commissions — open for debate in plenary. Many NCA members argued that the drafting committee had overstepped its authority when consolidating and harmonizing the drafts. At the root of the

A national debate on the constitution is held in Monastir.

Nedra Cherif

66 The Carter Center attended almost half of the dialogue sessions in Tunisia, with observers present in the governorates of Tunis, Sfax, Sousse, Monastir, Gabès, Beja, Zaghouan, Nabeul, Ben Arous, Ariana, Medenine, and Tozeur.

67 See the Historical and Political Background section of this report for more information regarding the reasons for the political crisis and the impact of Belaïd's assassination.

68 Revised Rules of Procedure, Article 104

argument was the interpretation of the wording of the revised Rules of Procedure Article 104, which delineated the role of the committee relative to those of the commissions.[69]

The committee never intended to release the third draft of the constitution. However, it was leaked to the media, prompting the committee to release it officially on April 22, 2013. The NCA then submitted the draft to a group of experts selected on the basis of proposals made by the presidents of the constituent commissions. Some of the selected experts, including renowned constitutional law specialists, declined to be part of the review group, citing concerns about ambiguity in the experts' scope of work and the fact that certain known experts were excluded from the list.[70] The remaining nine experts worked from April 23 to May 2, 2013, on the draft, at first separately and then together with the drafting committee.

In the meantime, President Marzouki and the General Union of Tunisian Workers (UGTT) held separate and successive national dialogues to tackle remaining points of contention in the draft as well as political, economic, and security issues in Tunisia. The dialogue convened by the president was held with the participation of the more prominent political parties, while UGTT's dialogue continued a process begun in 2012 that brought a wider range of parties together with civil society groups.[71]

The drafting committee resumed its work on the draft even before the end of the second National Dialogue, which was still discussing contentious issues related to the content of the constitution. The committee incorporated some agreements that had already been reached during the sessions on constitution-related matters.

In addition, the drafting committee also added a 10th chapter to the draft constitution dealing with transitional provisions. In doing so, the committee followed a different process for this chapter than for all the others, which were drafted by constituent commissions. Though the heads of the constituent commissions were represented in the drafting committee, other members were not. Many later protested their exclusion from the formulation of the transitional provisions. In addition, the committee drafted this chapter at the very last stage of the process, leaving little time for careful study and little opportunity for its members to discuss and reflect on its implications.

The Fourth and Final Draft

By the end of May, expectations were high both within the NCA and in the media that the final draft of the constitution—the one that would be considered in the plenary—would be released at any moment. Speculation and confusion as to the exact date were fed by contradictory statements in the press and on social networks by various actors involved in the process.

New urgency was injected into the drafting process by a governmental crisis, the perceived lack of improvement in the economy, and increasing political violence, which culminated in the assassination of political party leader Chokri Belaïd on Feb. 6, 2013.

Without announcement, President Ben Jaâfar officially presented the final draft of the constitution to the media on June 1, 2013. It was immediately met with protests by NCA members, mainly from the opposition but also by some of Ennahdha's Troika partners, CPR, and Ettakatol, who argued that the draft was not faithful to the work of the six constituent commissions. In

69 Rules of Procedure Article 104 as amended in March 2013 provides that "the committee meets to prepare the final version of the draft constitution *based* (emphasis added) on the work of the commissions and with the help of experts." See the Recurring Challenges section of this report for more information on this controversy.

70 Kaïs Saïd was the first expert to decline. Iyadh Ben Achour, Chafik Sarsar, and Hafidha Chekir declined after a joint letter to the NCA president that requested further clarification regarding the role of the experts (i.e., whether their work was merely of a linguistic nature or also content-related), remained unanswered.

71 See the Historical and Political Background section of this report for more information.

particular, they felt that the drafting committee had overstepped its mandate in changing the content of some articles already drafted by the commissions (in "draft 2bis") and in adding a chapter on transitional provisions without consulting the commissions. Seventy NCA members filed a lawsuit regarding the drafting committee's actions at the administrative tribunal, which later refused to examine the case due to lack of jurisdiction.[72]

At first, the NCA leadership avoided dealing with the growing tensions around the draft and proceeded as planned. In accordance with amended Rules of Procedure Article 104, the final draft was resubmitted to the constituent commissions, which had an opportunity to make a last assessment of their sections and submit a report within 48 hours summarizing their comments. The commissions met on June 4, with the exception of the Commission on Executive and Legislative Powers, as commission President Amor Chetoui (CPR) refused to call for a meeting in protest of the drafting committee's heavy-handedness in editing and finalizing the constitution draft, and its lack of adherence, in his opinion, to agreements reached in the national dialogues.[73]

His refusal to call for the meeting of the commission effectively blocked the NCA from moving forward with the process. To resolve the deadlock, NCA President Ben Jaâfar organized a closed-door meeting with commission members, which he chaired. The meeting, which excluded Chetoui, took place on June 10 and resulted in the commission preparing its report. Nine commission members boycotted the meeting.

By June 11, all commissions had submitted their reports, which were largely similar in format. They presented the articles proposed by each commission and the changes made to them, if any, by the drafting committee, with a note on the collective position of the commission's members regarding those changes: agree/do not agree/reservations. Only the Rights and Freedoms Commission included the votes concerning each article, which revealed very low attendance (between eight and 14 members out of the 22). The Judicial Commission was the sole one to dedicate significant space in the report (two pages) to protest the drafting committee's actions in changing the substance of articles.

Nedra Cherif

Rapporteur General Habib Khedher and NCA President Mustapha Ben Jaâfar signed the final draft of the constitution during a press conference on June 14, 2013.

All the commissions' reports were then submitted to the drafting committee, which had to produce the final report on the constitution. This report, as well as the final draft of the constitution, was officially signed by Ben Jaâfar and the Rapporteur General Habib Khedher during a press conference on June 14. The draft constitution was then submitted with the commissions' reports to the NCA registry office. This represented the last step before presenting the documents to President Marzouki.

On June 12, The Carter Center released a report recognizing the importance of the work carried out by the NCA, the extent of the progress made throughout the different drafts of the constitution, and the willingness of assembly members to take into account the opinions and

72 See the Recurring Challenges section for more information on the lack of a judicial review mechanism in the constitution-making process in Tunisia and the role of the administrative tribunal.

73 Chetoui complained that the constituent commissions did not receive authentic copies of the last draft. He also contested the liberties taken by the drafting committee to modify the content of the constitution draft and to change articles that had been agreed upon by the constituent commissions.

views expressed throughout the process by political representatives, civil society, and citizens.[74] In the report, the Center evaluated the fourth draft and assessed the extent to which it was consistent with the country's obligations under public international law. The Center came to the conclusion that while the draft reflected the authorities' strong commitment to democratic reform, it continued to fall short on critical guarantees of human rights and fundamental freedoms.

On July 9, President Marzouki published his comments on the draft constitution. His observations and recommendations included the need to redraft language in various sections to make it more precise and less likely to be misinterpreted. The report also called for greater social and economic protections, especially the right to health care, and called for more protections for the "weaker" sections of society, such as women and children.[75]

The Lead-Up to the Constitution's Adoption

On July 1, 2013, the NCA's plenary convened amid fanfare to launch a general discussion about the final draft of the constitution. Some members of Tunisia's first National Constituent Assembly (1956–1959) attended as honored guests. The general discussion was seen by the NCA's leadership as the final step ahead of the article-by-article vote and the vote on the constitution in its entirety.

The opposition, however, felt that the drafting committee, which did not reflect the proportional membership of the commissions, had exceeded its authority and had forced through controversial language not agreed in the commissions. Within minutes of opening the first session, the hall erupted in loud protests from some opposition members, forcing NCA President Ben Jaâfar to suspend the proceedings temporarily. Opposition members stood outside the plenary hall during the break distributing draft 2bis, which they claimed was the legitimate final draft of the constitution since it represented the work of the commissions prior to the intervention of the drafting committee.

Ben Jaâfar's announcement later that day of the formation of an ad hoc Consensus Commission — which would discuss the main contentious issues around the draft — helped ease tensions and allowed the NCA's plenary discussion to resume. The latter lasted for two weeks, July 1–15. It was plagued with low attendance, with at times less than 60 deputies present during the debates, and saw the resignation of an NCA member, Ahmed Khaskhoussi (Mouvement des Démocrates Socialistes or MDS), in protest against what he termed the "falsification" of the draft constitution.

Agreement on the composition of the Consensus Commission required some negotiation, particularly on how best to represent independent and unaffiliated deputies. The commission was in place, however, by the second week of July.[76] Notably, while the composition of other NCA commissions reflected, at least at inception, the proportional representation of each bloc's relative strength in the chamber, the assembly employed a different strategy with regard to the Consensus Commission in order to be as inclusive as possible. For example, the Democratic bloc — the second biggest bloc in the assembly though still much smaller than Ennahdha's — received several seats, in acknowledgment of the bloc's internal heterogeneity.

The commission began by identifying a range of contentious issues in the final draft, touching on nearly every chapter of the constitution in addition to the preamble.[77] This list was narrowed down to key contentious issues.[78] Rights and freedoms were the first set of provisions tackled by the commission, which made rapid progress in that area, reaching key agreements on July 24.

74 "The Carter Center Congratulates Tunisia's NCA Assembly on Final Draft of Constitution and Urges Safeguards for Human Rights," June 12, 2013

75 The report included five main sections: Tunisia's identity and the identity of the state, the relationship of religion to the state, individual rights and responsibilities, judicial powers, and the executive powers: balance, responsibilities, coordination.

76 See the Organizational Structure section for a description of the composition of the Consensus Commission.

77 The long list of contentious issues was drawn up on July 11, 2013.

78 The short list was agreed on July 16–18, 2013, and became referred to as "the July 18 list."

In an effort to impact the Consensus Commission's work, The Carter Center released a joint statement with Human Rights Watch, Amnesty International, and Al Bawsala making recommendations for greater compliance with Tunisia's commitments to international norms, including the recognition of the universality of human rights, the inclusion of stronger anti-discrimination provisions in the text, and unequivocal commitment to the principle of equality between men and women in all its facets.[79]

The assassination of NCA deputy Mohamed Brahmi the next day, on July 25, 2013, as the country celebrated the 56th anniversary of the proclamation of the republic, sparked a deep political crisis, as the majority of the opposition suspended their participation in the assembly.

The assassination of NCA deputy Mohamed Brahmi the next day, on July 25, 2013, as the country celebrated the 56th anniversary of the proclamation of the republic, sparked a deep political crisis, as the majority of the opposition suspended their participation in the assembly. The assassination came only six months following that of Chokri Belaïd, and in a very similar manner, as both were gunned down by men who fled on motorcycles. Public anger was fueled by the fact that Belaïd's murderers had not been brought to justice. Less than two weeks later, President Ben Jaâfar suspended NCA activities, pending the launch of a new national dialogue to resolve the crisis.[80] The Quartet, composed of the UGTT, the UTICA, the LTDH, and the Bar Association, officially launched a third national dialogue process in October 2013, following months of behind-the-scenes negotiations by political parties.[81]

The NCA subsequently resumed its activities in October but suffered renewed crisis shortly thereafter on a smaller scale. On Nov. 4, the assembly convened a plenary amid controversy to amend several articles of the Rules of Procedure in order to streamline its work. Of the five articles amended that night, there was only consensus on Article 106, which regulated the article-by-article vote on the constitution. The plenary voted to raise the number of deputies required to come together in order to propose an amendment and imposed tighter controls on the proposal process itself, including the presentation of each article and the subsequent debate, stipulating, for example, that each proposal must identify a specific deputy to defend it in the plenary debate.

Unlike Article 106, however, the votes for several other Rules of Procedure articles were controversial. The plenary amended Article 36 to allow the NCA bureau to hold meetings after a one-hour delay if at least half the members were present and to make decisions by majority if the two-thirds quorum (previously required) was not reached. Amended Article 79 extended the right to call for a plenary session, which had been exclusively the prerogative of the NCA's president, to deputies as well, who could schedule a plenary session by petition of 50 percent or more of NCA members. Most controversially, the amendment obligated the NCA president or one of his deputies to chair the session, even if he was opposed to it. This measure was intended to prevent the president or his deputies from blocking plenary sessions through nonparticipation, as had happened previously.

New Article 126 retained the possibility to impose penalties on repeatedly absent deputies by docking their pay but required the NCA bureau to publish the amount docked on the assembly's website. Advocates of this change framed it as an attempt to avoid paralysis of the assembly should some deputies decide to withdraw again, but it was interpreted by some members of the opposition as an act of vengeance for their three-month

79 "Tunisia: Strengthen New Constitution's Rights Protection," July 24, 2013

80 NCA President Mustapha Ben Jaâfar announced his decision to suspend the NCA's activities in a televised address on Aug. 6, 2013.

81 As discussed in the Historical and Political Background section of this report, the national dialogue was organized into three tracks: (1) the formation of a new government, (2) the adoption of a constitution, and (3) the election of the members of the election management body and the adoption of an electoral law.

withdrawal from the assembly following Brahmi's assassination. During the vote, a visible divide was evident, for the first time ever perhaps, between many of Ennahdha's deputies, who supported the proposed changes, and their leadership. For example, head of bloc Sahbi Atig urged his deputies to vote against some of the more controversial proposals. Mehrezia Laâbidi, NCA vice president and Ennahdha member, for her part expressed dismay at some of the language "obligating" NCA leadership to chair sessions. Members of the Democratic bloc walked out of the vote in protest early on, along with several independents.

The following day, the Democratic bloc and several other deputies announced their intention to freeze their participation in all commissions and plenary sessions until the Nov. 4 decisions were reversed. Ettakatol did the same, in protest, partly due to what it saw as an attack on the status and dignity of the party's leader and NCA president, Ben Jaâfar. During the next three weeks, feverish negotiations took place within the Rules of Procedure commission and behind closed doors, including with the Quartet, in an attempt to resolve the crisis. Despite the relative secrecy of the discussions, at least at the highest levels, it was clear that the amendments could be repealed only with Ennahdha's support.[82] It was also widely believed that stakeholders were negotiating the Rules of Procedure as part of a package deal that would also include the formation of a new government.

A deal was reached, and the plenary met on Nov. 27 to vote on the Rules of Procedure once more. Despite the fact that some NCA members, particularly from Al-Wafa and CPR, held steadfastly to their position, the plenary repealed the amendments to Rules of Procedure Articles 36 and 79 that amended the regulations regarding a quorum in meetings and the right to call a plenary session. These measures passed with a comfortable majority with the majority of Ennahdha members voting, many reluctantly, alongside the Democratic bloc.[83]

Despite Ennahdha's concessions on the Rules of Procedure amendments, many opposition members continued to boycott assembly business in the days that followed, noting that they had suspended their activities not only on account of the now-resolved Rules of Procedure crisis but also the stalled discussions over a new government.[84] The continued absence of key opposition members created tensions and resentment within the assembly, particularly in relation to the Consensus Commission, which was once again paralyzed. Ennahdha deputies, along with members of other parties such as CPR and Tayyar Al-Mahabba, accused the opposition of holding the constitution-making process hostage by withdrawing, which they argued not only led to delays but also further damaged the reputation of the NCA.

While negotiations at the national dialogue focused largely on the formation of a new government, political leaders relied on the Consensus Commission to put the constituent process back on track.

As the suspension of the Quartet-mediated national dialogue continued, the common stance of the Democratic bloc and its allies regarding participation in assembly activities began to falter. Opposition members returned to commission work on an individual basis at various points over the next weeks. By Dec. 14, when the Quartet announced an agreement on a candidate for head of government, the assembly was already up and running again, including the Consensus Commission.[85]

82 In contrast, the Rules of Procedure commission remained commendably open to observers, despite the extremely tense discussions that were taking place within it, as it had throughout the two-year process.

83 Article 106, which regulates the article-by-article vote procedures of the constitution, was not up for a vote, as the Nov. 4 changes to the article were widely accepted by the various blocs. In addition, the plenary voted to amend Article 20 (which had not been part of the Nov. 4 vote) to make it easier to dissolve political blocs.

84 Some did not; for example, the deputies who returned immediately to work in the assembly the following day.

85 After weeks of intense negotiations between the Quartet and the various political parties involved in the national dialogue, the Quartet announced in a press conference held on Dec. 14 the designation of Mehdi Jomâa, minister of industry in Laârayedh's government, as the new head of a "technocratic" government.

While negotiations at the national dialogue focused largely on the formation of a new government, political leaders relied on the Consensus Commission to put the constituent process back on track. Despite the interruption of NCA activities for nearly three months following the assassination of Mohamed Brahmi, and for several weeks due to the Rules of Procedure crisis, the commission managed to meet a total of 37 times between June 29 and Dec. 27, 2013. During that period, it reached agreement on 52 points of contention affecting the preamble and 29 articles in total.[86]

On Jan. 27, 2014, the constitution was signed into law by President Marzouki, NCA President Ben Jaâfar, and Prime Minister Ali Laârayedh.

Toward the end of the process, the commission also sought the advice of prominent constitutional experts, particularly with regard to the transitional provisions.[87] These provisions were some of the most complex, and for that and other reasons, had been left to the very end. Under significant pressure from the NCA's leadership and political parties to wrap up its work, the commission did not accord these discussions the thorough deliberation and consultation afforded other sections of the constitution, leading some to question the coherence and adequacy of the agreements reached on the transitional provisions. Also, some commission members feared that the consensus was fragile and thus vulnerable to contestation during the vote.

Disagreement within the NCA centered not only on the constitution's substance but also extended to whether the agreements reached by the Consensus Commission were binding on the plenary. Given that the Consensus Commission had no formal standing in the NCA and was not mentioned in the assembly's Rules of Procedure, one of the most controversial issues was how to ensure that the various blocs, parties, and independent deputies respected the decisions reached by their representatives in the commission during the article-by-article vote.

The Adoption Process

The first concrete step in the long-delayed article-by-article vote on the constitution took place on Dec. 30, 2013. Under the amended Rules of Procedure, deputies had one day to submit proposals to amend specific articles of the constitution.[88] The following day, the 256 proposed amendments were distributed to all deputies and published on the NCA's website. Finally, after months of debate, the plenary met on Jan. 2, 2014, to amend the Rules of Procedure once more in order to give the Consensus Commission formal status and to specify that "amendments emanating from the Consensus Commission shall be binding for all political blocs."[89] That same day, deputies submitted requests to speak during the plenary session in favor of or against proposed articles and amendments. The article-by-article vote itself began on Jan. 3, 2014.

The NCA's leadership hoped to complete the adoption process—meaning the article-by article vote and the vote on the text in its entirety—by Jan. 14, 2014, the third anniversary of the Tunisian revolution. Adding further pressure on the NCA, parties involved in the Quartet-mediated national dialogue discussions had agreed on the deadline of Jan. 12 for the constitution's adoption. While the NCA did not manage to meet this tight deadline, it adopted the constitution in less than four weeks, on Jan. 27, 2014. This

86 Document titled "Consensus Commission Meetings," NCA, December 2013. It should be noted that other than the key contentious issues (the July 18 list), the commission returned to some issues in the long list (the July 11 list).

87 Rules of Procedure Article 59 entitles the commissions to consult "anyone whose opinion they believe they could benefit from" on a given issue, including experts and government representatives. Experts were consulted at various moments of the process. For example, the constituent commissions conducted several hearings with Tunisian and international experts, as did the drafting committee prior to the release of the final draft of the constitution on June 1, 2013.

88 New Rules of Procedure Article 106 (as amended on March 15, 2013) gave deputies a total of four days per chapter of the constitution to lodge amendments. It also required that each chapter be announced 10 days in advance of the vote on it. The article was amended again on Nov. 4, 2013, and the window to lodge amendments was shortened to one day. The number of deputies needed to propose an amendment was raised from a minimum of five to a minimum of 15. The requirement was removed that a vote on each chapter must be announced 10 days in advance.

89 Relevant articles: Articles 41 and 106 (a)

Thierry Bresillon

President Marzouki, NCA President Ben Jaâfar, and Prime Minister Ali Laârayedh sing the national anthem during the signing ceremony of the constitution on Jan. 27, 2014.

was remarkably fast considering the number of articles involved, some of which were controversial and required a delicate negotiation on the part of NCA members.[90] Furthermore, the constitution was adopted by the NCA in its entirety with an overwhelming majority of 200 votes out of 216 NCA members present.[91] Only 145 votes in favor were needed for its passage. On Jan. 27, 2014, the constitution was signed into law by President Marzouki, NCA President Ben Jaâfar, and Prime Minister Ali Laârayedh. The constitution entered into force Feb. 10, 2014, through its publication in a special edition of the official gazette of the Republic of Tunisia.[92]

During the adoption phase, The Carter Center released two statements jointly with Human Rights Watch, Amnesty International, and Al Bawsala: one on Jan. 3, 2014, reiterating their July 2013 recommendations for greater compliance with Tunisia's commitments to international norms and a second one on Jan. 14 focusing specially on the independence of the judiciary and the impartiality of justice. The joint statement called on the NCA to ensure that the judiciary was given the necessary power and independence to protect human rights.[93]

The Rules of Procedure: A Flexible Interpretation

Though governed by the NCA's Rules of Procedure and the OPPP, the procedures for the article-by-article vote were not static throughout the process. Rather, the NCA interpreted them, at times controversially, in a highly flexible manner to avoid political blockages.

90 There were a total of 180 items up for consideration: the preamble, which was divided into eight parts;146 articles; and 26 headings, in addition to proposed amendments. (Source: press conference, Habib Khedher, General Rapporteur of the constitution, Oct. 18, 2013)

91 One member, Mohamed Allouche, was absent from the vote, having died of a heart attack several days prior.

92 Special edition of the official gazette (the JORT), Feb. 10, 2014

http://www.legislation.tn/sites/default/files/news/constitution_1.pdf

93 "Tunisia: Strengthen New Constitution's Human Rights Protection Guarantee Equality for All; Affirm International Law Obligations," Jan. 3, 2014, and "Tunisia: Improve Guarantees for Judicial Independence Ensure Judiciary Has Powers to Protect Human Rights," Jan. 14, 2014

Al Bawsala

Tensions at the National Constituent Assembly escalated when Habib Ellouze, a conservative member of Ennahdha, and Mongi Rahoui, a leftist member of the Democratic bloc, debated the principle of freedom of conscience.

The Nov. 4 amendments to the Rules of Procedure were, to a large extent, successful in streamlining the vote procedures by raising the threshold of deputies required to propose amendments and by imposing tighter controls on the proposal process and debate.[94] While these changes helped, they did not fully address all aspects of the process. On more than one occasion during the article-by-article vote, the Consensus Commission had to define procedures on the spot and make adjustments "on the floor," in the midst of the debate or vote.

For example, some deputies raised concerns as to whether larger blocs would be overrepresented on the floor in terms of their opportunity to express opinions. The Nov. 4 amendment to Rules of Procedure Article 106 specified that only one deputy would be designated to speak for any specific article and only one deputy against, for an allotted time of three minutes each. The article also noted that if several demands to speak were made ahead of the vote priority would be given to deputies who had not yet had an opportunity to speak. To that end, NCA members gave the assembly's bureau the prerogative to choose among multiple requests by lottery.

The article was silent, however, on equality of opportunity between blocs (versus between deputies). During the vote on paragraph 3 of the preamble for example, both deputies speaking for and against the language used were from Ennahdha. A member of the opposition suggested at that point that a new draw be made on the spot whenever this situation arose. His suggestion was accepted, and from that point onward, this procedure was followed.

The rules for speaking for or against a proposed amendment also did not take into consideration a scenario in which a proposed amendment was withdrawn. Assembly members faced this situation frequently during the vote. At first, deputies were not allowed to comment on the withdrawn proposal. They were later permitted to do so after protesting that their position should go on the record, since judges may refer back to the proceedings of the vote to determine intention of the legislator.

An issue also arose in relation to the Rules of Procedure centered on consensual amendments. Amendments from the Consensus Commission were described as "binding" in the revised Rules of Procedure, a word that was understood in various ways. Some NCA members felt that the assembly was bound to vote in accordance with the agreements, while others interpreted it as a "loose guideline." Most of the commission's amendments were adopted, and NCA members generally voted in line with the agreements reached.[95] This changed, however, during the vote on the articles

94 More specifically, key changes made to Article 106 on Nov. 4, 2013, were: (a) The minimum number of deputies required to propose amendments was increased from five to 15. A proposal to introduce an article could now be made but only by a minimum of 30 deputies. A deputy was allowed to make only one proposal per article, which had to contain all amendments relevant to all the paragraphs of the article. (b) The proposal had to specify the exact wording of the provision as it should appear in the constitution, as well as the deputy (from among the group) who would present the proposal to the plenary. (c) The window for proposing amendments was reduced from four days to one, with proposed amendments published the following day on the NCA's website and distributed to all NCA members. (d) The window to request the opportunity to address the plenary against proposed amendments, in defense of the original article or against it, was set at one day. (e) For each object of vote, only one deputy was designated to speak for and only one against. The time allowed on the floor for each was specified as not to exceed three minutes. Should several demands to speak for or against be made, priority was given to deputies who had not spoken previously, and the NCA bureau was given the prerogative to choose among multiple requests via lottery.

95 The Consensus Commission continued to meet as needed during the vote, mediating certain issues and proposing amendments; for example, on Article 45 (Article 46 in the final constitution) on the rights of women.

that defined the conditions of eligibility for the office of president of the republic, a polarizing subject from the outset of the constitution-making process in Tunisia.[96] The language proposed by the Consensus Commission did not pass, and the heads of blocs had to mediate a resolution. This represented a turning point, and from then on, the role of the Consensus Commission diminished significantly. On Jan. 14, 2014, Habib Khedher, the general rapporteur of the constitution, announced an end to the work of the commission.

A key procedural issue according to journalists, civil society groups, and international observers centered on the interpretation of Rules of Procedure Article 93, which allowed the general rapporteur of the constitution (among other designated people) to request that the assembly "reopen the debate on an article already passed … if new relevant elements appear before the close of deliberations on the constitution draft." This clause was applied extensively during the vote.

The general rapporteur proposed an application of these powers during the first day of voting. He suggested reopening the debate on the fourth paragraph of the preamble, and in particular on the notion of Tunisia's "Mediterranean belonging." This suggestion was rejected.

Two days into the vote, a major altercation between two NCA members from opposing camps had a drastic impact on the adoption process. Tensions at the NCA escalated when, in declarations to the media, Habib Ellouze, a conservative member of Ennahdha, said that Mongi Rahoui, a leftist member of the Democratic bloc, was "known for his enmity of Islam." Rahoui and others strongly condemned Ellouze's words, arguing that the latter's comments could incite religious extremists. Rahoui reported receiving threats in the 48 hours after the declarations were made.[97] This episode resulted in heated debate about whether to add to Article 6 a ban on allegations of apostasy, since these could expose accused individuals to the risk of physical violence or death. Opposition members argued that the conflict between Ellouze and Rahoui had resulted in "new relevant elements" and requested to amend the relevant article on the basis of Rules of Procedure Article 93 to include an obligation for the state to ban incitement to hatred and violence as well as *takfir* (labeling another Muslim an unbeliever, or *kafir*).

The motion to reopen discussion with regard to Article 6 set a precedent. The debate could be reopened on other articles already approved, leaving the process inconclusive. Though Rules of Procedure Article 93 stipulates that "new relevant elements" must appear before an article could be revisited, it did not clarify what constituted "new" and "relevant" elements. After much debate, the general rapporteur suggested that the assembly designate the heads of blocs as the arbiters on whether Rules of Procedure Article 93 could be invoked. Deputies accepted his suggestion, and the heads of blocs permitted the article's invocation on multiple occasions, usually to resolve controversial issues, including regarding the right to strike (Article 36), the values to be taught when implementing the right to education (Article 39), and candidacy conditions for the election to the office of president of the republic (Article 74).[98] Article 6, itself a source of controversy until almost the last moment, was voted on a total of three times, before being adopted in its final form on Jan. 23, 2014.

96 Discussion centered on the question of whether to place an age limit on candidates as well as the conditions for dual nationals to run for office. Both issues directly affected several potential candidates.

97 Mongi Rahoui is a member of Al-Watad, the party of assassinated political leader Chokri Belaïd. As a member of Al-Watad, Rahoui is also a member of the leftist coalition the Popular Front, to which assassinated NCA member Mohamed Brahmi also belonged. Rahoui alleged that both Belaïd and Brahmi were killed by religious extremists and argued that the comments were intended to tarnish his religious beliefs and could have deadly consequences.

98 Other articles that were re-voted on using Rules of Procedure Article 93 were 12, 32 (was 31 in the fourth draft), 36 (35), 63 (62), 65 (64), 81 (80), 88 (87), 91 (90), 106 (103), 110 (107), 111 (108), 121 (118), 122 (119), and 147 (145). Articles 13 and 149 were added in the final version and did not exist in the fourth draft.

Recurring Challenges During the Process

Constitution making in transitional contexts is often a deeply contested process, and Tunisia is no exception. Constitution makers face significant hurdles, many the result of prevailing circumstances and thus beyond the control of the constituent body. The manner in which constitution makers respond to these circumstances and the choices they make regarding the process can either facilitate or hinder the task of arriving at a constitution seen as appropriate and legitimate by citizens.

The assembly's composition shifted significantly and repeatedly during the constitution-making process, as deputies migrated among political parties and political blocs. New parties and blocs emerged regularly, while others were dissolved.

In Tunisia, some of the NCA's choices created tensions and led to delays and frustrations. At times, these choices threatened to derail the constitution-making project. Chief among them was the failure to put in place a clear road map to chart a course and address timing and sequencing issues. Other challenges included the assembly's sparse and vague Rules of Procedure, the absence of a judicial review mechanism, and an ill-defined role for experts. The process took place in an environment of constantly shifting political alliances within the assembly without consistent cross-party coalitions on issues. These shifting alliances made fair representation within commissions and other assembly structures a challenge. The problem was compounded by chronic absenteeism on the part of deputies, which was never addressed by the NCA bureau. This dynamic was partly to blame for the Tunisian public's negative perceptions of the assembly's work.

Representation and the Politics of Shifting Alliances

The Oct. 23, 2011, elections resulted in a high degree of political diversity in the NCA. In addition, the assembly's composition shifted significantly and repeatedly during the constitution-making process, as deputies migrated among political parties and political blocs. New parties and blocs emerged regularly, while others were dissolved. As the NCA bureau and the commissions relied on a proportional representation formula at their inception, the shifts within the assembly over time often resulted in the two structures getting progressively out of sync with the real balance of power in the NCA at any given moment. Constant shifts also made researching agreement on the content of the constitution more difficult. This was mitigated in large part by the stability of the largest bloc in the assembly, Ennahdha.

Beginning in February 2012, most NCA members participated in one of seven political blocs, composed along party lines or political

Table 2: NCA Political Blocs as Initially Composed (February 2012)

Political blocs	Number of members
Ennahdha	89
Democratic Bloc	30
Congress for the Republic	29
Ettakatol	22
Freedom and Democracy	13
Freedom and Dignity	12
Al-Aridha	11
Nonaffiliated	11
Total	**217**

affinities.[99] Though the number of blocs remained fairly stable throughout the process—seven blocs in the beginning versus five at the time of the adoption of the constitution—there was intense political maneuvering throughout the two years of the process. An estimated 50 deputies changed parties after joining the NCA, approximately one-quarter of the NCA's 217 members.[100] Furthermore, while 11 parties were elected to the NCA in 2011, 27 parties were represented in the assembly at the time of the adoption of the constitution, in addition to a much higher number of independent/unaffiliated deputies.

A first change to the NCA's composition occurred shortly after the deputies took office, with the appointment of several NCA members to positions within the new government of then-interim Prime Minister Hamadi Jebali. Eleven of the 18 appointed members resigned from the NCA, thus ceding their seats to the next candidate on the candidate list.[101] Since the vertical parity principle established in the 2011 electoral law meant that women and men alternated on candidate lists, and since the vast majority of lists put a man in the first position, the resignations resulted in increased women's representation at the assembly. This dynamic continued throughout the process, as various male members of the NCA resigned or died and were replaced by women. Numbers of women eventually rose from 59 immediately following the 2011 elections to 67 by the time of the adoption of the constitution. Women thus went from comprising 27 percent of NCA members to almost 31 percent.[102]

Ettakatol and CPR's decision to join Ennahdha's governing coalition also generated significant change in political party representation. Many members of these two parties were unhappy with their parties' decisions, leading some to move to other parties or join the independents.[103]

An additional factor in political shifts at the NCA was the emergence of new political parties. The Democratic Alliance was a breakaway splinter of PDP (later Al Joumhouri). Its members remained within the Democratic bloc until the end of the constitution-making process, coordinating closely with their former party and others, and only formed their own political bloc on March 6, 2014, following the constitution's adoption.[104] The creation of Nidaa Tounes in June 2012 attracted numerous deputies from various other parties.[105] At its peak, Nidaa Tounes counted 12

99 Rules of Procedure Articles 16 to 23 regulating the composition and prerogatives of political blocs

100 "Political Tourism in the NCA: No Passport Necessary," July 3, 2013, Tunisia Live http://www.tunisia-live.net/2013/07/03/political-tourism-all-the-rage-in-the-nca

101 According to Rules of Procedure Article 123, resigning members shall be replaced by the next candidate on their candidate list.

102 The Beijing Declaration and Platform for Action, adopted in 1995, acknowledges in its para. 187 that "The equitable distribution of power and decision making at all levels is dependent on governments and other actors undertaking statistical gender analysis and mainstreaming a gender perspective in policy development and the implementation of programs. Equality in decision making is essential to the empowerment of women. In some countries, affirmative action has led to 33.3 percent or larger representation in local and national governments." http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf

103 This was the case in particular for the CPR, from which many members separated early on to create their own party and political bloc group called Al-Wafa. Later in the process, other groups of discontented members left to create their own parties: Al-Iklaa, which is not affiliated to any of the political blocs, and the Democratic Current, which remains within the CPR political bloc.

104 The Democratic bloc also saw the departure of deputies from Al Joumhouri on May 13, 2014, thus dropping the group's number of members from 30 (35 at its peak, making it the second biggest group at the assembly) to 14.

105 Nidaa Tounes drew many of its members from Ettakatol, CPR, and Al-Aridha. From Ettakatol, Khmais Ksila, Fatma Gharbi (later resigned), and Selim Ben Abdessalem joined Nidaa Tounes in August 2012, November 2012, and July 2013 respectively. From CPR, Abdelaziz Kotti and Dhamir Al Manai (later resigned) joined Nidaa Tounes in August 2012. Mohamed Ali Nasri, a former CPR member, joined in September 2012 after leaving Al Wafa. From Al-Aridha, Ibrahim Kassas and Mouldi Zidi joined Nidaa Tounes in August 2012 (both later resigned), and Abdelmonem Krir and Rabiaa Najlaoui did so respectively in October 2012 and November 2012.

Table 3: Political Affiliation Shifts

Political Affiliation	Number of Members		
	October 2011	December 2013	Change
Ennahdha	88	85	-3
Congress for the Republic	29	12	-17
Popular Petition for Freedom, Justice, and Development (Al-Aridha Al-Chaabia)	26	0	-26
Ettakatol	20	12	-8
Progressive Democratic Party	16	0	-16
Independent	9	17	8
The Initiative (Al-Moubadra)	5	4	-1
Democratic Modernist Pole	5	0	-5
Afek Tounes	4	3	-1
Communist Workers Party of Tunisia	3	3	0
Democratic Socialist Movement	2	0	-2
People's Movement (Harakat Achaab)	2	2	0
Party of Justice and Equality	1	0	-1
Republican Party for Freedom and Justice	1	0	-1
Neo-Destour Party	1	0	-1
Cultural and Unionist Party of the Nation	1	0	-1
Free Patriotic Union	1	2	1
Maghreb Liberal Party	1	1	0
Party of Progressive Struggle	1	1	0
Movement of Democratic Patriots	1	1	0
Democratic Alliance	0	11	11
Al-Massar	0	10	10
Tayyar Almahaba	0	7	7
Al-Joumhouri	0	7	7
Nidaa Tounes	0	6	6
Wafa Movement	0	6	6
Al-Amen Party	0	5	5
Democratic Stream	0	4	4
Movement of the Republic	0	4	4
Tunisia People's Voice	0	6	6
Party Patriotic Construction	0	3	3
Iklaa Party	0	1	1
Third Alternative	0	1	1
Reform and Development Party	0	1	1
Tunisian National Front	0	1	1
Tunisian Movement for Freedom and Dignity	0	1	1

Data Credit: Al Bawsala – Marsad

NCA members, a notable number for a party that did not exist at the time of the 2011 election. Though the party had the ability to create its own political bloc in the assembly, it never did so. The number of its members eventually declined to six following a wave of resignations, and it became no longer eligible to form a bloc, with members spread between the Democratic bloc and nonaffiliated members.

Another major evolution of the NCA's composition was the decline of Al-Aridha Al-Chaabia (La Pétition Populaire), a party unknown prior to the 2011 election, which ran independent lists during the elections and managed to gain the third highest number of seats (26) at the NCA. The group suffered from numerous resignations, however, and subsequently retained only seven members (under the name Tayyar Al-Mahabba), too small a group to allow for the creation of a political bloc under the NCA's Rules of Procedure.[106] Al-Massar (previously Pôle Démocratique Moderniste or PDM) constantly increased its number of representatives at the assembly, having benefited most from the shifting political landscape of the NCA.[107]

These shifts directly impacted the representation in the NCA's various structures. As the composition of the NCA commissions as well as the NCA bureau was decided early on based on the principle of proportional representation, changing affiliations of their members created tensions as some parties or political blocs became overrepresented vis-à-vis their membership within the NCA, and others became underrepresented.[108] The representation of independent and unaffiliated deputies also became a concern, since the number of deputies not affiliated to any political bloc dramatically increased during the two-year constitution-making process, from 11 to about 50, almost a quarter of NCA members. During the negotiations on the composition of the Consensus Commission, for example, the NCA bureau required that an independent who wished to be represented on the commission collect signatures from a certain number of other independent members.[109] This threshold had to be reduced, since the diverse range of political leanings among unaffiliated/independent deputies made it difficult to secure the necessary support.

The NCA bureau and in particular the NCA presidency were also directly concerned by the shifting loyalties in the assembly. The presidency (the NCA president and the two vice presidents) had been divided between the Troika parties, with the president drawn from Ettakatol, the first vice president from Ennahdha, and the second vice president from the CPR. The second vice president eventually joined Ettakatol, resulting in a disproportionate representation of Ettakatol in the leadership of the assembly when, in fact, the party's political bloc had decreased in size, retaining only the minimum number of deputies needed to form a political bloc. This may explain why President Ben Jaâfar, other Ettakatol representatives, or CPR representatives never pushed for reconsideration of the composition of commissions, since not only would it have turned into a "hornet's nest" but also because these parties would have been among the first to be adversely affected. Ennahdha—by far the biggest political bloc in the assembly—was remarkably stable throughout the process, shifting from 89 deputies to 91 at the time of the adoption process.[110]

The shifting political composition of the assembly also affected plenary session debates. In particular, independent/nonaffiliated members found difficulties in agreeing on a spokesman, in light of their divergent political views and ideologies. This limited their impact on debates

106 Al-Aridha was officially dissolved by its president on April 28, 2013, and later replaced by the Tayyar Al-Mahabba Current created on May 22, 2013.

107 Al-Massar's (former Pôle Démocratique Moderniste or PDM in the 2011 election) initial five members were joined by four former Ettakatol members: Selma Mabrouk, Karima Souid, Abdelkader Ben Khmis, and Ali Bechrifa, who joined the party at different points over the course of 2013.

108 For instance, the CPR lost all three of its seats within the Constituent Commission on Judicial Powers to Al-Wafa, a party that did not exist during the NCA elections and which was less represented than the CPR within the assembly.

109 According to Rules of Procedure Article 41bis

110 Ennahdha has remained extremely stable all through the constitution-making period and only recently experienced resignations from its group: Kamel Saadaoui (Mouvement des démocrates socialistes or MDS) and Naoufel Ghribi (CPR) joined Ennahdha's political bloc respectively on July 12, 2013, and Oct. 20, 2013.

and prevented them from being represented in accordance with their numerical strength in both the heads-of-blocs discussions and otherwise.

Though political "nomadism" was a common feature at the NCA, it was heavily criticized at times, most bitterly by Tayyar Al-Mahabba (the former Al-Aridha), which suffered serious defections. Al-Aridha called for the resignation of NCA members who left the party or list on which they had been initially elected and presented an amendment during the article-by-article vote of the constitution to sanction any assembly member who changed "his or her party affiliation or electoral coalition on which s/he was elected."[111] The amendment did not pass, and deputies who had changed party affiliation defended their freedom of opinion as well as the right to readjust affiliation in view of the evolution of the political scene.

Though the NCA deserves commendation for its internal deliberative approach, one of the major challenges faced by the drafters of the Tunisian Constitution was the absence of a clear work plan spelling out the different stages of the process and the approximate time it would take to complete them.

Absence of Issue-Based Coalitions

Apart from political blocs, it is worth noting that deputies never developed issue-based cross-party groups or caucuses within the assembly; for example, around women's rights, the rights of youth, or regional concerns. The NCA's Rules of Procedure stipulated that deputies could join only one political bloc, which most did. However, the rules were silent on the creation of issue-based advocacy groups, which meant that deputies could come together on an informal basis to create such groups in order to increase their lobbying power within the assembly.

The only attempt of this sort came from female deputies who tried to organize an informal group transcending partisan lines to lobby for stronger protections for women's rights in the constitution. The initiative never materialized, and constitutional provisions related to women's rights were not a priority for much of the process, including the period when the Consensus Commission met to resolve remaining contentious issues in the text. However, deputies (both men and women) managed to mobilize around the issue at the very last minute during the article-by-article vote and made a push in the last step of the adoption of the constitution.

The Carter Center encourages Tunisia's legislative assembly, the Assembly of the Representatives of the People, and other constitution-making bodies to consider the establishment of informal, issue-based caucuses. Experiences from other countries suggest that such groups can help build trust among political groups in the assembly, increase the visibility of certain issues, and contribute to better legislative and policy agendas.[112] Such political blocs and informal groups should be provided with logistical and administrative support to increase their effectiveness.

Organizing of the Drafting Process

Though the NCA deserves commendation for its internal deliberative approach, one of the major challenges faced by the drafters of the Tunisian Constitution was the absence of a clear work plan spelling out the different stages of the process and the approximate time it would take to complete them. Instead of tackling delays through more realistic planning and better communication, the NCA responded to growing public dissatisfaction with the pace of progress by announcing deadlines considered by many to be unrealistic, including some in the assembly itself.

111 This amendment to add a paragraph to Article 54 of the constitution related to the right to vote was introduced by Ayman Zwaghi (former Al-Aridha; then Tayyar Al-Mahabba) during the article-by-article vote but was rejected in plenary session by 89 votes against, 16 abstentions, and 54 votes in favor.

112 See, for example, the National Democratic Institute's "Women's Caucus Fact Sheet." http://old.iknowpolitics.org/files/NDI-Womens%20Caucus%20Fact%20Sheet_0.pdf

Although comparative examples suggest that participatory constitution-making processes are typically lengthy processes, varying between 18 and 24 months, most Tunisian political actors, with the exception of CPR, insisted on a one-year time frame to complete the process.[113] The Aug. 3, 2011, decree calling for the NCA elections clearly stipulated a one-year mandate for the assembly.[114] Solidifying this apparent commitment was a declaration signed Sept. 15, 2011, by several political parties represented in the High Authority for the Achievement of Revolutionary Objectives, which limited the time frame of NCA activities to one year.[115] The OPPP law, adopted by the assembly in December 2011, did not, however, mention any deadlines. The OPPP law had primacy over all other laws, acting as a constitution of sorts, and in fact was referred to as "the little constitution."

The constituent commissions put in place by the NCA began their work in February 2012. Assuming an October deadline, this left the assembly with eight months for the drafting, review, and adoption of the constitution — an ambitious time frame, particularly given the NCA announcement that it would start from a blank slate rather than amend the 1959 constitution. It did not surprise those following the work of the NCA when the NCA's rapporteur general announced on Aug. 13, 2012, that the constitution's adoption would be postponed by several months to an undetermined date between February and April 2013. The announcement was, however, a disappointment to many Tunisian citizens who had anticipated a defined end to the transitional period. Those expectations had been nurtured by numerous political actors who repeatedly mentioned Oct. 23, 2012, as a final point for the constitution-making process, despite evident constraints in meeting this deadline.

The spring 2013 deadline came and went, and with the assassination of Chokri Belaïd in February 2013, external factors began to increasingly impact the already beleaguered constitution-making process, making it even more challenging. In the end, it took an initiative external to the NCA, namely the Quartet-mediated national dialogue, to pave the way for a road map leading to the constitution's successful adoption on Jan. 27, 2014.[116]

Over its two-year observation of the process, The Carter Center repeatedly called on the NCA to put a road map in place to help the assembly structure its work as well as to provide the public with greater transparency on the process and facilitate understanding of its complexity.

The Carter Center recommends that constitution-making bodies establish a detailed work plan and time table for the adoption of the constitution at the very beginning of the process to ensure better planning and progress as well as to provide the public with greater visibility on the way forward.

Inadequacy of the Rules of Procedure

The NCA's Rules of Procedure, adopted in January 2012, were ill-defined and sparse. As each new step of the process unfolded, gaps were revealed in the Rules of Procedure that at times threatened to hamper the process.

The NCA amended the Rules of Procedure four times between March 2013 and January 2014, at times in response to the ambiguity of the procedures around key issues, at others in reaction to internal and external tensions or to address new

113 See example cited in "Constitution-Making and Reform: Options for the Process," published by Interpeace, November 2011. Page 49: "The constitutional convention for the United States took nearly four months; ratification by the states took a further 40 months. (...) The Eritrean process took 38 months from the proclamation of the Constitutional Assembly to ratification of the constitution. The South African process took five years from the beginning of multiparty negotiations to the adoption of the final constitution. The Ugandan commission took from 1989-1993 to prepare a draft constitution, and the final constitution was adopted in 1995." See also Rédaction d'articles ou d'amendements constitutionnels autour du cas tunisien, Democracy Reporting International (DRI), 2012.

114 Decree No. 2011-1086, dated Aug. 3, 2011

115 With the exception of the CPR, the only party to state from the beginning a belief that the constitution-making process would require more than a year

116 The Quartet's initial deadlines were not realistic either but aimed mainly to exert pressure and make political actors aware of the urgency of the situation. The Quartet's road map initially provided that the adoption of the constitution should be completed within four weeks starting from the first session of the national dialogue. The dialogue was officially launched Oct. 5, 2013, meaning that the constitution-making process should have been completed by Nov. 2, 2013. Taking into consideration that the stakeholders were required to complete other tasks—including the selection of the ISIE members, the adoption of the electoral law, and the appointment of a new government—within the same time frame, this deadline appeared untenable from its inception.

political developments.[117] Some of the assembly's changes were successful in addressing lacunas in the text and clarifying the roles and responsibilities of the NCA's various structures. Others only served to complicate the situation further.[118]

An example of the latter is the controversy that gripped the assembly in 2013 over the prerogatives of the drafting committee in relation to those of the constituent commissions. The Rules of Procedure did not clearly delineate the scope and powers of the drafting committee to redraft the various sections of the draft constitution emanating from the commissions. Article 104 of the Rules of Procedure simply directed the committee to "prepare the final draft of the constitution in accordance with the decisions of the plenary," with no further elaboration. The Rules of Procedure, which assigned each of the six constituent commissions a specific topic, also failed to mention transitional provisions and the procedures that should be followed for drafting them.[119]

In March 2013, during the political crisis following the assassination of Chokri Belaïd, the NCA plenary met to amend the Rules of Procedure, in the hope of speeding up the process. The problematic Article 104 concerning the powers of the drafting committee was amended to say that "the [drafting] committee meets to prepare the final version of the draft constitution based on the work of the commissions and with the help of experts." The transitional provisions, however, were not addressed.

The words "based on" were interpreted differently by various stakeholders. The drafting committee significantly changed certain provisions already voted on within the commissions and added a tenth chapter on transitional provisions without referring back to the commissions. The controversy almost derailed the whole process, leading to the formation of the Consensus Commission following the release of the final draft in June 2013 as well as months of subsequent work to arrive at consensus.[120]

This could have been avoided had NCA deputies made sure that the Rules of Procedure were clearer and more specific regarding each NCA body, its role, and the consultative mechanisms it should employ. The Rules of Procedure also proved inadequate, though to a lesser extent, during the adoption phase.[121]

The experience of the NCA with regard to its Rules of Procedure suggests that one of the most critical steps that a constituent body should take is to engage in careful deliberation and extensive consultation prior to the adoption of its Rules of Procedure. Perhaps more than anything, the work invested in this step might have spared the constituent body months of delays and tension. In the case of the NCA, the lack of a work plan or road map for the process compounded the problem, making it difficult to plan ahead and to anticipate next steps and the procedural requirements they would entail. The Rules of Procedure were not only ambiguous but were weakly enforced and not always evenly applied on all members of the assembly and at all stages of the process.[122]

The Carter Center recommends that Tunisia's legislative assembly conduct extensive lessons-learned exercises ahead of drafting its Rules of Procedure. The Center also recommends that the legislative assembly adopt an amendment to the law that created the Provisional Commission to Review the Constitutionality of Draft Laws (Instance Provisoire de Contrôle de la Constitutionalité des Projets de Loi or IPCCPL) in order to give it the mandate to review the new

117 The NCA adopted its Rules of Procedure Jan. 20, 2012 (published in the official gazette, the JORT, on Feb. 14, 2012). The first amendment took place March 15, 2013 (published in the JORT March 22, 2013). Articles 24, 36, 38, 52, 61, 62, 72, 82, 85, 87, 89, 91, 100, 104, 106, 108, 109, 114, and 126 were amended. Article 88 bis was also added. The second amendment of the Rules of Procedure took place Nov. 4, 2013 (published in the JORT Nov. 29, 2013). Articles 36, 79, 106, 126 and 89 were amended. The third amendment took place Nov. 27, 2013 (published in the JORT Dec. 6, 2013). Articles 36 (new) and 79 (new) were amended as well as Article 20. The fourth amendment of the Rules of Procedure took place Jan. 2, 2014 (published in the JORT Jan. 14, 2014). Article 41 was amended and an Article 106 bis added.

118 Refer to the Constitution-Making and Adoption Process section for more information on the various crises around the NCA's Rules of Procedure.

119 Rules of Procedure, Article 64

120 See the Constitution-Making Process section for more information.

121 See the Constitution-Making and Adoption Process section of this report for more detail.

122 See the Constitution-Making and Adoption Process section for more examples.

assembly's first set of Rules of Procedure.[123] Giving the IPCCPL this mandate could help guarantee that the exercise of legislative power is in conformity with the prerequisites of the constitution.

Absenteeism and Accountability

Absenteeism, both in commission meetings and during plenary sessions, was a major issue throughout the constitution-making process, which led to considerable delays in the work of the assembly and deeply affected the NCA's credibility among the Tunisian public. In addition to profoundly affecting the NCA's credibility among the Tunisian public, this absenteeism meant that the subgroups responsible for the practical development of constitutional drafts could not complete their work in a timely fashion, and the entire process was delayed.

For example, more often than not the commissions worked with some of their members absent, even during crucial discussions and votes on sensitive articles of the constitution.[124] Absent members often subsequently protested that important decisions had been made without them and requested a re-examination of the issues. In addition, some commission sessions could not occur at all due to a lack of quorum (an absolute majority of members).This phenomenon could be seen equally in plenary sessions.[125] Not only were there considerable delays in order to reach the absolute majority quorum required for debates, but members frequently left the sessions before their conclusion, thus losing the quorum needed to hold votes. Tellingly, in the entire two-year process, only the vote on the constitution in its entirety succeeded in drawing all deputies.

In theory, these absences should have been sanctioned in accordance with the Rules of Procedure, several articles of which directly address unjustified absences in various commission and subcommittee contexts.[126] The Rules of Procedure did not specifically address absences in the plenary session, but its section governing membership did explicitly forbid NCA members to be absent without notice and actually called for a reduction of their salaries in proportion to their attendance.[127] These provisions, however, were never enforced, contributing to a culture in which widespread absenteeism was the norm.[128]

This practice tarnished the already compromised reputation of the assembly, especially since plenary sessions were broadcast live on television. In an effort to put pressure on members to attend sessions, the NCA introduced in late November 2012 a system of magnetic cards used for vote-tracking, but this measure did not curb the trend of absenteeism. In March 2013, the assembly

123 See Key Issues section for more detail.

124 For instance, when the sensitive question of the political system was debated on July 4, 2012, in the Legislative and Executive Powers Commission, only 15 of 22 commission members were present. Nine were from Ennahdha, whose members voted in favor of a parliamentary regime. Due to the large protest by other NCA members, the issue was later reopened for debate in the commission. As a matter of fact, the question of the political system was not decided upon in the commission, due to its sensitivity, and was later settled by the Consensus Commission.

125 An analysis of 22 plenary votes held from January 2012 to February 2013 published by the civil society organization Al Bawsala showed that, on average, 90 deputies (out of 217) voted during each session, or 41 percent of NCA members. The highest level of participation during a vote was just 44 percent (i.e., 123 deputies). During that time frame, there were three votes in which fewer than 50 NCA members participated.

126 Articles 52–54, detailing the functioning of the commissions, offered means to ensure maximum attendance of members and specified that their presence during commission meetings was obligatory. Article 53 allowed for the disqualification from commission membership of any member absent for more than three consecutive sessions without authorization. Article 125 stated that assembly members had to participate consistently in plenary sessions and in the commissions to which they were assigned. An exception was granted to NCA members who were members of the government or who held other state responsibilities outside the assembly. Those members were automatically excused from participating in NCA meetings and plenaries.

127 Rules of Procedure Section VII, Article 126

128 The president of the NCA, for his part, did not set a particularly positive example for deputies. As of May 2013, Ben Jaâfar chaired 13 plenary sessions; Vice Presidents Mehrzia Laâbidi and Arbi Abid chaired the other 32 and 18, respectively. (See: "Tunisie/ANC: Un fort taux d'absentéisme parmi Ettakatol et l'opposition", May 7, 2013 http://www.gnet.tn/temps-fort/tunisie/anc-un-fort-taux-d-absenteisme-parmi-ettakatol-et-l-opposition/id-menu-325.html) Some of the deputies who were selected to serve as ministers withdrew from the NCA, ceding their seat to the next person on the list. The five remaining members had the lowest rate of participation, ranging from almost 0 to 6 percent. According to figures published on the marsad.tn website in May 2013, Khalil Zaouia (Ettakatol, Minister for Social Affairs) voted only once, while Abdelwahab Maater (CPR, Minister of Professional Training and Employment then Minister of Trade and Handicrafts), Abderrahmane Ladgham (Ettakatol, Minister to the Prime Minister in charge of the cases of financial corruption), Abdellatif Abid (Ettakatol, Minister for Education), and Slim Hamidene (CPR, Minister of Land and State Property) had attendance rates ranging from 3 to 6 percent. Khalil Zaouia eventually resigned from his NCA mandate on June 21, 2013. Apart from these special cases, the participation in votes of individual members varied considerably, ranging from 9 percent to 100 percent attendance (Mohamed Lotfi Ben Mesbah (CPR) and Warda Turki (Ennahdha) respectively: rates from May 2013).

amended the Rules of Procedure to reduce the amount of time after which commissions could start working even without a quorum from one hour to half an hour.[129] The revised Rules of Procedure also mandated the publication of attendance records of plenary and commission sessions within three days of the end of the session, with each absence classified as justified or unjustified.[130] No attendance records were published, however, until October 2013, and none of these measures impacted absenteeism significantly.

Absenteeism, both in commission meetings and during plenary sessions, was a major issue throughout the constitution-making process, which led to considerable delays in the work of the assembly and deeply affected the NCA's credibility among the Tunisian public.

When the NCA bureau did begin to publish attendance results in October of 2013, the data was of questionable use.[131] This move was met with criticism and consternation by civil society. Rather than perceiving these measures as steps to enhance the NCA's credibility and transparency, civil society organizations considered them politically motivated and divisive, especially as several measures coincided with the withdrawal of several opposition members following Brahmi's assassination. In addition, the records included only plenary votes and neglected commission sessions, where absenteeism had a real effect. The records counted justified absences as "present," thereby distorting the reality of any given member's attendance, sometimes dramatically. For example, the minister of trade and handicrafts (Abdelwahab Maâtar, CPR) had an attendance record of 100 percent during the July 2013 general debate on the constitution. According to the analysis of Al-Bawsala, however, he voted in only 43 percent of the sessions and ranked 191 of 217 deputies in terms of actual presence.[132]

Following the resumption of the assembly's work in the fall of 2013 and the compromises reached on many contentious issues by deputies ahead of the adoption phase, NCA members did make more efforts to be present during the article-by-article vote, leading to a general attendance above two-thirds. The level of attendance continued to vary, however.[133] Only two deputies, Habib Khedher and Imen Ben Mohamed (Ennahdha), were present during all of the votes on the constitution in January 2014.[134]

At a crucial time in the transitional period, the problem of chronic absenteeism contributed to concerns about the NCA's accountability and transparency. The lengthy process required a great degree of personal sacrifice on the part of NCA members, and many deputies remained extremely dedicated to the task. But many others fell short of living up to the task. The NCA as an institution failed to show that such actions would not be tolerated and that public officials are accountable for their actions or, in this case, inaction. This likely contributed to the crisis of Tunisian citizens' confidence in post-revolution state institutions.

In public statements and personal conversations, The Carter Center repeatedly urged the NCA to implement sanctions in cases of repeated unjustified absences to create increased accountability of NCA members to their work and the expectations of their constituents. In the future, the Center recommends that the Tunisian legislative body and other constitution-making bodies should ensure that the Rules of Procedure regulate

129 Rules of Procedure, Article 52

130 Rules of Procedure, Article 126

131 The records (in Arabic) can be found at: http://www.anc.tn/site/main/AR/liste_presence.jsp

132 http://www.marsad.tn/fr/deputes/4f4fbcf3bd8cb56157000079. The indicated presence rate is as of June 2014.

133 One of the lowest participation records during a vote was 149 NCA members voting on Article 1 of the constitution. http://www.marsad.tn/fr/vote/52c9ba0712bdaa7f9b90f436. Statistics show that throughout the process Ettakatol's political bloc had the lowest attendance rate during votes and Ennahdha bloc the highest. The latter peaked during the adoption phase at 91.58 percent. During that period, the Al-Wafa bloc had the lowest voting rate, with only 63.72 percent of its members present.

134 http://www.marsad.tn/classement/constitution

attendance and participation in detail and that the rules are implemented and enforced in a rigorous and transparent manner.

The Role of Experts and the National Constituent Assembly's Legal Advisers

The NCA's openness to external input and advice was a particular strength of the Tunisian process. However, unlike constitution-making processes in other countries, the NCA never formalized the role of experts, preferring to draw on them on an ad hoc basis.[135]

The Rules of Procedure permitted constituent commissions (and the drafting committee by extension) to consult "any person whose advice might be pertinent."[136] This included not only national and international experts and academics but also government representatives and statesmen from Bourguiba's era. Following the launch of the constituent commissions' work in February 2012, all the commissions organized extensive hearings with academics and civil society representatives, civil servants, and others. During later stages of the process, the drafting committee invited national experts to provide advice on the content of the final draft of the constitution in the lead-up to its publication on June 1, 2013.

The NCA bureau selected the experts on the basis of proposals made by the presidents of the commissions. However some, including renowned constitutional law experts, declined to take part in the review, expressing concerns regarding the ambiguity in their scope of work and the fact that certain experts were not on the list.[137]

In late December 2013, just prior to the article-by-article vote on the constitution, the NCA called on experts once again, this time to advise the Consensus Commission. The commission was particularly struggling with the complex transitional provisions that the commission had agreed in July to revise in full. Experts agreed to advise the commission. Due to sensitivities between those selected, they split into two distinct groups, which were heard separately by the commission. They also submitted written reports, the content of which was never released.

The Carter Center recommends that constitution-making bodies clarify the roles played by experts in the Rules of Procedure to ensure greater clarity and maximize their impact. The Center also suggests calling on linguist experts in addition to legal expertise to help ensure clarity in the initial drafting process.

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The NCA's "in-house experts," the *conseillers* or legal advisers, also faced some challenges. The assembly's Rules of Procedure were silent on the role of the advisers in the process. Rather, their work was organized by the secretariat of the NCA, the assembly's administrative body. Most commissions, constituent and otherwise, benefited from the support of at least two advisers. Their role varied considerably from one commission to the next and included legal research, drafting, note-taking, recordkeeping, and secretarial support. Since the role of the advisers was not clearly defined, the extent to which each commission used them depended on the commission members as well as the perceived capacity of the adviser. Some advisers, for example those assigned to the Consensus Commission, were taken very seriously by their commissions, while others were not given as much opportunity to play an advisory role or

135 The role of experts was, for instance, formalized in the Kenyan constitution-making process.

136 Rules of Procedure, Article 59

137 Kaïs Saïd was the first expert to decline. Iyadh Ben Achour, Chafik Sarsar, and Hafidha Chekir declined after not receiving an answer from the NCA to a letter they sent to its president in which they sought clarification about the scope of their role. See the Constitution-Making Process section of this report for more detail.

were reduced to a largely secretarial support function. This was partly due to logistical and resource limitations in the assembly as well as a certain administrative disorganization.

The Carter Center recommends that the legislative assembly strengthen its secretariat and, in particular, extend stronger secretarial support to the commissions. Among other things, this would allow the legal advisers to focus on their primary mandate: namely, research and drafting.

Absence of a Judicial Review Mechanism

The constitutional council that had existed for many years under Ben Ali was disbanded by the OPPP decree law immediately following the revolution due to its notorious reputation as a tool of the president's regime.

During the three tumultuous years following the revolution, no mechanism existed to review the constitutionality of laws or the constituent and legislative processes. The Administrative Tribunal stepped into the void. Under Tunisian law, the tribunal is responsible for reviewing administrative acts and arbitrating any litigious process in which the state is a party. As one of the few institutions that commanded a level of respect at the time of the revolution, the tribunal took an active and at times controversial stance on issues closely tied to the transition.

While the interim president of the republic, Foued Mebazaâ, suspended the 1959 constitution in March 2011, the Judicial Appeal Court issued a decision in 2013 finding that the rights and freedoms guaranteed in the constitution were not abrogated by its suspension (Decision No. 43429 of the Judicial Appeal Court, Feb. 5, 2013). The court later played a role in reviewing the administrative functioning of the NCA, scrapping raises for NCA members and twice halting the selection process of the members of the elections management body.[138] The Administrative Tribunal also refused to quash the unilateral decision of Ben Jaâfar to suspend the activities of the NCA on Aug. 6, 2013, a deeply polarizing issue in the assembly.[139]

Throughout the constitution-making process, however, the tribunal maintained that the constituent process was beyond its jurisdiction; for example, refusing to examine a petition by NCA members against the publication of the final draft of the constitution in June 2013.[140] Steering clear of the process, however, did not mean that the tribunal's actions did not impact the work of the NCA. Those who followed the constitution-making process closely noted that political actors' shifting perceptions regarding the tribunal's neutrality led the drafters of the text to make changes to the constitution's transitional provisions in the final text.

The final draft of the constitution had foreseen the establishment of a constitutional court three years following the entry into force of the constitution. In the interim, the draft stipulated that the Administrative Tribunal would be assigned the role of arbiter on constitutional matters. This measure was not immediately controversial. By the time the Consensus Commission reopened the discussion on transitional provisions in December 2013, however, a crisis of confidence between segments of the assembly and the tribunal had taken root. The tribunal's decisions in May and September 2013 to cancel the NCA's selection of members of the elections management body had generated significant tensions, which were aggravated following the tribunal's refusal to review Ben Jaâfar's decision to suspend the NCA's activities. Ennahdha, CPR, and others categorically refused

138 A petition was filed by Néji Baccouche, professor of public law and finance expert, in April 2012 to cancel a decision by the NCA presidency to augment NCA members' salaries. The Administrative Tribunal suspended the raise in October 2012.

139 A petition was filed by Abderraouf Ayadi and other deputies on Aug. 30 to stop execution of the NCA president's decision to suspend the activities of the assembly. The motion was dismissed by the Administrative Tribunal on Sept. 27, 2013. Article 3 of the organic law on the administrative court grants it jurisdiction to adjudicate on appeals against decisions of an administrative nature only. The Administrative Tribunal held that the decision of the NCA president to suspend the work of the assembly until the start of a serious national dialogue cannot be detached from constituent and legislative matters, and the powers devolved to him in the provisional organization of public authorities law (OPPP), which were beyond the jurisdiction of the tribunal.

140 Decision of the Administrative Tribunal, dated June 26, 2013

to give the tribunal the power of judicial review. The commission finally reached a compromise to establish a provisional constitutional commission to review draft laws, pending the establishment of the Constitutional Court. The Consensus Commission designated the president of the Administrative Tribunal as one of six members of the future Provisional Commission to Review the Constitutionality of Draft Laws (or the IPCCPL). The provisional commission was also given a limited mandate to examine laws a priori only. This restricted authority reflects the distrust of the Administrative Tribunal among some assembly members.[141]

In countries undergoing similar processes, The Carter Center recommends that in order to ensure that acts by the interim legislative body do not violate existing domestic law or international obligations, a judicial review mechanism should be defined in advance.

141 The president of the Administrative Tribunal was replaced several times, most recently just before the president became a member of the IPCCPL.

Transparency, Accessibility, and Public Participation

A transparent constitution-making process is one where the public is aware of what is occurring at each stage of the process and can access information easily. Such efforts increase the accountability of the body entrusted with this task.[142] To make the constitution-making process participatory, citizens must not only be informed about the process and choices at stake but should also be given a genuine opportunity to express their views directly to decision-makers involved in the drafting and debating of the constitution. When citizens are confident that their voices have been heard, the Constituent Assembly also gains in legitimacy.

While access to media representatives was generally granted without restriction, civil society organizations were rarely allowed to attend, thus hindering their effective access to the debates. Very early on in the process, this issue created controversy among civil society members and members of the NCA.

Understanding and support for the principle of transparency by NCA members evolved significantly throughout the constitution-making process. Despite a suggested commitment to transparency and accessibility in the provisions of the Rules of Procedure and by some members, the NCA as an institution appeared reluctant to publish crucial documents emanating from the NCA and to allow civil society to play a full role in the process. This initial reluctance and lack of political will were exacerbated by the limited logistical and human resources at the assembly, which contributed to the nontransparency of many aspects of the process.

Over its two-year observation of the process, The Carter Center repeatedly called on the NCA—through its statements but also during meetings with individual members of the assembly—to work in a more transparent and accountable manner, including by allowing better access to the debates of the NCA, by releasing official documents and information, and by improving the communication of the institution with the media. It also urged the NCA to allow for more active participation of all stakeholders in the constitution-making process.

Eventually, lobbying by different civil society groups led to increased transparency and a greater acceptance of civil society's right to play a role in the process. By the end of the process, the trend was almost reversed, with one civil society organization in particular filling the vacuum created by the NCA's dearth of official publications. Al Bawsala, which "live tweeted" from commissions and plenary sessions and published the details of the votes by deputies on its website, became an important resource for the assembly, notably

142 The U.N. Human Rights Committee recommends that constitutional reform should be a "transparent process and on a wide participatory basis." (See Concluding Observations to the 2005 State Report on Bosnia and Herzegovina, CCPR/C/BIH/CO/1, para. 8.d.)

during the adoption process of the constitution, when the organization was systematically consulted by NCA members to know the positions taken by other NCA members during the article-by-article vote.

Transparency and Accessibility of the Process

Tunisia's authoritarian legacy meant that transparency in government was a new concept at the time of the revolution. The affirmation in the NCA's Rules of Procedure that commission meetings and plenary sessions would be public suggested that NCA members acknowledged transparency as an important principle.[143] Around 30 NCA members also joined the international civil society movement, OpenGov, which holds that citizens have the right to access documents and proceedings of official institutions in order to allow for effective public oversight.[144]

Despite this apparent commitment, several NCA members, including NCA President Ben Jaâfar and other OpenGov members, publically expressed reservations regarding full transparency, arguing that Tunisians were not ready for it.[145] Other members were reluctant to allow civil society to play its monitoring role.[146] This skepticism, coupled with a lack of common and agreed-upon working methodology, meant that the provisions of the Rules of Procedure ensuring access to commission meetings and plenary sessions were interpreted inconsistently in practice—most restrictively when it came to civil society organizations—thus eroding the principle of transparency.

Access to the Debates of the National Constituent Assembly Commission Meetings and Plenary Sessions

The Rules of Procedure stated that commission meetings were public.[147] Meetings behind closed doors were the exception to the principle and could only be held following the request of the majority of commission members. While access to media representatives was generally granted without restriction, civil society organizations were rarely allowed to attend, thus hindering their effective access to the debates. Very early on in the process, this issue created controversy among civil society members and members of the NCA. Some presidents of commissions deemed that the spirit of the Rules of Procedure should always be respected and allowed civil society representatives to attend their sessions. Others refused referring to an internal note produced by the NCA and to a

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Some participants, including these members of the Al Bawsala team, "live tweeted" during the article-by-article vote on the constitution. The organization published attendance rates and the details of the votes by deputies on its website.

143 The Rules of Procedure foresaw that commission meetings as well as plenary sessions were public, Articles 54 and 76, respectively.

144 Figure published by OpenGov.tn in June 2012. See www.opengov.tn/wp-content/uploads/Dossier_Presse_OgTn.pdf

145 For instance, Lobna Jribi (Ettakatol) said during a TV interview in July 2012 that transparency should be applied gradually in Tunisia as people are not ready for it (citing the example of the salaries of members of the NCA). The same month, NCA President Ben Jaâfar made similar statements, notably during a meeting with members of the OpenGov movement in Paris, where he confided, "Between us, I tell you, if there were no cameras during the plenary sessions, the constitution would have probably already been adopted." After being criticized by the meeting participants, he stated that the lack of transparency was not a question of lack of political will but rather due to the fact that the NCA was lacking human, financial, and technical resources to transcript the verbatim record and track the votes and that these issues should be resolved in September 2012. The video can be seen at www.facebook.com/mo9awma/posts/124197827722896. Samia Abou (CPR) allegedly said that many citizens could show a "superficial reaction" regarding reports on attendance rates by deputies. See www.mag14.com/national/40-politique/1654-al-bawsala-tant-mieux-si-nos-chiffres-derangent-.html

146 NCA member Salah Chouaïeb (Ettakatol), for instance, requested the dissolution of the observatory Al Bawsala after it released a report in February 2013 denouncing the low attendance rate of deputies during votes in plenary sessions. See "Le rendement de l'ANC à la loupe" La Presse, March 2013 cited at http://fr.allafrica.com/stories/201303060871.html

147 Rules of Procedure, Article 54

debate held during a plenary session of the NCA on Feb. 28, 2012, where the general rapporteur of the constitution explained that the meaning of "public" in Article 54 referred only to the media.[148] Despite several inquiries, The Carter Center could not acquire any written record of this restrictive interpretation of Article 54 and cannot confirm its existence. Meetings of the drafting committee and of the Consensus Commission were always held behind closed doors.

The Rules of Procedures foresaw that NCA plenary sessions were public as well.[149] Even if the implementation of this rule was less restrictive than that for commission meetings, citizens and other interested parties who tried to access plenary sessions also faced repeated impediments. While the Rules of Procedure stipulated that the NCA bureau should establish a procedure regarding public access to plenary sessions, this was only done for the last phase of the process, the article-by-article vote on the constitution. Understanding of the commitment to allow public access to plenary sessions varied according to the interlocutor and from one session to the next. Deputies often expressed fear of receiving too many requests to observe commission and plenary sessions — thereby overwhelming the assembly — to explain the NCA's failure to establish official procedures granting public access to the proceedings.

This concern should not, however, have been used as a justification for inaction. Had commitment to the principle of transparency and public participation been strong, the NCA would have reflected on the best means to manage and regulate the attendance of civil society organizations. Access to the NCA often depended on whether civil society organizations knew one or more NCA members and on the good will of deputies. This practice made it difficult for some civil society organizations that had criticized the institution to have access to it. Individuals or organizations with no connections at the NCA but with an interest in attending plenary sessions found it difficult to do so.

The NCA eventually became more open, largely as the result of continued efforts by the civil society organization Al Bawsala. Actively lobbying for increased access to the work of the assembly, Al Bawsala found a loophole in the NCA's interpretation of the Rules of Procedure, which allowed journalists to attend commission meetings provided they presented a press card. The organization's staff eventually succeeded in attending commission and plenary sessions by producing press cards. In the sessions they attended, Al Bawsala representatives started "live tweeting" the interventions made by NCA members (translated into French) first from their personal accounts and then from April 2012 on, from the organization's account.[150] This real-time dissemination of the discussions helped citizens, journalists, and international observers to follow the debates even when not physically present in the assembly. More importantly, Al Bawsala challenged the culture of nontransparency of the NCA and contributed to improve the right of citizens to be informed and for civil society to play a role in holding elected officials accountable.

In contrast to the drafting process, the NCA made significant efforts to facilitate civil society's access to the vote during the adoption phase. Several weeks before the start of the article-by-article vote, the NCA invited interested civil society observers to apply for accreditation on its website. According to the NCA, a total of 353 organizations registered on the site, and all were accredited. The procedure put in place for the adoption phase was effective and likely could have been implemented much earlier in the process.

Tunisia's experience and comparative experiences globally suggest that observation of the constitution-making process by civil society organizations can have an impact that goes beyond the right of the public to access information. Direct observation of the constituent body can strengthen

148 During this plenary session, the general rapporteur recalled the preparatory work for the adoption of the Rules of Procedure. He mentioned that while some deputies advocated for the right of civil society organizations to observe the commissions' work, most deputies considered that commission sessions would only be "public" for the media. See footage of the plenary session of that day at www.anc.tn/site/main/AR/docs/vid_debat.jsp?id=28022012s&t=s (in Arabic, starting at minute 101).

149 Rules of Procedure, Article 76.2

150 Al Bawsala's Twitter account: https://twitter.com/AlBawsalaTN and Facebook page https://www.facebook.com/AlBawsala

civil society's ability to elaborate informed analysis, positioning itself to contribute more meaningfully to the constitution-making process both through advocacy and awareness-raising.[151]

The Carter Center recommends that in countries undergoing similar processes, debates of the body entrusted with constitution-making should be fully open to the public and that formal and objective procedures be put in place to grant access and observer status to media, civil society organizations, and interested citizens.

Tunisia's legislative body should build upon the positive evolution of the NCA with regard to civil society access to the debates and fully commit itself to the principle of transparency. The Carter Center recommends that the assembly establish an unequivocal right of public access to commission meetings as well as plenary sessions in its Rules of Procedure. The institution should also establish formal and fair criteria and procedures to grant access and observer status to civil society organizations and interested citizens.

Access to Official Documents and Information

Verbatim records of meetings (*procès verbaux*) and reports about the activities of constituent bodies are a valuable source of information for interested citizens, highlighting issues debated during the sessions. The NCA's initial Rules of Procedure did not require constituent commissions to publish verbatim records of meetings.[152] The Rules of Procedure only instructed commissions to post reports describing their activities on the NCA's website.[153] As no deadline was initially foreseen for the release of such reports, few such documents were made public in practice. However, the assembly did publish some documents—notably the reports prepared by the constituent commissions on their respective chapters and overall methodology—at different moments in spring 2013.[154] The General Report on the Constitution Project, issued by the drafting committee, was released on June 14, 2013.[155]

Starting in spring 2012, some assembly members began publishing meeting notes and official records prepared by the rapporteurs of the constituent commissions on their personal Facebook pages or blogs, or they gave them to Al Bawsala to be posted on its website.

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The Carter Center's constitution-monitoring team observed the article-by-article vote.

Despite this practice, many members were still reluctant to have the assembly publish official minutes of working sessions. Advocating for increased transparency, the organization Al Bawsala issued a petition in June 2012 calling for the publication of all official documents by the NCA. While the petition garnered more than 50 signatures by NCA members and 488 citizens in total, it did not yield any results. On Aug. 29, 2012, Al Bawsala, together with two other activist groups, the Nawaat media association as well as citizens of the Tunisian collective OpenGov TN, lodged a formal complaint at the Administrative Tribunal against the NCA for violating the provisions of the decree law related to access by citizens to the administrative records of public bodies.[156]

The lawsuit specifically charged the assembly with failing to publish the results of votes,

151 Guidance Note of the Secretary-General, United Nations Assistance to Constitution-Making Processes, para. 4

152 Rules of Procedure, Article 61

153 Rules of Procedure, Article 62

154 The reports (in Arabic) can be found at http//www.anc.tn/site/main/AR/docs/rapport_final/liste_rapports.jsp#.

155 The report (in Arabic) can be found at http://www.anc.tn/site/main/AR/docs/rapport_general_const.pdf.

156 Decree Law 41 dated May 26, 2011

deputies' attendance lists, and the verbatim records of the meetings. As of January 2015, the court had not rendered its decision on the matter. In addition to the legal complaint, the civil society coalition also highlighted during press interviews the need for the NCA to dedicate more staff to ensure that verbatim records be prepared in timely fashion and to improve the release of information to the public.

The right of access to information is essential to guarantee transparency and to permit the active participation of all stakeholders in the constitution-making process. This right implies that the authorities should undertake all possible measures to guarantee simple, rapid, effective, and practical access to all information of general interest.

Following the filing of the complaint, the NCA president announced that the NCA would publish attendance lists as well as verbatim records of the commissions' meetings. The promise remained unfulfilled, even when the Rules of Procedure were amended in March 2013 to stipulate that the NCA had one month to publish commission transcripts after they were signed by the relevant commission president and rapporteur.[157] Despite this legal obligation, the NCA never published any verbatim records. The revised Rules of Procedure also mandated the NCA bureau to publish attendance records of plenary and commission sessions within three days of the end of the session and to specify whether the absences were justified.[158] Attendance records were not published, however, until the fall of 2013 and then only contained a monthly average of participation by each deputy in votes in plenary sessions, without specifying the exact dates of attendance. Attendance records of commission meetings were never published.[159]

Furthermore, the NCA never revealed how assembly members voted, despite having the means to do so. The assembly had a computerized system for voting that created a visual map of the assigned seats with colors to show the details of the votes. Votes in favor were marked in green, those against in red, and those abstaining in yellow. The map did not indicate the names of the deputies. The system flashed the voting map on the screen of the plenary hall for a few seconds immediately following the vote, then switched to the vote count and showed the aggregate result.

From July 2012 on, Al Bawsala began publishing the details of every vote at the assembly, including the article-by-article vote on the constitution.[160] In order to do so, its members photographed the visual map. They then layered that photo over the NCA's seating map, which showed the deputies' assigned seats. This allowed the organization to publish a full report on who voted, and how. The record of votes was useful to observers and journalists, but it was also used by NCA members directly. Deputies frequently used Al Bawsala's website themselves to know how their colleagues had voted, especially during the article-by-article vote.[161]

The right of access to information is essential to guarantee transparency and to permit the active participation of all stakeholders in the constitution-making process.[162] This right implies that the authorities should undertake all possible measures to guarantee simple, rapid, effective, and practical access to all information of general interest.[163] The Center welcomes the provision in the new constitution introducing an obligation for the state to guarantee the right to public information

157 Rules of Procedure, Article 61

158 Rules of Procedure, Article 126

159 For a more detailed analysis of absenteeism and the lack of publication of attendance records, see the Recurring Challenges section.

160 See http://www.marsad.tn/fr/votes and http://www.marsad.tn/fr/vote/52e598b212bdaa593ad566f2.

161 See also the editorial published by Noah Feldman, professor of constitutional and international law at Harvard, in the Bloomberg View about Al Bawsala's action. http://www.bloombergview.com/articles/2014-01-10/tunisia-tweets-its-way-to-democracy

162 ICCPR, Article 19 (2)

163 Human Rights Committee, General Comment No. 34, Article 19, Freedoms of Opinion and Expression, para.19

and the right to access information without any limitation or restriction—other than the general limitations established for almost all the rights and freedoms—and calls upon the government to implement this provision in practice.[164]

The right to access information is a fundamental human right as defined by Article 19 of the Universal Declaration of Human Rights and is a critical link to other rights cited in the constitution. Implementation of the right to access public information requires officials to respond to citizens' requests, compile data from different sources, and redact parts of documents to protect sensitive information. The state should also address legal challenges arising from unfulfilled or denied requests. Comparative experiences from other countries suggests that the implementation of this right can sometimes create considerable financial burdens for citizens. Therefore, in order for the right to be meaningful, this burden should be shared between citizens and the state.

The Center recommends that the legislative assembly as well as constitution-making bodies elsewhere in the world publish and disseminate in a timely manner all official documents—minutes, reports, decisions, submissions, attendance records, and details of the votes—including posting them on the institution's official website.

Media Access, Outreach, and Communication

Outreach and communication campaigns, when well thought-out, can play a role in raising public awareness of the process and understanding of the constitution-making body's mandate, thus increasing the legitimacy of both. Access by the media is equally important to ensure a critical assessment of the institution's work.

Media Coverage and Relationship With the National Constituent Assembly

Media access to and coverage of the NCA's work was one of the more positive aspects of the process and helped ensure that citizens were informed regarding key issues debated at the assembly; as well, the NCA's commission meetings and its plenary sessions were open to the media. The latter were also broadcast live on television.[165]

The relationship between the NCA and journalists was often tense. As the NCA lacked a dedicated communications department, deputies initially relied heavily on the media to report on their work. Many NCA members were, however, dissatisfied with media coverage, which they found biased and unbalanced. The media, for its part, considered itself a watchdog, closely monitoring and reporting on the NCA's shortcomings and failures, though it did not always do so accurately or in a balanced manner. In part, this reflected the politicized media landscape in Tunisia, where audiovisual media in particular tend to be affiliated, or are at least perceived to be affiliated, with one political group or another.

Following the revolution, the working conditions of journalists remained difficult, and the freedom afforded them was still limited. Many expressed concerns that the state still limited their freedom of expression. Judicial authorities prosecuted numerous journalists and bloggers, among others, for peaceful expression under penal code provisions on defamation, offenses against state agents, and harming public order, all of which can result in prison terms.[166] Security of journalists was also an issue: Harassment of and attacks on journalists happened at various occasions during the two years of the constitution-making process. The attacks on journalists covering the demonstrations of the Leagues for the Protection of the Revolution in December 2012 and June 2013 in front of the NCA building—and the limited reaction of verbal condemnation it provoked from the NCA—drew protests by journalists working in

164 Article 32 of the adopted constitution

165 This positive initiative was sometimes undermined by practical problems. For instance, live broadcasting was regularly interrupted by news bulletins or redirected to another channel (TTN2, which was not as widely accessible as Wataniya 2 and not accessible at all from abroad). Such interruptions and redirection did not happen during the article-by-article vote.

166 See, for instance, "Tunisia: Spate of Prosecutions for Free Speech, Journalists, Union Leader Prosecuted for Criticizing Officials," HRW, Sept. 13, 2013. http://www.hrw.org/news/2013/09/13/tunisia-spate-prosecutions-free-speech, and the open letter by Reporters Without Borders to the French president of the republic before his visit to Tunisia in July 2013. http://fr.rsf.org/IMG/pdf/130701_tunisie_lettre_hollande.pdf

Marion Volkmann

Human Rights Watch director Amna Guellali and National Constituent Assembly member Baddredine Abdelkafi of Ennahdha participate in a televised debate during the vote on the constitution.

the assembly, who felt that they were not provided with sufficient security to do their work.[167]

The NCA's relations with the media somewhat improved over time, with public as well as private media outlets regularly covering commission work and plenary sessions. The NCA improved its communication with the media during the final voting and adoption phase. NCA members readily answered questions from journalists and participated in talk shows and debates on the constitution. The media's work was facilitated through the creation of a dedicated central space at the assembly for use as a studio during the article-by-article vote. The media played an important role in broadcasting the process to the Tunisian public. Public broadcasting channel Wataniya 2, for example, dedicated its programming throughout the voting process to live broadcast of plenary sessions and related interviews with various deputies and civil society members.

During the first days of the article-by-article vote, journalists had difficulty reaching deputies, as media and civil society members were prevented from accessing the ground floor. Despite the dedicated "studio space" on the first floor, the ground floor was an important space, as it contained the entrance and exit to the plenary hall where deputies tended to congregate. The decision to deny

167 This was not the first time that journalists had complained about being attacked by LPR members. The same had occurred on Dec. 8, 2012, during a demonstration by LPR members calling for reform of the media and "protection of the revolution." On March 3, 2014, journalists protested the police's harsh treatment of them while covering a rally by supporters of Imed Dghij, an LPR leader.

access to the floor was made by the NCA's bureau, which hoped to reduce pressure on deputies at a sensitive moment of the process. Journalists protested this and called on the NCA president to lift the restriction.[168] The NCA bureau conceded as far as media were concerned but continued to deny access to the ground floor to civil society organization representatives.

In addition to broadcasting the plenary sessions, national television also broadcast interviews with NCA members that were often followed by debates on public as well as private television and radio channels. This access allowed a wide range of political party members as well as political and legal experts and civil society activists to participate in the discussions. Not every political group in the assembly felt included: NCA members belonging to the former Al-Aridha Al-Chaâbia, now Tayyar Al-Mahaba, complained that they were not invited to any of those debates, and as they had on many occasions in the two years prior, spoke of a "media blackout" against their party.[169]

Outreach and Communication

The fact that the media were granted unrestricted access to the NCA was often used as justification by NCA leaders for not conducting its own communications and outreach to the public. This attitude indicates a misunderstanding regarding the function of the media. In a well-functioning democracy, the media does not supplant the state's obligation to guarantee the right of citizens to information. Strong communication and outreach to citizens would have not only contributed to helping the NCA fulfill this obligation but also would have helped allay fears of assembly members regarding the media's role in the process. By and large, NCA members had little trust in the media's portrayal of the assembly's work, and many if not most seemed to feel that media coverage of events and discussions taking place at the assembly was unfair and oftentimes biased.

Unfortunately, the assembly never developed an adequate communication strategy or put in place public outreach campaigns to inform citizens about its work. One of the few steps that the NCA took in this regard was to assign NCA member Karima Souid the role of deputy to the president of the NCA in charge of information, communication, and relations with the media.[170] Beyond this, however, few means were devoted to communication, and the NCA did not set up a communications department or even establish a team to focus on this aspect. Alone, Souid could not fill the need, and the situation became more dire when she left the Ettakatol party and openly, vehemently, and repeatedly criticized the NCA president to the media. Far from improving the image of the NCA, this damaged it even more, since it created confusion as to what represented her personal opinion as opposed to that of the NCA as an institution.

Communication by other members of the NCA with the media, notably senior NCA members, was irregular, informal, uncoordinated, and insufficient. The presidency did not organize regular press conferences and did not often issue press communiqués. Subject matters of central importance, such as delays in the process, were often communicated in passing to the media.

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168 See the communiqué released by the Tunis Center for Press Freedom on Jan. 4, 2014, "De nouveaux obstacles devant les journalistes à l'Assemblée nationale constituante": http://ctlj.org/index.php/fr/communiques/222-01

169 Tayyar Al-Mahaba boycotted the article-by-article vote, protesting among other things the lack of reference to Sharia in the constitution. It should be noted that the founder of Al-Aridha/Tayyar Al-Mahaba, Al Hashmi Al Hamdi, himself owns a television channel.

170 Karima Souid, elected on an Ettakatol list, joined the opposition party Al-Massar on March 23, 2013.

For instance, although in March 2013 the NCA announced the date of April 27 as the deadline for completing the final draft of the constitution—and thus the start of the article-by-article vote by the plenary in May—the postponement of this deadline was not communicated to the public through a press conference or a communiqué. It was during a meeting with French senators on May 6 that Ben Jaâfar announced that the vote by the plenary would not start before June.[171]

The NCA's engagement with social media, though commendable, came very late in the process and exacerbated the impression of "missed communication opportunities." Using social media tools from the outset may have rendered the work of the assembly less opaque and given a better sense of the assembly's progress.

The official NCA website was similarly unsuccessful in providing citizens and observers of the process with sufficient information. Created early on in the process, the website was supposed to inform citizens about commission meeting schedules and topics to be discussed at plenary sessions and to provide a platform for the NCA to publish verbatim records of commission reports, attendance records, and video recordings of plenary sessions. However, the NCA website was not a reliable source of information. It often contained inaccurate schedules, and information tended to be posted after considerable delay or never posted at all. Verbatim records of commission meetings and attendance records were published only toward the end of the process and inconsistently, and video recordings of plenary sessions were not posted on a regular basis. In some instances, documents that had been published were later removed from the website without explanation; for instance, the document summarizing the amendments proposed by deputies during the adoption phase. Instead of addressing the problem on an institutional level, many NCA members, most notably Souid, compensated for this by publishing information on their private Facebook pages or Twitter accounts. It was only two years into the process, in November 2013, that the NCA appointed an official spokesman, Hatem Klaii (former Al-Aridha, later Al-Amen), a member of the NCA bureau and deputy to the NCA president.

Putting NCA members in charge of communication and of relations with the media, including as official spokesmen, was arguably a problematic choice from the outset. Such positions imply a responsibility to put a positive spin on the actions of the assembly and to highlight its achievements as well as to represent the "leadership line" regardless of the individual or party position of the deputy assigned to the task. Assigning a deputy to this position, rather than an independent professional, may have put the selected deputy in a difficult situation when communicating with the media. Given a deputy's partisan affiliation or at least political orientation, she or he could be tempted to use the position as a tool to further a specific political agenda to the detriment of the credibility of the institution as a whole. In addition, the portfolio that encompasses communication and relations with the media is often time-consuming, requiring serious engagement on the part of those assigned it. The time commitment was difficult for deputies to make without neglecting their core mandate, namely attending commission meetings and plenary sessions and participating actively in the constituent and legislative affairs of the assembly, particularly without any other form of support.

In November 2013, the NCA launched a Facebook page and Twitter account aimed at informing citizens about the adoption process and the NCA's work.[172] Though coming very late in the process, the social media presence was positive,

171 "MBJ la Constitution sera présentée au vote en plénières à partir de juin2013." www.tuniscope.com/index.php/article/25032/actualites/politique/mbj-juin-585523#.UYodHqJ96KF

172 Facebook https://www.facebook.com/tunisie.anc and Twitter https://twitter.com/tunisieanc

especially since many Tunisians use this kind of media, especially Facebook, as a primary source of information.[173] While it was created in May 2013, the Facebook page was used as a communication tool by the NCA only from January 2014 onward, starting with the adoption phase of the constitution. The page proved useful since the information published on it could not be found elsewhere and since it dealt with practical aspects of the vote, such as plenary session or Consensus Commission schedules, amendments presented by the Consensus Commission or groups of deputies, and articles voted on during the day's sessions.

From that moment, the Facebook page supplanted the NCA's website as the official source of information on the NCA, since updates on the former were more comprehensive, timely, and up-to-date. The Facebook page also featured many photos illustrating the activity of the assembly and offered an insight into the work of deputies.

The NCA's engagement with social media, though commendable, came very late in the process and exacerbated the impression of "missed communication opportunities." Using social media tools from the outset may have rendered the work of the assembly less opaque and given a better sense of the assembly's progress. Furthermore, social media, if used effectively by the legislative assembly, should not just be a one-way street of information but rather should serve as a place for citizens to be informed as well to express feelings and views, pose questions, and engage in dialogue with the institution.

While The Carter Center acknowledges that effective communication strategies require expertise and means, it notes that the issue was not considered a priority and did not garner the attention it deserved. Actions such as regular press communiqués and press conferences with the media at the assembly, during which NCA officials could answer journalists' questions, do not necessarily require significant resources. In addition, the NCA could have supported the work of credible civil society organizations to conduct outreach to citizens, particularly in regions outside Tunis. Finally, the Center notes that many donors, institutions, and experts offered to support the NCA in this endeavor, both technically and financially. In several instances, the NCA failed to follow up concretely on these offers.

The Center encourages constitution-making bodies in other countries to invest time and resources to implement comprehensive and ongoing information campaigns throughout the process and to use a range of media to reach citizens. The Center also encourages these bodies to reflect on how best to support civil society in playing an effective role in outreach and awareness-raising. Further, media representatives should provide substantive and balanced professional coverage of the process to help bridge the gap between elected officials and their constituents. The international community for its part should continue to support—in a coordinated, responsive, and timely manner—the capacity of media, civil society, and constituent and legislative bodies to conduct outreach and communication.

Future constituent assemblies, as well as Tunisia's legislative assembly, should create communications departments and devote sufficient resources to devising and implementing communication strategies and to liaising with the media, including developing a comprehensive website and social media presence. The Carter Center also suggests hiring competent, experienced communications professionals to interact with the media and to act as a spokesman for the institution.

Public Consultations and Citizen Involvement in the Process

A participatory constitution-making process is one in which citizens are informed about the process and choices at stake and are given a genuine opportunity throughout to directly express their views to decision makers involved in the drafting and debating of the constitution. Lessons learned from countries undergoing constitution-making processes as part of a democratic transition, both

173 In Tunisia, the number of Internet users in 2012 was estimated at 4.2 million, with nearly 3.2 million Facebook accounts. See http://www.internetworldstats.com/stats1.htm.

post-conflict and otherwise, highlight the benefits of public consultations in terms of increased legitimacy, added relevance, and stronger acceptance of the new constitutional order.[174] International law supports these examples, notably the International Covenant on Civil and Political Rights (ICCPR), which establishes obligations for participation in public affairs and which gives citizens an individual right to participate in public affairs surrounding constitution making. Notably, according to a U.N. General Assembly declaration, participation in the conduct of public affairs includes the right of citizens to submit proposals to state institutions "for improving their functioning and [to] draw attention to any aspect of their work that may hinder or impede the promotion, protection, and realization of human rights and fundamental freedoms."[175]

The NCA's main initiative to consult citizens was the national public consultations, which were held from December 2012 to February 2013.

In Tunisia, there was a will to involve citizens in the process. However, lack of planning, methodology, and — to a certain extent — understanding of what public participation meant resulted in limited opportunities for citizens' involvement. Those that did exist were often poorly communicated to the public.

When drafting the Rules of Procedure, the deputies allocated one week per month for NCA members to reach out directly to citizens (Article 79). However, these "outreach weeks" or "week of the regions" never materialized. There was no administrative, financial, or logistical support provided by the NCA for outreach activities, which were left to the initiative and individual commitment of the deputies. In the first months of the constitution-making process, some members appeared very committed to report to their constituencies and were able to mobilize on their own, while others relied on their political party structures to prepare meetings. But without any formal institutional support, these initiatives remained rare, and citizens began expressing skepticism toward the NCA, whose work was neither well-known nor well-understood. Ironically, instead of addressing complaints by increasing outreach, the week devoted to this task was canceled altogether, partly due to a sense of urgency and partly due to the NCA leadership's feeling that it could be perceived as the NCA taking time off despite the significant delays.

The Carter Center regrets that the only mechanism foreseen to encourage regular contact and exchange between deputies with their constituencies was not better designed and finally dropped altogether.

Early on, the NCA bureau appointed Baddredine Abdelkafi (Ennahdha) as deputy to the NCA president in charge of the relationship with citizens, civil society, and Tunisians from abroad. Abdelkafi took a positive initiative to set up a working group on this issue with representatives of the different political blocs at the NCA. The working group elaborated several projects to consult citizens by various means but lacked logistical means and support and, to a certain extent, internal backing. Civil society participation in the process never assumed the importance it deserved within the broader NCA. In addition, the few opportunities put in place for citizens' involvement were not coupled with any information campaigns and thus remained largely unknown to the general public.

For instance, the online consultation on the official NCA website to allow citizens to suggest

174 Guidance Note of the Secretary-General, United Nations Assistance to Constitution-Making Processes, Lessons Learned From Constitution-Making: Processes With Broad-Based Public Participation, Democracy Reporting International (DRI), 2011

175 The right to take part in the conduct of public affairs is enshrined in Article 25, ICCPR. The Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the U.N. General Assembly on Dec. 9, 1998, states in its Article 8 that participation in the conduct of public affairs includes inter alia, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection, and realization of human rights and fundamental freedoms.

issues of importance in the constitution, which was launched in September 2012, was not advertised beyond a short press conference. While the initiative itself was positive, the online consultation received only 217 online contributions, in a country in which more than 41 percent of the population has access to the Internet.[176]

The NCA also organized a two-day dialogue session with civil society organizations on the constitution in September 2012. Civil society organizations were requested to register online for the event. The enthusiasm with which civil society organizations responded to the invitation, with more than 300 civil society members taking part, showed the high level of interest of civil society in the constitutional debate.[177] It should be noted that several civil society organizations boycotted the event, because, among other things, at that time no guarantees were put into place to ensure that comments and recommendations made by those organizations during these two days would be considered by the constituent commissions.[178]

The Carter Center regrets that the NCA organized only one such formal consultation with civil society organizations during the two-year process. The NCA could have replicated this initiative at the regional level to afford civil society groups in all parts of the country an opportunity to contribute.

The NCA's main initiative to consult citizens was the national public consultations, which were held from December 2012 to February 2013. Convinced that public participation would empower citizens by acknowledging their sovereignty and increase their knowledge about the process, the interparty working group led by Abdelkafi advocated for extensive national consultation in all of Tunisia's regions. The idea was presented to the NCA's leadership in mid-2012 by the team in charge of building relationships with civil society, but it did not garner wide support. In its September 2012 statement, The Carter Center recommended that such consultation be conducted, arguing that an inclusive and participatory process was more likely to engender consensus around the new constitutional framework. Some assembly members, including the members of the NCA's bureau, feared that such consultations would slow down the process, which, at that time, had already suffered delays. Members advocated for and against increased outreach and reached a compromise, with NCA members holding national consultations on weekends in order not to affect the assembly's work.[179]

Nedra Cherif

National Constituent Assembly members and citizens in Tozeur participate in a national dialogue session.

Public consultations started after the publication of the second draft of the constitution in December 2012 and began with two sessions with students in Tunis and Sfax. They were followed by public sessions held through January 2013 in Tunisia's 24 governorates, at a rate of six governorates each weekend. Meetings with expatriate constituencies in France and Italy were also organized in January and February 2013. The Carter Center observed almost half of the dialogue sessions in Tunisia, in the governorates

176 Tunisia had the third highest rate of Internet penetration in Africa in 2012. See http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.

177 More than 300 civil society organizations indicated their interest in participating, and the NCA limited the number of participants to that number due to logistical constraints.

178 These organizations included the Tunisian League for Human Rights (LTDH), the International Federation of Human Rights (FIDH), the Association of Tunisian Democratic Women (ATFD), and the Euro-Mediterranean Human Rights Network (EMHRN). http://www.tap.info.tn/fr/fr/politique/300-politique/33042-des-associations-et-organisations-boycottent-le-dialogue-sur-le-projet-de-constitution.html

179 These sessions were held with support from the UNDP and the cooperation of the National Democratic Institute.

of Tunis, Sfax, Sousse, Monastir, Gabès, Beja, Zaghouan, Nabeul, Ben Arous, Ariana, Medenine, and Tozeur.

Once again, the communication strategy around these consultations was weak, and only well-informed civil society groups and interested citizens knew of the consultations. In total, the consultations involved around 6,000 citizens over the two-month period.[180]

Participation in the first few sessions was low, increasing near the end of the process with turnout generally varying between 150 to 300 people. In the sessions observed, women's participation was generally low (around 10 percent of participants), with the exception of Nabeul governorate, where approximately 30 percent of the participants were women. The Center estimates that the main reasons behind the low participation at the beginning of the process were the lack of public information about the events and the limited initial involvement of some political parties.[181]

As opposition parties became more aware that public comments from the consultation sessions would directly contribute to the constitution-drafting process and to the subsequent mobilization of the electorate, they began to encourage their supporters to attend the sessions. Political mobilization from both religious and secular political groups was evident in most sessions.

Despite the low participation, those who attended the sessions demonstrated knowledge of the draft constitution, raised relevant points, and made constructive recommendations to the NCA members in attendance, among whom a member of the drafting committee was always present. Topics raised during the consultation sessions centered on several main themes, including ways to refer to the universality of human rights in the constitution, the rights and freedoms to be granted by the new constitution, the role of religion and Arab Muslim identity in the state, state powers and security forces, the inclusion of a rejection of Zionism in the preamble, and provisions for amending the constitution. Participants also raised local issues of concern: For example, participants in Tozeur, a governorate in the south of Tunisia with a very arid climate, highlighted the right to water.

When the Rules of Procedure were initially adopted, the NCA did not foresee any procedures as to how and to what extent the suggestions made by citizens and civil society organizations should be taken into consideration. During the amendment of the Rules of Procedure in March 2013, deputies added language granting the constituent commissions the authority and responsibility to study the comments and suggestions made during the general debate and national consultations (revised Article 104). The Carter Center welcomed this amendment, as it had called for the establishment of a formal procedure to process and record inputs made by citizens during the various consultative mechanisms so that NCA members and the constituent commissions could more effectively take these comments into account. One of the specific positive outcomes of the national consultation process was the inclusion in the draft constitution of the rights of the political opposition, an issue that was raised during the national consultations as well as on other occasions.[182]

The lack of opportunities to participate in the constitution-making process caused citizens, and especially young people, to feel excluded from the process. Many began to see the NCA and the process with growing skepticism. This sense of disenfranchisement was reflected in a survey undertaken by the United Nations Development Program (UNDP) in 2012 among 15- to 29-year-olds. Fifty-six percent indicated that they were completely unaware of the contents of the constitution, and another 30 percent responded they had

180 See the ANC's report on these consultations (in Arabic): http://www.anc.tn/site/main/AR/docs/societe_civile/presentation.jsp. See also "The U.N. Constitutional, A Newsletter on United Nations Constitutional Support," Issue 2 Spring/Summer 2014, p. 16. Also http://www.anc.tn/site/main/AR/docs/societe_civile/presentation.jsp

181 As an illustration of this lack of outreach, Carter Center observers on field visits to the governorates reported meeting representatives of the UGTT, civil society organizations, and political parties who were not aware of the national consultations.

182 The UNDP report on the national consultation process highlights that attendees in the governorates of Monastir, Bizerte, and Sidi Bouzid raised the issue of the inclusion of the rights of the opposition in the constitution. See PNUD, "Dialogue National Sur Le Project de La Constituation: Rapport General" (in French), Tunis, March 2013, p. 35.

only slight knowledge. Not surprisingly, around 45 percent indicated they did not feel involved in the process of elaborating the constitution.[183]

Tunisia's experience offers rich lessons for constitution-making bodies elsewhere in the world and is a reminder that in a transitional context, failure to engage the public in the process can lead to feelings of exclusion. Demonstrations across the country against governors, mayors, and other authorities suggest that these shortcomings also fueled resentment toward state institutions. Enabling citizens to actively participate in public affairs and in the exercise and protection of their rights should be an integral part of the process.[184] Inclusive and participatory processes are more likely to engender consensus around a constitutional framework.

The Carter Center recommends that constitution-making bodies thoughtfully plan and pursue mechanisms to engage the public genuinely in the process. In the early phases of its existence, constitution-making bodies should devote careful thought to the design of public participation mechanisms in the drafting process and the means necessary for their effective realization. Such consultations should be advertised by comprehensive information campaigns using the entire spectrum of the media. Campaigns should focus on the constitution in general, the work of the constitution-making body, and the opportunities for the public and individual citizens to participate directly in the process. Ideally the campaign should also present the limitations of public participation to avoid disappointment and frustration.[185]

The body entrusted with the drafting of the constitution should also build sufficient time into the process for a thorough national debate on the constitution.[186] In addition, to ensure that the voices of the citizens are effectively taken into consideration, it is important to set up formal procedures to analyze, process, and record inputs made during all these various consultation mechanisms. Outreach efforts after the adoption of the constitution are needed to ensure that citizens are aware of its content as well as the rights and freedoms contained therein.

The Carter Center recommends that the legislative assembly consider introducing similar provisions in its Rules of Procedure to encourage and support opportunities for deputies to conduct constituent outreach. For example, the legislative calendar could include periodic breaks so as to allow deputies the time to travel to their home regions. Logistical and institutional support should be provided to deputies in order to plan and implement activities during the weeks devoted to outreach to citizens in the deputies' constituencies.

The lack of opportunities to participate in the constitution-making process caused citizens, and especially young people, to feel excluded from the process. Many began to see the NCA and the process with growing skepticism.

External Engagement in the Process

While public consultations led by constitution-making bodies are instrumental in creating a sense of ownership and in building consensus for the future constitution, initiatives by civil society organizations are also necessary, not only to mobilize support for the process but also to apply pressure for greater responsiveness to international standards and citizen demands.

183 UNDP, "Enquête nationale sur les attentes des jeunes à l'égard du processus constitutionnel et de la transition démocratique en Tunisie" (In French), Rapport de synthèse, April 2013, p. 11. Similar findings are also documented in a report by NDI, "Prioritizing Patriotism: Tunisian Citizens Express Their Views," June 2013.

184 Guidance Note of the Secretary-General, United Nations Assistance to Constitution-Making Processes, 2009. Constitution-Making and Reform: Options for the Process, published by Interpeace, November 2011, p. 49–50 and 86

185 Lessons Learned From Constitution-Making: Processes With Broad Based Public Participation, DRI, 2011

186 The time allocated to public consultations in countries that have conducted similar exercises varies significantly, but in processes that were considered highly participatory, such as in South Africa and Kenya, public meetings were held countrywide, targeting not only the main cities but also rural areas. Constitution-making bodies organized hundreds of meetings and engaged tens of thousands of citizens to explain the process and issues at stake.

Al Bawsala

Al Bawsala organized a forum in Siliana for the public to interact with National Constituent Assembly members on matters related to the constitution.

The Role and Impact of Civil Society

Two key functions of civil society are to provide a check on state institutions and to offer avenues for citizens to engage with the process across a variety of perspectives. Furthermore, civil society can play a key role in helping citizens to understand the issues under debate by publicizing and explaining the issues, providing the public with a range of opinions and perspectives, and facilitating dialogue between the drafters of the constitution and the people. Civil society, which reflects ideas and positions across the political spectrum (from those aligning with government positions to those who challenge its policies), could also directly monitor and comment on the process.

During the constitution-making process in Tunisia, a significant number of civil society organizations engaged in multiple initiatives, including Al Bawsala, ATIDE, Conscience Politique, Free Sight Association, I WATCH, Jeunesse Sans Frontières, Lam Echaml, and the Ofyia Center, which organized forums for the public to interact with NCA members on matters related to the constitution. Others, such as the youth organization Sawty, launched awareness-raising campaigns.[187] Local associations also engaged in activities around the constitution. For example, AC Gafsa (Association Citoyenneté de Gafsa) produced a report on women's expectations in Gafsa with regard to the constitution, and LCL Tataouine (Ligue de la Citoyenneté et des Libertés Tataouine) organized a workshop titled "For a Democratic Constitution in Tunisia."[188]

The civil society organization Al Bawsala played an important role in monitoring the NCA and the process by creating a website, marsad.tn, that sought to inform citizens about the process by giving them improved access to information

187 Sawty organized an action in August 2012 to protest the fact that the constitution had not yet been written and to encourage citizens to demand its completion. http://www.youtube.com/watch?v=W7m3opFHJSI&feature=share

188 Other civil society groups initiated activities around the constitution, including the UNESCO Club (which promoted a dialogue between NCA members and young people, women, and people with disabilities) and Lam Echaml, which set up a campaign for citizen ownership of the constitution at a regional level.

regarding the NCA, including votes made in plenary sessions and the attendance rate of each NCA member. Marsad.tn also offered an interactive platform to comment on each article of the draft constitution and created another platform to give individuals the possibility to address questions directly to specific NCA members and to comment on each article of the draft constitution.

In the first stages of the constitution-making process, a group of interested citizens — including several who had unsuccessfully contested for a seat in the NCA — created a "civil constituent assembly," mirroring the NCA's constituent commissions. This initiative was intended to promote the development of political consciousness throughout Tunisia and to yield recommendations regarding the constitution for consideration by the NCA. Some of these recommendations were taken into consideration by the NCA, particularly on issues of local democracy. The group lost some credibility, and its role and impact as a civil society initiative diminished when many prominent members of the civil constituent assembly joined the opposition party Nidaa Tounes.

Other civil society groups organized numerous conferences, roundtables, and workshops on the content of the different drafts.[189] For instance, after each release of a draft of the constitution, the Tunisian Association of Constitutional Law (Association Tunisienne de Droit Constitutionnel known by its French acronym, ATDC) often in partnership with the Association for Research on the Democratic Transition (Association de Recherché sur la Transition Démocratique, ARTD) organized a conference offering a critical analysis of the proposed text. During these events, constitutional experts debated developments, took questions from the audience, and presented recommendations to the NCA, notably on the importance of ensuring the protection of human rights in the new constitution and on the text's internal cohesion. ATDC subsequently published detailed commentaries on the different draft constitutions. The Center for the Study of Islam and Democracy (CSID) was also an important player in shaping the debate around the constitution. It organized a series of conferences and workshops during the process, which were often attended by high-level decision makers and almost always enjoyed significant media coverage.

These events and others, which brought together local and international experts, NCA members, and civil society organization representatives, contributed to a dynamic debate around key issues of the constitution and underlined numerous insufficiencies and incoherencies. However, as the political context in Tunisia became more polarized, such conferences increasingly drew participants from the same ideological orientation and offered little diversity of opinion. Furthermore, such events were generally concentrated in Tunis and, therefore, tended to reinforce the elite and Tunis-centric nature of the process.

At times, civil society actors and citizens engaged in protests and strikes to make their claims heard. For example, after the release of the first draft of the constitution in August 2012, groups advocating for women's rights organized large protests to demand that the NCA redraft the main article in the constitution dealing with the issue, which spoke of the "complementary roles of men and women inside the family" without reference to the equality of men and women. During the article-by-article vote on the constitution in January 2014, judges, public prosecutors, lawyers, and civil society members went on strike to protest some proposed amendments, which they saw as an attempt to weaken judicial independence. Around the same time, a delegation of imams issued a fatwa against provisions in the constitution enshrining the right to freedom of conscience, and they lobbied by distributing leaflets inside the NCA building condemning this idea.[190]

189 Organizations that held events in relation to the constitution were notably the Tunisian Bar Association as well as the civil society organization Dostourna (which created a project titled "Let's Think About Our Constitution"), Al Bawaba (which organized a debate on the constitution in Gabès), Femmes & Leadership (which organized a workshop entitled "Today Students, Tomorrow Leaders"), and Forum Jahedh (which organized a constitutional dialogue forum in Tunis).

190 The text of the fatwa can be found at: "Constitution–Tunisie: A l'Assemblée, des imams lobbyistes émettent une fatwa contre la liberté de conscience, " HuffPost Maghreb, Jan. 15, 2014. http://thalasolidaire.over-blog.com/article-tunisie-l-assemblee-constituante-civile-la-liberte-de-croyance-doit-etre-respectee-par-les-diff-104719289.html

Though protests around the constitution were not uncommon, direct dialogue and lobbying activities by civil society and interest groups, such as the imams, were rare. The lack of defined procedures to access the NCA may have been partially responsible for the lack of a significant civil society presence at the assembly during the constitution-making process, including at crucial moments such as the Consensus Commission's discussions in November and December 2013 on outstanding issues of contention in the draft constitution. The polarization of civil society, which resulted in members from organizations with a particular political orientation being reluctant to engage with NCA members supporting different political tendencies, was certainly another reason for weak civil society engagement at the NCA. Finally, in Tunisia's new democracy, civil society organizations were not always attuned to the range of pressure and lobbying techniques beyond the organization of conferences or a reliance on personal networks for access to decision makers.

During the final stages of the process, as the assembly prepared to vote on the constitution, political parties became more active, with Ennahdha, Nidaa Tounes, Al-Joumhouri, and Al-Massar, among others, conducting more outreach and organizing some information meetings on the constitution.

The situation improved during the adoption phase of the constitution. The NCA made significant efforts to facilitate civil society's access to the vote on the constitution. Thus, civil society organizations had more visibility during the adoption phase than in previous phases of the process, though attendance was not always consistent throughout the three weeks of voting. Nonetheless, civil society's presence at the NCA at key moments of the vote added dynamism to the proceedings and allowed for exchanges to take place at the margins of the plenary, not only between civil society members and NCA deputies but also between civil society and the media.

Political Party Outreach and Advocacy Efforts

Political parties also played a role, though limited, in educating their supporters on the mandate of the NCA, keeping them informed of their contributions to the constitution-making process and its position on issues under consideration.

In the very early stages of the drafting process, some political parties—including Ennahdha, the Tunisian Workers' Communist Party (Parti Ouvrier Communiste Tunisien or POCT), and the Progressive Democratic Party (Parti Démocrate Progressiste or PDP)—drafted a text outlining their respective positions on key issues in the constitution. During much of the drafting process, however, direct engagement with the party base or potential members was rare and varied considerably in frequency and scope from one party to another, Ennahdha being an exception.

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Eager to reassure a restless public that progress was being made on the constitution, individual

191 Ennahdha organized several seminars and roundtables throughout the country on the content of the draft constitution. Carter Center observers attended one in Tunis on May 18, 2013. NidaaTounes organized a seminar on the draft constitution on April 30, 2013. The seminar was attended by several professors who underlined both positive and negative aspects of the draft. Al Joumhouri, along with Al-Massar, organized a joint information meeting in Carthage on the constitution for interested citizens on May 9, 2013, titled "Understanding the Draft Constitution To Better Defend Our Rights," to discuss the content of the constitution. Carter Center observers attended the meeting.

NCA members at times did a much better job than their parties in communicating with the public. For example, in the fall of 2013, when the Consensus Commission met in closed sessions to discuss outstanding issues in the draft constitution, several of the commission's members summarized agreements reached within the commission to the public via social media.

For the most part, political parties failed to conduct regular, direct, and countrywide outreach to inform the public about their work within the assembly, their positions on important constitutional issues, and the constitution-making process overall. This may have reflected, in part, a lack of a unified position within the parties themselves on key issues or the failure to elaborate a position beyond that of their NCA members. It also reflects the underdeveloped nature of many political parties in Tunisia, since most were formed in haste following the revolution and have struggled to define their identity, elaborate a vision, and build their structures.

International Input and the Role of International Organizations

Prior to the revolution, few international organizations operated in Tunisia. Following the revolution, many were eager to play a role in the transition. Tunisia's constitution-making process has been a nationally driven and owned process. However, numerous international actors, including multilateral and regional organizations such as the United Nations and the European Union as well as individual country governments and international nongovernmental organizations, provided expertise and resources to the process and at times advocated around specific issues.[192]

Most Tunisian decision makers and NCA members were interested in the opinion of international actors and were willing to consult with them particularly in regard to international standards and comparative experiences of constitution-making. International involvement, however, also triggered suspicion among some NCA members about foreign interference. Members of CPR and Al-Wafa political blocs, but also others, denounced foreign involvement at times.[193]

Financial and Technical Expertise Support to the Process

The UNDP, supported by various governments, was the biggest external partner to the NCA in this process. The UNDP supported the assembly in strengthening its institutional capacities as well as in organizing public consultations. One of the main aims of UNDP's support was developing mechanisms to facilitate the participation of citizens and civil society in both constitution making and wider political processes.

Democracy Reporting International (DRI), an international nongovernmental organization, provided expertise to many political parties and NCA members on international human rights obligations and comparative constitution-making experiences. These activities were further supported by frequent topical publications and public roundtables on key aspects of constitution making. Other organizations, including the International Institute for Democracy and Electoral Assistance (International IDEA) and the Max Planck Institute, provided expert advice through conferences, seminars, and working sessions on content-related issues. The Venice Commission, an advisory body of the Council of Europe composed of constitutional law experts, made observations and recommendations to the NCA in regard to the content of the fourth and final draft of the constitution.[194] Several

192 In contrast, regional organizations such as the Arab League, the African Union, the Union of Arab Maghreb, and the Organization of Islamic Conference have hardly been visible in the process.

193 Abderraouf Ayadi (president of the Al-Wafa bloc) is an example of an NCA member who consistently expressed suspicion regarding foreign interference. He frequently denounced the influence of France in the constitution-making process. See "Abderraouf Ayadi fidèle à la théorie de la conspiration, L'économiste Maghrebin," Aug. 28, 2013. www.leconomistemaghrebin.com/2013/08/28/abderraouf-ayadi-fidele-a-la-theorie-de-la-conspiration/#sthash.gz4LuivP.dpuf. On Jan. 10, 2014, during a plenary in which NCA members were discussing and voting on articles of the constitution, Néjib Khila (PDP/Al-Joumhouri, later independent) on the other hand criticized the presence of American law professor Noah Feldman at the assembly. His comments suggested that Feldman was part of an American imperialist agenda in the region.

194 "Observation sur le projet final de la constitution de la République tunisienne," July 2013, Avis 733/2013 (French only), Council of Europe, Venice Commission www.venice.coe.int/webforms/documents/?pdf=CDL(2013)034-f

organizations or embassies also hired constitutional professors to advise national actors.[195]

While some of these experts were involved throughout the entire process and succeeded in developing trust with NCA members, others came just once and tended to push for ideas drawn from their own countries, failing to understand the Tunisian context and the specific challenges it faced in its own transition. Some often used Europe as a model to the exclusion of other regions of the world that may have offered relevant considerations within the Tunisian context.

At times, the NCA found itself "drowning in a positive alphabet soup" of United Nations organizations as well as international nongovernmental organizations that wished to engage in the process.[196] The NCA, which was already struggling with organizing its own logistics, experienced difficulties in managing the numerous offers of support. In the absence of a clear focal point in the NCA to deal with international organizations, proposals were channeled through staff in the president's office and to the assistant to the president in charge of the relationships with civil society, all of whom were busy with other duties. Donors and nongovernmental organizations failed to hold regular coordination meetings, which could have taken some pressure off the NCA and allowed for more coherent programming. Pressure from international organizations seemed to overwhelm the NCA at times, and the result was that some projects never materialized.

Besides The Carter Center, several other human rights groups monitored the process closely, issued reports and recommendations, and wrote letters to NCA members on the constitution.

Key donors preferred to channel their funds through UNDP, which became the central implementing agency of international assistance to the NCA.[197] However, UNDP's large budget—$18.6 million—came with strict financial management requirements. While offering an important source of structure, the requirements also meant that even projects agreed upon with the NCA took considerable time to implement and at times came too late to be truly effective.

Much of the support from the international community to the NCA was provided through study trips and local and out-of-country trainings on a large variety of issues.[198] While generally useful to NCA members, the timing often meant that NCA members were absent during commission work and plenary sessions. At times, it seemed that international organizations failed to respect the obligations of NCA members to participate in the daily work of the body, including commission and plenary work. Events were scheduled even at crucial stages of the process, putting deputies in the position of having to choose between NCA duties or attending events organized by organizations that supported the NCA.

The Carter Center encourages aid agencies, embassies, and international nongovernmental organizations in Tunisia to establish increased coordination mechanisms to improve planning, avoid duplication of efforts, and maximize the positive impact of support, particularly as the legislative assembly is likely to continue to receive assistance and requests from international organizations. International actors in constitution-making processes in the region and elsewhere should take into consideration the work schedule and rhythm of the public institutions that they

195 For instance, the UNDP, DRI, the European Parliament, the Max Planck Institute, and the Swiss Embassy hired constitutional experts to assist the NCA members.

196 Constitution-Making and Reform: Options for the Process, published by Interpeace, November 2011, Part 4: Guide to Key External Actors in the Process: Civil Society, the Media, and the International Community

197 Donors included the European Union and the governments of Japan, Belgium, Sweden, Denmark, Norway, and Switzerland.

198 Assembly members benefited from comparative examples on a wide variety of issues, notably training on legislative, constitution-drafting, and public consultation techniques drawn from several different countries. For instance, NCA members participated in an international conference on renewable energy in Sri Lanka and Qatar in November 2012 and December 2012 while others attended a regional conference on the protection of socio-economic and cultural rights in post-revolution constitutions in Cairo in November 2013. Several NCA members participated in exchange missions to parliaments and other relevant institutions in Belgium, France, Denmark, Canada, Germany, Austria, and the European Parliament. NCA members also undertook study trips to the European Court of Human Rights and the German Constitutional Court in Karlsruhe.

support and refrain from organizing trainings, conferences, and study trips during commission and legislative working sessions, especially when crucial issues are under debate. Constitution-making bodies should appoint members in charge of interacting with the international community and prepare strategic plans and a budget for the process to be presented to the donors.

Advocacy Efforts by International Organizations

Besides The Carter Center, several other human rights groups monitored the process closely, issued reports and recommendations, and wrote letters to NCA members on the constitution. Human Rights Watch (HRW), for instance, released several reports and sent several open letters to the members of the NCA urging them to amend articles of the draft constitution that undermined human rights, including freedom of expression, women's rights, the principle of nondiscrimination, and freedom of thought and conscience.[199] After the release by the NCA of the fourth draft of the constitution, Amnesty International issued a report noting that while there were some improvements over the drafts circulated in August and December 2012 and April 2013, the text still undermined tenets of international human rights law such as restrictions of basic fundamental rights, including the rights to freedom of expression, peaceful assembly, association, and freedom of movement as well as providing insufficient guarantees for the independence of the judiciary and the right to freedom from torture and other forms of ill-treatment.

These three organizations, together with Al Bawsala, issued three joint statements on the draft constitution in the final phase of the drafting process, suggesting changes to language and making recommendations as to how freedoms and rights could be better safeguarded.[200] Several other specialized human rights groups, such as the International Commission of Jurists, Reporters Without Borders, and Article 19, also issued reports including recommendations for the NCA.[201]

United Nations specialized agencies engaged in lobbying activities aimed at the inclusion of human rights standards and principles in the draft constitution. In July 2013, the U.N. country team in Tunisia sent a joint letter to Tunisian authorities, both the NCA and the government, advocating for the inclusion of human rights standards in the future constitution.[202] The High Commissioner for Human Rights also sent a letter with detailed comments regarding the content of certain provisions of the fourth draft of the constitution. Communications were also sent to the NCA from U.N. human rights experts, including special rapporteurs of the Human Rights Council. Organizations such as UNESCO, UNICEF, and U.N. Women also advocated for the inclusion of international standards governing the freedom of expression, the rights of children, and gender equality in the draft constitution.[203]

The conjunction of national and international advocacy efforts—coupled with the NCA's openness to external input and advice—was a particular strength of the Tunisian process and led to an improvement in the degree of protection for fundamental freedoms and human rights in the constitution, in particular strengthening women's rights, improving the guarantees for an independent judiciary, removing excessive restrictions on rights and freedoms from most provisions, and strengthening fundamental political and civil liberties.

199 See http://www.hrw.org/middle-eastn-africa/tunisia

200 Joint statements by Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center on July 24, 2103, and Jan. 3, 2014, can be found at http://www.cartercenter.org/news/publications/peace/democracy_publications/tunisia-peace-reports.html

201 See, for example, the report released in February 2013 by the International Commission of Jurists calling on the authorities, especially the NCA, to elaborate and adopt a constitution that takes account of the full range of views of the Tunisian people and adheres to international law and standards. www.icj.org/tunisia-the-draft-constitution-should-be-amended-to-meet-international-standards/. Reporters Without Borders and Article 19 both issued statements focusing in particular on freedom of expression. See: http://fr.rsf.org/tunisie.html and www.article19.org/pages/en/middle-east-north-africa.html

202 "The U.N. Constitutional, A Newsletter on United Nations Constitutional Support," Issue 2, Spring/Summer 2014

203 For more details on U.N. involvement in the process, see "The U.N. Constitutional, A Newsletter on United Nations Constitutional Support," Issue 2, Spring/Summer 2014.

Key Issues in the Tunisian Constitution

The NCA released four drafts of the constitution over the two-year period. There was also a "Draft 2bis," which refers to the compilation of all the chapters prepared by the constituent commissions after having incorporated comments emanating from various sources on the second draft. On April 10, 2013, this text was submitted to the drafting committee for review, but it was not publicly released though it formed the basis of the third draft released by the NCA on April 22, 2013. The Carter Center assessed a number of key constitutional issues throughout the various drafts.

The text evolved significantly over time, in most instances toward greater clarity and a higher degree of protection for fundamental freedoms and human rights. Throughout the drafts, NCA members strengthened women's rights, improved the guarantees for an independent judiciary, and removed excessive restrictions on rights and freedoms from most provisions. They also strengthened fundamental political and civil liberties and granted the Constitutional Court full power immediately upon its creation. Nevertheless, concerns remain regarding some provisions where the wording could lead to insufficient protection of internationally recognized fundamental freedoms and rights. These include measures to protect citizens from discrimination, provide security of tenure for judges, and safeguard fundamental freedoms during a state of emergency, all of which should be strengthened.

The adoption of the constitution is a key step in the country's transition from authoritarianism to democracy, but it is not sufficient on its own to guarantee a successful transition. Tunisian authorities should take legislative action both to address remaining concerns and to ensure that the existing legal framework is brought into alignment with the new constitution.

International Law

International law defines the legal responsibilities of states in their conduct with each other as well as their treatment of the people within their boundaries. Its domain encompasses a wide range of issues, including human rights, migration, international trade, and the use of force. States have developed a variety of international instruments by which they establish rights and obligations among themselves, such as treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, modus vivendi, and exchange of notes.[204] These international documents, once ratified by a state, are binding and supersede domestic law.

The NCA took a conservative approach in the first two drafts of the constitution with regard to the status of international law and its hierarchy vis-à-vis Tunisian law and the constitution. These drafts made Tunisia's respect of its international commitments conditional upon those commitments' conformity with domestic law, a position

204 See the U.N. Web pages on international law at www.un.org/en/globalissues/internationallaw/ and https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml

that contradicted Tunisia's obligations under the Vienna Convention on the Law of Treaties, which states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[205] The drafting committee specified in the third and fourth drafts that international treaties approved and ratified by Tunisia are above domestic law and beneath the constitution. The language in the fourth draft, however, referred to treaties approved by "the Assembly of the People's Deputies," the new legislative body. This implied, perhaps unintentionally, that treaties which had been approved by former legislative bodies would not necessarily have the same legal status. The Carter Center had called for a different phrasing of the article and welcomes the final wording of this provision in the constitution. It now extends it to "the legislative body," which should encompass all legislative bodies, past, present, and future.

However, the NCA did not clarify the weight of international law and the scope of its influence in relation to Tunisia's legal framework. The constitution does not state clearly that Tunisia commits itself to respect all of its international obligations, including those based on customary law. The constitution also fails to give courts explicit incentives to make wider use of international human rights instruments.

The Carter Center encourages authorities to interpret the domestic legislation in conformity with Tunisia's international commitments, including customary law, which is recognized as part of international law. Provisions of international treaties should also always be interpreted in conformity with their universally accepted meanings.

Human Rights in the Constitution and Their Universality

The final version of the constitution includes several references to human rights and provides for the establishment of a national human rights commission to help ensure respect for human rights and to investigate human rights violations.[206] At various moments of the drafting process, NCA members discussed the universality of these rights, a discussion influenced by debates on the place of religion in the constitution. The preamble of the first draft referred to "noble human values." In the second draft, the preamble included a reference to "principles of human rights." While the word "universal" was added in the third draft, this reference was undermined by the simultaneous addition of the phrase "insofar as they are in harmony with the cultural specificities of the Tunisian people." This wording resulted in significant protests by civil society and some members of the opposition. In the fourth and final draft, this limitation was removed; however, it remained implicit, through the qualification of universal human rights values as "supreme." The General Report on the Constitution Project, issued by the drafting committee on June 14, 2013, reads:

The text evolved significantly over time, in most instances toward greater clarity and a higher degree of protection for fundamental freedoms and human rights.

"In describing the human values and principles of human rights as 'noble/supreme,' the committee wanted to emphasize the fact that we should build on only those values and principles that have attained supremacy due to their noble content, thus encompassing the meaning intended by the previous formulation [of the third draft], which required building on this second basis insofar as it was 'consistent with the cultural characteristics of the Tunisian people.' This is particularly the case when taking in consideration the reference following it [in the preamble], to drawing

205 Article 27, Vienna Convention on the Law of Treaties

206 Human rights are cited twice in the preamble, while Article 39 requests the state to spread the culture of human rights in the context of free public education, and Article 49 forbids any amendments that undermine any human rights acquisitions or freedoms guaranteed in the constitution.

inspiration from the civilizational heritage and reform movements based on the elements of the Arab–Muslim identity and the civilizational gains of humanity."[207]

From the outset, the place of religion in the new constitution mobilized political parties and civil society. The heart of the debate was how best to find a balance between the Arab–Muslim identity of the vast majority of the Tunisian people and the desired secular nature of the state. The debate also extended to how best to guarantee full equality to all people regardless of their religion while recognizing Tunisia as a predominantly Muslim country.

Despite advocacy by various human rights organizations, including The Carter Center, this issue was never seriously considered by the Consensus Commission. The word "supreme" was retained in the final version of the preamble of the constitution, despite the fact that it implies a hierarchy of human rights whereby some may be more important than others. This places a burden on the Tunisian judiciary to interpret the phrase in a way that does not compromise the rights and freedoms enshrined in the constitution and that remains consistent with the Vienna Declaration, which states that "all human rights are universal, indivisible, interdependent, and interrelated." The declaration further states that regardless of political, economic, and cultural systems, states have an obligation to "treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[208] Tunisia's 1959 constitution was more precise than the 2014 constitution in this regard, stating, "The Republic of Tunisia shall guarantee fundamental freedoms and human rights in their universality, comprehensiveness, complementarity, and interdependence."[209]

Religion in the Constitution

From the outset, the place of religion in the new constitution mobilized political parties and civil society. The heart of the debate was how best to find a balance between the Arab–Muslim identity of the vast majority of the Tunisian people and the desired secular nature of the state. The debate also extended to how best to guarantee full equality to all people regardless of their religion while recognizing Tunisia as a predominantly Muslim country.

In the first draft, the preamble contained both explicit and implicit references to religion. Even before the release of the first draft, political parties reached a consensus not to mention Sharia directly and to keep the emblematic first article of the 1959 constitution, which affirms Tunisia's Arab–Muslim identity without clearly defining Islam as the state religion. It reads: "Tunisia is a free, independent, and sovereign state. Its religion is Islam, its language is Arabic, and its form of government is a Republic."

A debate arose, however, with the introduction of a subsequent article which, instead of stating that certain provisions could not be amended, enumerated several inviolable concepts of the new constitution, including "Islam as the state religion."[210] This change resulted in controversy, with many politicians and academics arguing that the concept of a state religion exceeded the intentionally ambiguous wording of Article 1, "Tunisia is a free, independent, and sovereign state. Its religion is Islam." The Consensus Commission addressed the issue, reaching agreement to state clearly at the end of Article 1 that it could not be amended. The NCA's plenary honored this agreement during the vote.

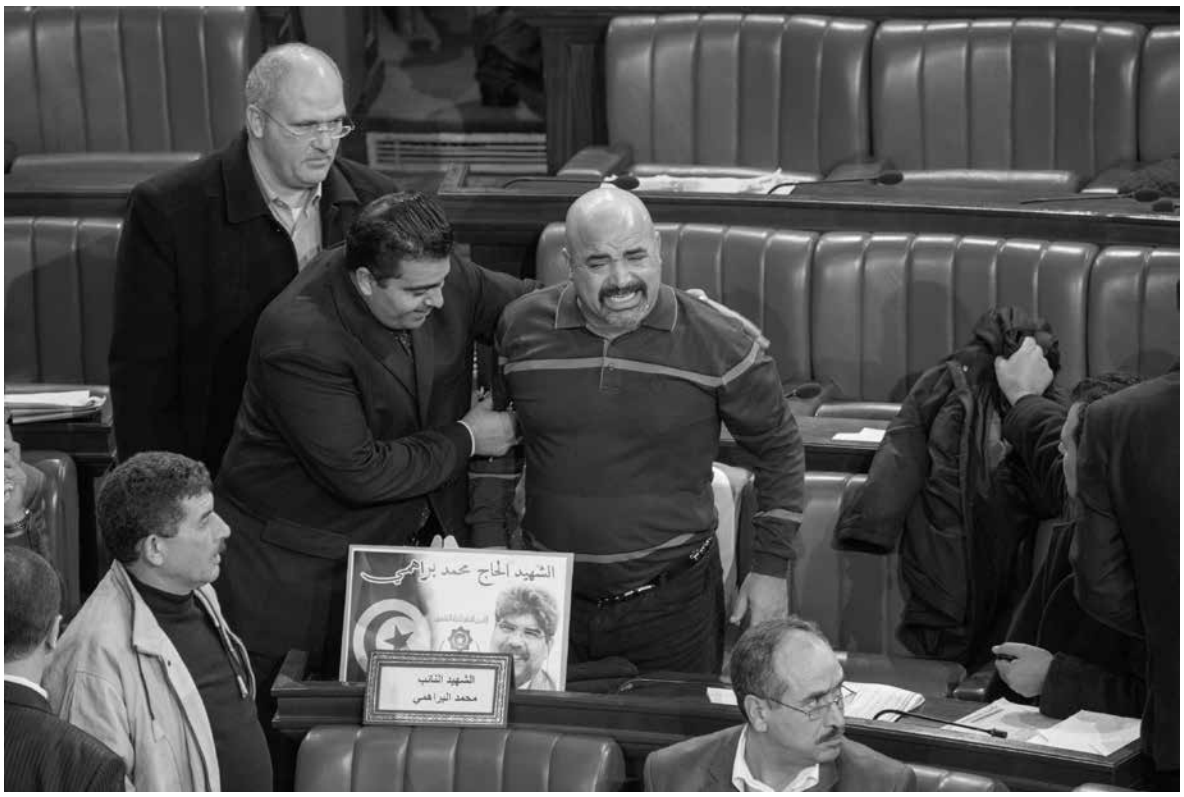
207 The Joint Coordination and Drafting Committee, "The General Report on the Constitution Project" (in Arabic), June 14, 2013. www.anc.tn/site/main/AR/docs/rapport_general_const.pdf

208 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on June 25, 1993: U.N./General Assembly, Vienna, June 14–25, 1993 (A/CONF.157/23)

209 Article 5, para. 1, added by Article 2 of Constitutional Law No. 2002–5 dated June 1, 2002

210 Article 148 of the second draft, which became Article 136 in the third draft and then 141 in the fourth

Thierry Bresillon



During the adoption of the constitution in January 2014, Ibrahim Kassas vehemently protested the formulation of Article 6.

The adopted constitution also forbids amending Article 2, which proclaims "the civil nature of the state." Some civil society representatives have argued that defining the state as both civil and Islamist in nature is contradictory. For that reason, they fear that prohibiting amendments to both Articles 1 and 2 could create conflict.[211]

The NCA also debated vigorously the concepts of freedom of religion and conscience. Freedom of conscience, included in the fourth and final draft of the constitution, had been absent prior to that. Its inclusion in the fourth draft was the product of months of debate and the result of extended negotiations between political parties and other stakeholders during the national dialogues that took place in spring 2013. The NCA eventually stipulated in Article 6 of the fourth draft that "the state protects religion, guarantees freedom of belief and conscience and religious practices, protects the sacred, and ensures the impartiality of mosques and places of worship away from partisan instrumentalization." The issue appeared settled, but the plenary vote on the constitution proved otherwise. Clashes between NCA members of different ideologies and political affiliations around the issue of the status of religion in the constitution resulted in calls to amend the article.[212]

Some NCA members felt that the state should be a protector of religion and of "the sacred." Others believed that the constitution should leave each person the freedom of religious choice, without intrusion or interference by the state. In the end, the NCA plenary voted on three different

211 Besides Article 1 and 2, the words "cannot be amended" appear in two other instances in the constitution: Article 49 (no amendment of the constitution can undermine human rights and freedoms guaranteed in the constitution) and Article 75 (the number and length of presidential terms).

212 A member of the Ennahdha bloc made a declaration to the media that was interpreted by some as putting into question the faith of another deputy from the Democratic bloc. This resulted in heated debate about the need to add guarantees in the constitution against allegations of takfir that could expose accused individuals to the risk of physical violence. Takfir is labeling another Muslim a nonbeliever or kafir.

formulations before finding a compromise between the major political blocs, though some deputies remained vehemently opposed to the article or parts of it. Article 6 of the adopted constitution tries to accommodate both concerns:

"The state protects religion, guarantees freedom of belief and conscience and religious practices, protects the sacred, and ensures the impartiality of mosques and places of worship away from partisan instrumentalization. The state commits itself to the dissemination of the values of moderation and tolerance and to the protection of the sacred and the prohibition of any offense thereto. It commits itself, equally, to the prohibition of, and the fight against, appeals to *takfir* and incitement to violence and hatred."

The Center is concerned that the obligation for the state to "protect the sacred"—a vague notion—could be used in the future to curb free speech if that speech is considered an attack against religion.[213] According to the United Nations Human Rights Council, accusations of defamation of religion should never be used to limit freedom of expression.[214]

The judiciary will likely play an important role in interpreting Article 6 should conflict arise. Therefore, The Carter Center encourages judges and legislators to protect freedoms of speech, conscience, and religion as defined by international standards, including the freedom to adopt, change, or renounce a religion or belief.[215] Notably, freedoms of religion and conscience are the only rights addressed in the general principles chapter of the constitution, as opposed to the chapter on rights and freedoms. Their exclusion from the latter should not be interpreted to mean that they merit less protection than other fundamental rights and freedoms, and they are still subject to the general limitations clause (Article 49).[216]

Additional religious elements included in all four drafts and in the final version of the constitution are the prescribed oaths of office sworn by elected officials, which are religious in nature, and the requirement for candidates running for president of the republic to be Muslim, a legacy of the 1959 constitution.

Rights and Freedoms

The scope and interaction of fundamental rights and freedoms sparked heated discussions throughout the process. The rights and freedoms chapter was one of the most dynamic, evolving to a significant degree over time. While for much of the process, several rights were listed in the chapter on general principles, all fundamental rights were consolidated in the fourth draft into a chapter on rights and freedoms, with the exception of the freedoms of religion and conscience.

The final text of the constitution upholds several key civil and political rights, such as freedom of expression, gender equality, and the protection of women's rights. Several key economic, social, and cultural rights are also protected. The rights and freedoms chapter ends with the statement that "no amendment is allowed that undermines any human rights acquisitions or freedoms guaranteed in this constitution."[217]

Restriction on Fundamental Rights

While the enshrinement of fundamental rights and freedoms is crucial in a constitution, it is also important to delineate when and how those rights can be restricted, keeping in mind that restrictions must be limited and are necessary.[218]

Until the final draft, the constitution gave wide scope to the passage of subsequent laws to determine whether limits could be placed on many

213 See also Amna Guellali, Human Rights Watch Country Director for Tunisia and Algeria, "The Problem With the New Constitution," Feb. 3, 2014. http://www.hrw.org/news/2014/02/03/problem-tunisia-s-new-constitution

214 United Nations Human Rights Council, A/HRC/RES/16 /18, Combating Intolerance, Negative Stereotyping, and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against People Based on Religion or Belief, adopted by consensus on March 24, 2011

215 Article 18 of the ICCPR and Article 18 of the Universal Declaration of Human Rights. See also U.N. Special Rapporteur on Freedom of Religion or Belief, Rapporteur's Digest on Freedom of Religion or Belief (excerpts of the reports from 1986 to 2011), p. 4: http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf

216 See sections on Rights and Freedoms and Restriction on Fundamental Rights.

217 Article 49

218 Lawful Restrictions on Civil and Political Rights, DRI, Briefing Paper 31, October 2012

rights and freedoms. Furthermore, the language limited certain rights to various degrees. It was not always clear how the drafters of the constitution had determined the limitations or on what basis. The fourth draft, for example, guaranteed the right of access to information "within limits that do not prejudice national security or the rights that are guaranteed by the constitution." Freedoms of expression, media, and publication could not be restricted except by virtue of a law protecting "the rights, reputation, safety, and health of others." The right to peaceful assembly and demonstration was guaranteed but could only be exercised per procedural regulations provided for by the law "without prejudice to the essence of the right." The right to privacy and freedom of movement could be limited by law but required a judicial order. Academic freedom and freedom of scientific research were not limited at all. This variation from one right to the next risked creating confusion and opened the door to an eventual erosion of those rights.

It is a positive development, and consistent with the Carter Center's recommendations, that the final version is free of specific restrictions on rights and freedoms in the majority of provisions, including freedom of movement; freedom of expression, information, and publication; freedom to form political parties; and the right to assembly and peaceful demonstration, academic freedom, and freedom of scientific research. The articles dealing with the right to life (Article 22), pretrial detention (Article 29), electoral rights (Article 34), the right to health coverage (Article 38), and the right to property (Article 41) still contain specific referral to the law, however, and may not fully benefit from the guarantees spelled out in the general limitations clause (Article 49).

Following the advocacy of various stakeholders, including The Carter Center, the general limitations clause—delineating how rights should be interpreted in their application—was introduced in the fourth draft. While the Center and other civil society groups welcomed this inclusion, they continued to advocate for the full protection of fundamental rights without restriction so as to conform to Tunisia's obligations under international law.[219]

The Consensus Commission reached agreement early in its work to reformulate the general limitations clause, an agreement that was honored in the NCA vote (Article 48 of the final draft, now Article 49 of the constitution). The final article details that any restriction of rights and freedoms "can only be put in place where necessary in a civil democratic state." The same article invokes the principle of proportionality, directing the state to respect "proportionality between these limitations and their motives."

The final text of the constitution upholds several key civil and political rights, such as freedom of expression, gender equality, and the protection of women's rights. Several key economic, social, and cultural rights are also protected. The rights and freedoms chapter ends with the statement that "no amendment is allowed that undermines any human rights acquisitions or freedoms guaranteed in this constitution."

The invocation of the principles of necessity and proportionality represents an important human rights gain in the Tunisian Constitution.[220] In the past, freedoms granted in the constitution were commonly restricted through legislation, removing all meaning from those rights. The constitution further instructs judicial authorities, which will likely have wide scope to interpret constitutional provisions around rights and freedoms, to "ensure that rights and freedoms are protected from all violations."

219 See joint statements by Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center, on July 24, 2103, and Jan. 3, 2014. http://www.cartercenter.org/news/publications/peace/democracy_publications/tunisia-peace-reports.html

220 Zaid El Ali and Donia Ben Romdhane (International IDEA), "Tunisia's New Constitution: Progress and Challenges to Come," opendemocracy.net, Feb. 16, 2014. http://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to-

Despite these important gains, The Carter Center remains concerned about potential limitation of rights guaranteed in the new constitution. While Tunisia has observed a moratorium on the death penalty since 1991, the constitution does not ban the death penalty outright, even if the right to life is defined as "sacred" by the constitution (Article 22) and can only be limited by law in extreme situations. It should also be noted that, in addition to the conditions delineated in Article 49 to limit rights, the constitution allows the president to take exceptional measures in times of state emergency, which often results in curtailing individual freedoms.[221] The constitution does not elaborate on the status of rights and freedoms once a state of emergency has been pronounced. The Carter Center recommends that subsequent legal reform restrict limitations to only those necessary for a specific period of time to meet the exigencies of the exceptional situation. Further, rights considered nonderogable in international law should never be limited under emergency powers.[222]

The first draft of the constitution ignited a heated debate on women's rights in Tunisia, as it mentioned the "complementary roles of men and women inside the family" without reference to the equality of men and women.

The Principle of Nondiscrimination

During the drafting process, debates around the principle of nondiscrimination revolved mainly around gender issues. While Article 48 also prohibits discrimination against people with disabilities, other possible grounds of discrimination — including race, color, language, religion, political or other opinion, and national or social origin — received far less attention. The unofficial version (draft 2bis) of the constitution mentioned "all forms of discrimination." However, this specification was not incorporated into the third and fourth drafts. As a result, while language regarding gender equality improved in each successive draft, the adopted constitution does not explicitly prohibit other grounds of discrimination as warranted by international law.[223]

Article 21 specifies only that "all citizens, male and female alike, shall have equal rights and duties, and shall be equal before the law with no discrimination." Not only are grounds for discrimination other than gender not mentioned, but the clause also does not conform to Tunisia's obligations under the ICCPR, which specifies that equality before the law is a right of the individual and is not limited only to citizens.[224]

The Carter Center recommends that legislators revisit relevant laws, taking into account Tunisia's international obligations, and incorporate clear prohibitions of discrimination on all grounds, including race, color, language, religion, political or other opinion, national or social origin, property, birth, or other status, toward all people and not only citizens.

It is noteworthy that, while Article 21 does not refer to other grounds of discrimination, its contribution to the protection of Tunisian women's rights is significant, a central issue during the entire constitution-making process.

Protection of Women's Rights and Equality

The first draft of the constitution ignited a heated debate on women's rights in Tunisia, as it mentioned the "complementary roles of men

221 Article 80 of the Tunisian Constitution allows the president to take exceptional measures in the event of an imminent danger threatening the entity, security, and independence of the country, after consultation with the head of government, president of the Assembly of the People's Deputies, and requires him to give notice to the head of the Constitutional Court. After a lapse of 30 days, the Constitutional Court may examine continued need for the measures, on request from the head of the Assembly of the People's Deputies or 30 deputies.

222 Article 4 of the ICCPR and Human Rights Committee General Comment No. 29

223 Article 2 (1) of the ICCPR states, "Each state party (...) undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant without any distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."

224 Article 2 of the ICCPR stipulates that states undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant," Article 26, ICCPR: "All people are equal before the law and are entitled without any discrimination to the equal protection of the law."

and women inside the family" without reference to the equality of men and women. More generally, the rights of women in the first draft were largely considered in the context of the family.[225] Widely criticized, the notion of "complementarity" was subsequently abandoned.[226] The second and successive drafts considered women independently from the family. The concept of the state as a guarantor for equality of opportunity between women and men in "assuming various responsibilities," as opposed to in all areas, nonetheless endured. None of the drafts touched on the issue of gender parity.

Furthermore, in relation to violence against women, the first and second draft noted that "the state guarantees the elimination of all forms of violence against women." The NCA commissions charged with drafting specific chapters later edited this clause. Unofficial draft 2bis specified that "the state takes adequate measures to eliminate violence against women." The reference to "adequate measures" disappeared in the third draft but resurfaced in the fourth and final draft.

Though the issue of parity did not garner much attention in the immediate months leading to the article-by-article vote on the constitution, it became a hotly debated topic during the final voting process. A pressure group of NCA members, mainly women from various blocs, coalesced to push for the inclusion of stronger language on women's rights in the constitution. The Consensus Commission addressed the issue and proposed an amendment to Article 45 of the final draft (Article 46 of the adopted constitution) stipulating that "the state commits to protect the acquired rights of women and works to support and develop them. The state guarantees equality of opportunity between men and women in assuming various responsibilities and in all fields. The state works to achieve parity between women and men in elected assemblies. The state takes adequate measures to eliminate violence against women."

The language was by no means universally acceptable in the NCA, and for several days during the plenary vote it was not clear whether the amendment would be adopted. After much negotiation, lobbying by civil society groups, and the involvement of senior political figures from various sides of the spectrum, the proposed Article 46 eventually passed with 116 votes in favor, 32 abstentions, and 40 against.[227]

Human rights groups and women's rights activists welcomed the adoption of Article 46, in conjunction with a prohibition of discrimination and specification of equality in rights and duties between male and female citizens (Article 21). The language not only preserves the rights acquired thus far by women in Tunisia but also instructs the state to support and further extend these rights. It also entrenches the principle of parity in elected bodies by introducing an obligation for the state to seek the achievement of parity in all elected councils. This language, while it does not mandate gender parity, is notable for its aspiration.

The constitution also introduced gender-sensitive wording in relation to key issues, such as the right to work and the right to decent working conditions (Article 40) and the right to stand for election (Articles 34 and 46). And while Tunisia's 1959 constitution stipulates that the president of the republic must be a man, Article 74 of the new constitution now provides that "every male and female voter" has the right to stand for election for the position of president.[228] The constitution can thus be seen as a notable step in the advancement and protection of women's rights in Tunisia, and it maintains Tunisia's historical advances within the Arab region in regard to the rights of women in society.

The Center commends the NCA for strengthening women's rights and tackling discrimination against women and applauds the progress made in strengthening women's position in the constitution. The language used in Article 34 ("the state seeks to guarantee women's representation in elected councils") is weaker, however, than the subsequent language used in Article 46. The

225 In the first draft, the state was entitled to "protect women's rights, preserve the unity of the family and maintain its cohesion."

226 For a more detailed description of the reaction to the term "complementarities," see the Constitution-Making Process section.

227 Article 45 of the fourth draft

228 Article 73 of the fourth draft

Center encourages Tunisian authorities and political parties to do their utmost to "achieve parity in elected assemblies." The Center encourages the state to adopt positive measures in all areas in order to achieve the effective and equal empowerment of women and to work to eliminate not only violence against women but, more widely, all forms of discrimination against women.[229]

During the elaboration of the election law, the NCA faced a first test of the principle of gender parity as enshrined in the constitution. The Center welcomes provisions in the electoral law that put in place measures to achieve gender parity in nomination lists by providing that women and men be nominated in alternating positions and encourages the state to tackle all barriers to women's participation in its implementation of the law.

Economic, Social, and Cultural Rights

The constitution guarantees many economic, social, and cultural rights, including the right to health (Article 38), education (Article 39), culture (Article 42), water (Article 44), and more broadly to a clean environment (Article 45). But the area of economic, social, and cultural rights is one of the few that did not consistently evolve toward stronger protections over successive drafts of the constitution. In some instances, the language in the adopted constitution does not fulfill the vision of the rights and freedoms constituent commission, which worked on these issues.

Further, many economic, social, and cultural rights in the constitution were not spelled out to explain how they are to be exercised and achieved. In addition, the constitution does not obligate the state to realize these rights to the maximum of its available resources and in a progressive manner, as stipulated in the International Covenant on Economic, Social, and Cultural Rights, to which Tunisia is a party.[230]

In some cases, subsequent drafts of the constitution actually diluted the state's obligation to enforce, fulfill, or protect a given right. This is illustrated, for example, by a closer examination of the right to water (Article 44). It should be recalled that U.N. General Comment No. 15, which provides guidelines for the interpretation of the right to water under the ICESCR, states that "the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights."[231]

In the draft 2bis that was submitted by the constituent commissions to the drafting committee prior to the release of the third draft, the right to *drinkable* water was guaranteed, with the state being obligated to protect water resources, use them efficiently, and distribute them fairly. The third draft read merely, "The right to water is guaranteed." The final draft reintroduced the obligation to protect water resources and use them efficiently, but both the "state and society" were obligated to do so in this version. However, the state's obligation to work for a fair distribution of water resources was eliminated, and the plenary eventually adopted the following formulation: "The right to water shall be guaranteed. The conservation and the rational use of water shall be a duty of the state and society."

The Carter Center had urged the NCA to strengthen economic, social, and cultural rights and welcomes the fact that a new provision was added in the last days of the article-by-article vote that stipulated that "natural resources are the property of the Tunisian people, and the state exercises sovereignty over them on the people's behalf. Investment contracts related to these resources shall be submitted to the competent committee of the Assembly of the Representatives of the People. Agreements ratified in relation to

229 Human Rights Committee, General Comment No. 28, para. 3

230 Article 2 of the ICESCR notes, "Each state party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, 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."

231 General Comment No. 15 on the right to water, adopted by the Committee on Economic, Social, and Cultural Rights in November 2002, provides guidelines for the interpretation of the right to water, under Article 11, the right to an adequate standard of living, and Article 12, the right to health. ICESCR. Comment No. 15 defines the right to water as the right of every single person to safe, sufficient, affordable, acceptable, and physically accessible water for personal and domestic use.

these resources shall be submitted to the assembly for approval" (Article 13).

The realization of economic, social, and cultural rights often has financial implications and requires the establishment of concrete enforcement mechanisms. The Center encourages Tunisian authorities to devote appropriate resources to the implementation of these rights, in order to meet the new constitution's human rights commitments and the aspirations of the Tunisian people.

Election Rights

Guarantees for electoral rights evolved significantly from the first draft of the constitution to its adoption. While the right to vote did not appear in the first draft—an unfortunate omission addressed in the second draft—the requirements for genuine elections in the adopted constitution align closely with those elaborated in international law.[232]

The Carter Center commends the NCA for its efforts to protect the electoral process and voting rights, which form the foundation of the modern democratic state. The constitution requires that legislative, presidential, and local elections be universal, free, direct, secret, fair, and transparent.[233] The words "fair and transparent" were added in the fourth draft, a positive step that reinforces the democratic nature of elections. The adopted constitution, however, omits the principle of equality in the articles related to voting rights. Equality is a fundamental element of the right to vote and is directly mentioned in the Universal Declaration of Human Rights as well as the ICCPR. The equality of the vote, or "equal suffrage," refers to the principle of "one person, one vote" so that no citizen's right to vote is greater or less than that of another citizen. It is one of the basic measures to combat election fraud, since such fraud is a violation of equality. Equality of the vote also means that every citizen's vote should have the same value. For example, the number of citizens or voters per elected representative should be generally equal when representatives are elected from different constituencies. This omission is significant, and lawmakers should make every effort to incorporate the principle when taking decisions regarding the demarcation of Tunisia's future electoral districts.

Concerns remain regarding the restriction of the right to vote. Article 34 on electoral rights is one of the few articles that retained a specific limitation, and thus it may escape the stringent conditions set in the general limitations clause (Article 49). The article gives wide scope to the law to determine the limits that could be placed on electoral rights. While this could be beneficial in certain circumstances, The Carter Center recommends that should any measures be placed to restrict these rights, the restrictions should be reasonable, proportional, and necessary in a democratic society, as per the conditions spelled out in the general limitations clause.

Furthermore, the criteria for candidacy for election to the office of president of the republic were hotly debated during the entire constitution-making process. Discussion centered on the question of whether to place an upper age limit on candidates as well as on the restrictions on dual nationals. Both measures directly affected several potential candidates.

The second and subsequent drafts of the constitution stipulated that candidates for the office of the president of the republic have a minimum age of 40 and a maximum age of 75. Key political stakeholders and members of the Consensus Commission managed to reach an agreement to remove the upper age restrictions on presidential nominees, to lower the minimum age to 35, and to soften the interdiction of candidacy for people holding dual citizenship. During the final plenary vote, these issues remained controversial. The assembly was forced to vote twice on the article (Article 74) but retained the Consensus Commission's format in the end.[234]

232 Article 25 of the ICCPR states that "every citizen shall have the right and opportunity... (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors..."

233 Articles 55 (legislative elections), 75 (presidential elections), and 133 (local elections)

234 Article 73 of the fourth draft

The removal of the age ceiling in the constitution as well as the lowering of the minimum age to 35 for candidates are positive and consistent with the Center's recommendations to bring the criteria for candidacy in closer alignment with international norms and may encourage wider participation by youth in the political affairs of their country.[235]

The nationality of the president also generated debate. Until the fourth draft, people possessing only the Tunisian nationality (and not dual nationals) could run for the president. This condition was refined in the fourth draft, which specified that on the date of the submission of the application the candidate is not allowed to hold another nationality, obliging dual nationals to give up any other nationalities before presenting their candidacy to run for president. After advocacy efforts by dual nationals serving within the assembly, the NCA eventually opted to ease the conditions for candidacy. The final text stipulates that a candidate must sign a commitment to revoke his or her non-Tunisian citizenship if elected president of the republic and abandon the second nationality only if elected (Article 74).

All drafts made reference to the candidate being Muslim.[236] While this triggered no debate, the requirement for a candidate for elected office to be of a particular faith contravenes Articles 25 and 26 of the ICCPR, which address the principle of participation in public affairs, nondiscrimination, and equality before the law.

Structure of the Political System

International law does not dictate a specific political system, as "every state possesses a fundamental right to choose and implement its own political, economic, and social systems."[237]

The content of the constitution should, however, ensure that all elements of a democratic system that guarantee the implementation of rights are respected. The separation and balance of powers are fundamental principles of democratic systems, and the idea of balance of power implies collaboration between the different branches of the state and the creation of mechanisms of mutual control and of countervailing authorities.

The choice of the political system was particularly contentious during the drafting process. Although the first draft of the constitution established the principle of separation of powers, the debate revolved around the balance of powers between the executive and the legislative and between the president of the republic and the head of government (prime minister), in a mixed system with an executive power with two "heads."

In both the first and second drafts, several aspects of the political system remained unresolved. In the absence of consensus within the Commission on Executive and Legislative Powers, its members put forth two or three options of several articles for consideration. In the third draft, the drafting committee incorporated one of the options presented by the powers commission. The selected political system granted considerable power to the Parliament and the government, while providing for the direct election of the president, whose prerogatives would be strictly limited.

The fourth draft of the constitution did not substantially change the prerogatives of the two heads of the executive but introduced details to clarify their respective roles and attempted to create a more even balance between them. A new provision (Article 70 in the fourth draft and 71 in the constitution) clearly stated that both

235 U.N. General Comment No. 25, the interpretive document for Article 25 of the ICCPR, indicates that any restrictions on the right to be elected and on the right of people to freely choose their representatives "must be justifiable on objective and reasonable criteria." (para. 15). Comment 25 identifies minimum age as a potentially reasonable restriction for holding office, as is lack of mental capacity. While the provisions for maximum age may endeavor to address mental and physical capacity to hold public office, they do not inherently reflect these qualities and may therefore discriminate against otherwise fit candidates.

236 When submitting their chapters for the first draft in August 2012, several commissions proposed multiple versions of articles. Regarding the candidacy conditions for the election to the office of president of the republic, five different options were presented, and two did not include the requirement for the candidates to be Muslim.

237 International Court of Justice (ICJ), Case Concerning Military and Paramilitary Activities In and Against Nicaragua, (Nicaragua v. The United States of America), June 27, 1986, p. 131: "A state's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every state possesses a fundamental right to choose and implement its own political, economic, and social systems." Also ICJ, advisory opinion, Sahara Occidental, Oct. 16, 1975, p. 43–44: "No rule of international law, in the view of the court, requires the structure of a state to follow any particular pattern, as is evident from the diversity of the forms of state found in the world today."

the president of the republic and the government, led by a head of government, "hold the executive power." These changes, emanating to some extent from the national dialogues, were criticized by some NCA members, who considered them insufficient.

In the end, the plenary adopted measures that clarified the competence of the head of government and the president of the republic, but some gray areas remain. In several instances, the constitution foresees that the president of the republic shall take decisions after consultation with the head of government.[238] These provisions may prove complicated to implement, should the executive powers fail to reach agreement. The constitution stipulates in Article 101 that in the case of a dispute arising between the heads of the executive, the "most concerned" of the two parties may refer the matter to the Constitutional Court for a ruling, which must be issued within a week. While the court could, in principle, act as arbitrator, there is a danger of it becoming politicized if it is called upon to arbitrate between the actors frequently, and the constitution does not offer specific guidelines for making judgments. In addition, the Constitutional Court may not be established for up to a year following the upcoming legislative elections, leaving a vacuum should conflicts arise in the immediate term.[239]

Another issue that may generate future difficulties concerns the ratification of international treaties. Article 77 stipulates that the president of the republic is responsible for ratifying treaties and authorizing their publication, while the head of government is "exclusively competent to present draft laws relating to the approval of ratification of treaties" (Article 62). The constitution is silent, however, on how to deal with a scenario in which the head of government chooses not to present a draft law or fails to do so in a timely manner, thereby blocking the ratification process.

Finally, some provisions regarding the political system are very complex and may prove challenging to implement. The president of the republic is allowed to ask the assembly to renew or withdraw confidence from the government up to two times during his or her term (Article 99). Should the assembly choose to withdraw confidence, the president is tasked with designating someone to form the new government in a period not exceeding 30 days. Should this person fail to do that, or should the assembly fail to give confidence to the new government, the president is authorized to dissolve the assembly and to call for elections. On the other hand, should the assembly give the government its confidence twice, the president must submit his or her resignation. The system does not give either party strong incentive to practice checks and balances, since the cost of failure is extremely high for both parties.

The separation and balance of powers are fundamental principles of democratic systems, and the idea of balance of power implies collaboration between the different branches of the state and the creation of mechanisms of mutual control and of countervailing authorities.

In order to avoid such political stalemates, Tunisian political actors should continue seeking consensus in the current phase of the transition and beyond, as they did in the months leading up to the constitution's adoption. Maintaining this spirit will help to integrate this positive aspect of the Tunisian constitution-making process into the wider political culture of the country and may help reduce the potential for conflict, particularly until permanent institutions, including the Constitutional Court, are set in place.

Role and Rights of the Political Opposition

The role and rights of the political opposition, which were not specified in the first and the

238 Articles 77, 78, 80, and 106

239 The constitution foresees the establishment of a temporary commission that is tasked with reviewing the constitutionality of draft laws. This commission, the Instance Provisoire du Contrôle de la Constitutionnalité des projets de loi, was established by a law voted on by the NCA on April 15, 2014. Its mandate does not extend to arbitration between political powers.

second drafts, are a key positive outcome of the national consultations held in December 2012 and January 2013.[240] The third draft includes a reference to the opposition as an integral element of the Assembly of the Representatives of the People, and in the fourth draft similar language is used to grant "the opposition the right to create and preside over an inquiry commission every year," but without giving further information on the status and prerogatives of such a commission.

The final text of the constitution not only retains the explicit recognition that the opposition is an "essential component" of the legislature but also provides for a member of the opposition to head the legislative assembly's finance committee. Such committees play a key role in controlling the state's funds and are charged with reviewing the state's annual budget before it is voted on in Parliament as well as with assessing whether the state's monies are being used wisely.[241] The constitution also extends the right to refer a draft law to the Constitutional Court not only to the president of the republic and the head of government but also to any 30 members of the assembly.[242] This provision should further boost the rights of the opposition and, by extension, the democratic nature of the state.[243]

Role of the Judiciary

The judiciary under former President Zine el Abidine Ben Ali was subservient to the executive branch and lacked independence. Therefore, it was essential that Tunisia's new constitution fully guarantee the independence of the judiciary and the impartiality of justice. As the NCA was discussing the chapter on the judicial powers during the article-by-article vote, The Carter Center, together with Human Rights Watch, Al Bawsala, and Amnesty International, issued several joint recommendations to ensure that the judiciary had the sufficient power and independence.

The Center welcomes the fact that the Tunisian Constitution lays a strong foundation for the independence of the judiciary. The chapter on judicial authority contains important guarantees in this regard, including Article 102, which affirms that "the judiciary is an independent authority that ensures the administration of justice, the supremacy of the constitution, the sovereignty of the law, and the protection of rights and freedoms." Article 109 prohibits outside interference with the judiciary.

The language concerning the appointment of judges was significantly improved in the adopted text of the constitution (Article 106).[244] Initially, this provision noted that judges would be appointed by presidential decree based on decisions by the High Judicial Council, the independent supervisory body for the judiciary. There were no specific provisions made for the appointment of senior judges, which meant that they would be appointed according to the provisions of Article 92 that gives the head of government the responsibility of appointing senior civil servants. In the final text, the NCA put in place stronger guarantees to ensure that the judiciary does not fall hostage to the government. The final draft gives the president the responsibility of appointing senior judges but only in consultation with the head of government and based on a proposal by the High Judicial Council (Article 106).

Similarly, later drafts strengthened the immunity of judges. Until the fourth draft, it was possible to lift the immunity of a judge in the event that he or she is caught red-handed (in flagrante delicto). In the final text, the judge must be caught red-handed committing *a crime*. Only then could his or her immunity be lifted. It should be noted that there were no provisions in the 1959

240 The UNDP report on the national consultation process highlights recommendations regarding the inclusion of the rights of the opposition in the constitution by participants of sessions held in the governorates of Monastir, Bizerte, and Sidi Bouzid. See UNPD, "Dialogue National Sur Le Project de La Constituation: Rapport General," Tunis, March 2013, p. 35.

241 For a more detailed analysis of the importance of this explicit recognition, see Zaid El Ali and Donia Ben Romdhane (International IDEA), "Tunisia's New Constitution: Progress and Challenges to Come," opendemocracy.net, Feb. 16, 2014, http://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to-

242 Article 120

243 The Human Rights Council adopted a resolution that emphasizes the crucial role played by the political opposition and civil society in the proper functioning of a democracy. (A/HRC/RES/19/36) See also "The Constitutional Rights of the Opposition," DRI Briefing Paper 34, February 2013.

244 Article 103 of the fourth draft

constitution to protect judicial independence. The guarantees of judicial independence in the new constitution can be seen as a key turning point in Tunisian history, in light of past practices of authorities—both prior to the revolution and to a lesser extent since—that made the judiciary vulnerable to the executive power.

The NCA also improved the text as it pertains to the establishment of the High Judicial Council, including its composition. According to the adopted constitution, the council must be established within six months of the upcoming legislative elections and will play an important role, among others, in selecting the members of the Constitutional Court. A key aspect of the council's work will be to deal with all matters relating to the appointment, promotion, dismissal, and career progression of judges. Initially and until the fourth draft, it was foreseen that half the members of the council would be judges, while the other half would not be judges. This measure was amended to increase the percentage of judges to two-thirds. The adopted constitution also strengthened selection measures, requiring the election and not the nomination of most judges and those who are not judges. Article 112 stipulates, moreover, that "the remaining third (those who are not judges) shall be composed of specialized independent individuals" and that "elected members shall undertake their functions for a single six-year term," which are further guarantees of independence.

Although this issue was apparently not discussed prior to the adoption phase of the process, a group of NCA members proposed an amendment to enshrine the profession of lawyers in the constitution for the first time in Tunisian history. The resulting article (Article 105) states: "The profession of lawyer is a free independent profession that contributes to the establishment of justice and to the defense of rights and freedoms. Lawyers are entitled to the legal guarantees that ensure their protection and the fulfillment of their task." This article should be read in the context of Tunisia's authoritarian past, in which lawyers were frequently subjected to harassment by state security. In this sense, the adopted language could play a role in strengthening a lawyer's right to provide defense and the right of individuals to a fair trial. The right to appeal—an ingredient of the right to a fair trial—first appeared in the second draft (Article 104) but was removed in the fourth, then eventually reintroduced in the final version of the constitution (Article 108).

Despite these strong guarantees, security of tenure requires further elaboration in the law. Article 107 states that no judge may be transferred, dismissed, expelled, or subjected to disciplinary punishment "except in accordance with the guarantees provided for by law." Though the article requires a decision by the High Judicial Council before any of the above actions can be taken, it leaves wide scope to the law to determine the criteria for dismissal. These could be used in future to undermine the judiciary.

The Carter Center recommends that the government, the NCA, and the legislative assembly incorporate stronger provisions on the independence of the judiciary into the legal framework, consistent with international standards. This should include the unambiguous affirmation of security of tenure with regard to appointment, promotion, and discipline, with removal of judges possible only for serious misconduct and only following a fair trial.[245]

The constitution accords the judiciary wide powers to interpret the constitution and, by extension, to enforce the freedoms and rights guaranteed therein. Furthermore, authorities have up to a year following the legislative elections to establish the Constitutional Court. This leaves a void in constitutional oversight that may not be met entirely by the Provisional Commission to Review the Constitutionality of Draft Laws, the IPCCPL, foreseen by the constitution's transitional provisions, which has only a priori oversight of laws (Article 148, paragraph 7).

The Carter Center recommends that judges be required to interpret the law, including the constitution, to favor the enforcement of a right or fundamental freedom. In addition, the interpretation of human rights treaties from

245 The U.N. Basic Principles on the Independence of the Judiciary and the Principles and Guidelines on the Right to Fair Trial in Africa

any official treaty body, including courts and commissions, should be taken into account as a minimum standard.

A further concern is the question of the supremacy of the constitution. Until the fourth draft of the constitution, Article 102 paragraph 2 stipulated that "judges are independent.[246] No power shall be exercised over their rulings other than the power of the constitution and the law." In the final text, the reference to the constitution in that paragraph was removed, a move that puts in question the provisions of the first paragraph, which instructs judges to enforce the supremacy of the constitution yet in the second paragraph essentially asks them now to refer only to the law. This may lead to the prevalence of the law over the constitution where contradictions exist between the two as well as a systematic referral of cases to the Constitutional Court, even where the constitutionality of the issue in question is clear. This could result, on a practical level, in an overburdening of the Constitutional Court and delays in judgment.

However, given that Article 102 instructs the judiciary to ensure the constitution's supremacy, the article assumes paramount importance during the remainder of the transitional phase, particularly in the absence of the Constitutional Court. It should be read in the context of the larger constitution, which sets limits on the scope of permissible restrictions to rights and freedoms (Article 49).

Composition and Competence of the Constitutional Court

Until the fourth draft, the assembly was mandated to elect 12 Constitutional Court members from among candidates proposed by the president of the republic, the head of government, the president of the assembly, and the president of the High Judicial Council. The final version specifies that the president of the republic, the assembly, and the High Judicial Council each appoint four members of the court. This measure was a positive step that strengthens the balance of powers and ensures that no single branch controls the court.

The first and second drafts mandated that the Constitutional Court be composed entirely of legal specialists with a minimum of 20 years of professional experience. The drafting committee lowered these prerequisites in the third draft, requiring a majority of legal specialists with a minimum of 10 years' experience.[247] Opposition members, civil society representatives, and some members of the judicial powers commission that had initially drafted the article protested these changes. The fourth draft proposed a compromise of a two-thirds composition of legal specialists with a minimum of 15 years of experience (Article 115). NCA members eventually opted for an intermediate solution, namely an increase of the number of legal specialists to three-quarters and a return to the initial 20 years of professional experience requirement initially foreseen by the judicial powers commission (Article 118).

The second draft of the constitution articulated the Constitutional Court's competencies, including the mandatory referral to the Constitutional Court of any proposed amendments to the constitution, draft organic laws, and ratification of treaty laws as well as an optional referral under certain conditions for draft legislation (Article 117). Further, the second draft indicates that any five assembly members, in addition to the president of the republic, the president of the assembly, and the head of government, could refer legislative matters to the court. Although the judicial powers commission increased the number of deputies to 10, the drafting committee kept only the mandatory referrals and removed the mechanism of optional referral in the third draft. National and international organizations criticized this decision.[248] A Consensus Commission

246 Article 100 in the fourth draft

247 The provisions on the composition of the Constitutional Court were said to have been changed as a compromise between advocates for the establishment of a High Islamic Council and its opponents. The court's composition was widened by the drafting committee so as to allow for the inclusion of nonlegal specialists, thus opening the door for the inclusion of religious law scholars.

248 Observation sur le projet final de la constitution de la République tunisienne, Strasbourg, le 17 July 2013, Avis 733/2013 (French only), Council of Europe, Venice Commission, para. 176. www.venice.coe.int/webforms/documents/?pdf=CDL(2013)034-f. Also "Strengthen New Constitution's Human Rights Protection, Guarantee Equality for All, Affirm International Law Obligations," joint statement by Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center, Jan. 3, 2014. www.cartercenter.org/news/pr/tunisia-010314.html

proposal allowing a minimum of 30 assembly members to address the court was adopted in the plenary votes. This measure will allow deputies, particularly the opposition, the power to challenge draft laws before the Constitutional Court while at the same time reducing the risk of blockage by a small number of deputies.

Transitional Provisions

A new chapter was added to the final draft of the constitution, which dealt with the transitional provisions intended to ensure a smooth transition between the former and new constitutional orders. The drafting process was unique with regard to transitional provisions. The constituent commissions did not discuss their content, nor did any of the commissions have a mandate to address these provisions. Instead, the drafting committee adopted the transitional provisions late in the process, leaving little time for members to discuss and reflect on their implications. Stakeholders widely criticized both the process and the content of the chapter. It was the only chapter that was re-evaluated in full by the Consensus Commission, which debated, among other issues, the timeline of the establishment of the Constitutional Court, the prerogatives of the NCA, and the deadlines for the entry into force of the various provisions of the constitution, including the date for upcoming elections.

The Carter Center notes that the transitional provisions that were finally adopted set clear timelines and deadlines for the entry into force of the various provisions of the constitution. The Center applauds the NCA's decision to grant the Constitutional Court full jurisdiction to examine the constitutionality of laws immediately upon its creation, rather than three years later, as previously specified. The establishment of the Constitutional Court, however, is dependent on the timing of the legislative elections and could take up to one year from that date, leaving a void in judicial review that will not necessarily be met by the court system at large, given that Article 148 paragraph 7 of the constitution explicitly states that the court system is not allowed to review the constitutionality of laws.

The constitution calls for the establishment of an interim commission charged with considering the constitutionality of draft laws until the permanent body is in place. This commission, the IPCCPL, was established by an organic law adopted by the NCA on April 15, 2014.[249] As this body does not have a mandate to consider the constitutionality of current laws, including those inherited from Ben Ali's regime, there is no way of ensuring that Tunisia's legal framework is in conformity with the new constitution. In addition, prior to the establishment of the Constitutional Court, there is no mechanism to arbitrate potential conflicts between the two heads of the executive, leaving a vacuum should conflicts arise in the short term.

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Furthermore, the transition between temporary and permanent governments is regulated currently by the transitional provisions as well as the OPPP law. It would have been preferable to integrate the still-applicable provisions of the OPPP into the transitional provisions to ensure greater coherence and to fully reflect the force of the new constitution.

One issue that The Carter Center highlighted in the months immediately following the adoption of the constitution is the need for the NCA and the new government to put in place the legal framework necessary to implement the provisions of the constitution, in particular the timely establishment of the IPCCPL.[250] The Center particularly encouraged the NCA to establish the IPCCPL in time to review the draft election law, which came under discussion by the assembly's

249 Law No. 14–2014 published in the JORT on April 22, 2014

250 As stipulated in Article 148, para. 7, of the constitution

plenary in April 2014. The NCA adopted an organic law to establish the IPCCPL on April 15, 2014, and the commission went on to examine several challenges to the constitutionality of the law.[251]

The Center further recommended that the commission be mandated to review the Assembly of the Representatives of the People Rules of Procedure. Article 120 of the constitution mandates the future Constitutional Court to review the legislative body's Rules of Procedure as presented to it by the president of the assembly. However, there is no mechanism foreseen in the transitional provisions to review the Rules of Procedure that will be put in place by the Assembly of the Representatives of the People, following the legislative elections. The assembly is expected to be in place for approximately one year before the establishment of the court.

Despite this likely vacuum in oversight of the assembly's Rules of Procedure, the NCA chose to keep the IPCCPL's mandate very narrow, i.e., to limit it to the examination of the constitutionality of draft laws. The Carter Center maintains that enabling the commission to review the future assembly's Rules of Procedure would respect the spirit of Article 120. This review would be critical in guaranteeing that the exercise of legislative power is in conformity with the prerequisites of the constitution.

251 See the Immediate Post-adoption Outreach Efforts section of this report for more information about the IPCCPL.

Immediate Post-adoption Outreach Efforts

In part due to insufficient outreach during the constitution-making process, the NCA decided to organize regional information sessions following the adoption of the constitution, in order to allow NCA members to make the content of the new constitution, in particular the rights and freedoms contained within it, known to their constituents.

Due to the NCA's hectic schedule in the months following the constitution's adoption, when the assembly debated and voted on two crucial pieces of legislation, the electoral law and the law creating the IPCCPL, regional information sessions were not launched until mid-May 2014.

Organized by Badreddine Abdelkafi, the deputy to the president of the NCA in charge of relations with citizens and civil society and with the support of the interparty working group within the assembly, the consultations took place at the rate of six governorates per weekend. The sessions lasted a half-day each, with meetings open to the public and held, as much as possible, in public spaces such as university campuses.

The launch of the regional information sessions was scheduled to take place on May 10, 2014, in Sidi Bouzid, in apparent recognition of the governorate's strong symbolic value as the birthplace of the revolution. However, the event was not well-received by some residents of the area. NCA members, including President Ben Jaâfar, were prevented from holding the event due to protests. Subsequently, sessions were held peacefully in other regions, though clashes occurred in El Kef and Beja, where some residents protested what they saw as a "premature electoral campaign" by Ennahdha. The weak participation of the public—3,479 citizens in total throughout the country—limited the impact that such events could have had in increasing people's awareness and knowledge of their constitution. Attendance varied from one meeting to another, ranging from 39 to 334 citizens. Carter Center observers attended the sessions in both Bizerte and Sousse governorates, where between 75 and 100 people participated.

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The format of the information sessions was standardized across the governorates. They began with the display of a simple and well-thought-out 20-minute video presenting the content of the constitution, and then the chairman of the session (an NCA member) would give the floor to participants to ask questions to the panel, composed of other NCA members. In some governorates, the panel was composed of deputies elected from the

Thierry Bresillon

National Constituent Assembly members happily celebrate the adoption of the constitution.

governorate itself, such as in Bizerte, while in others, the deputies came from other constituencies. They were always accompanied by NCA legal advisers and UNDP staff members.

Most of the questions and comments throughout the country focused either on the constitution itself or on the overall political and economic situation. Criticisms were raised by some participants regarding the inability of the NCA to meet the goals of the revolution. Audience members commented on a variety of issues, including unemployment, the political system, the timing of local elections, and whether the constitution sufficiently guarantees the independence of the judiciary. The issue of decentralization and of giving more prerogatives to local authorities was also a recurrent theme of the debate, suggesting the importance of local governance issues in the daily lives of Tunisians.

Events observed by The Carter Center suggest that the NCA could have benefited from more direct contact with citizens throughout the process. However, most audience members appeared to appreciate the chance to have a dialogue with the deputies.

The Center encourages the legislative assembly to think not only about the frequency of such events but also about their timing and accessibility, so as to give women and Tunisians of all walks of life a chance to engage with deputies and to learn about the constitution. The Carter Center also encourages the NCA and the assembly to hold regular dialogues with youth, since many seem to feel anger, disdain, or lack of interest in

political institutions. This should be addressed head-on through more contact and accountability of elected bodies rather than by avoidance.

In addition to NCA-led information sessions, some civil society organizations engaged in awareness-raising activities. The Tunisian Association for Constitutional Law, the ATDC, "translated" the constitution into Tunisian dialect, in an effort to reach a wider audience and in order to make it more accessible to a lay audience. ATDC also produced an audio version of the text, intended to reach illiterate people. CSID organized several workshops on the constitution, including one in September for young, active people engaged within civil society organizations to reflect on ways to disseminate the content of the constitution.

Since the constitution should be a "living document," outreach and awareness-raising should not be limited to the month immediately following the text's adoption. Constitutional knowledge should be integrated into school curricula as well as be disseminated by media and civil society. Other countries in the region or elsewhere should also learn from Tunisia's experience, which suggests that in transitional contexts, failure to engage the public in the process can lead not only to feelings of exclusion on the part of citizens but to a breakdown in the relationship between citizen and state.

The Carter Center recommends that current and future constitution-making bodies thoughtfully plan and pursue mechanisms to engage the public in a genuine way in the process, including following the constitution's adoption. Such initiatives can help reconcile conflicting groups and sensitize people to diverse viewpoints. In addition, they can help ensure the constitution reflects the aspirations of citizens, while giving voice to minorities and other groups that may not be heard in the public arena. Genuine engagement of citizens may also increase support for the new constitutional order and contribute to the stability of the new political system.

Conclusions and Recommendations

Tunisia's new constitution lays a solid foundation for the establishment of the rule of law and the protection of rights and freedoms in the country. It also puts in place strong guarantees for an independent judiciary, thus breaking away decisively from the 1959 constitution. Some articles are broadly worded, however, and risk being interpreted in ways that contradict other provisions of the constitution. Measures to protect citizens from discrimination, provide security of tenure for judges, and safeguard fundamental freedoms during a state of emergency should be strengthened. Tunisian authorities are encouraged to take legislative action to address these concerns.

The adoption of the constitution is a key step in the country's transition, but on its own it is not sufficient to guarantee a successful transition from authoritarianism to democracy. The implementation phase, specifically the process to bring the country's laws and regulations into alignment with the human rights commitments laid down in the constitution, will be important in securing a strong foundation for the respect of these commitments. This process should be carried out in a way that provides the highest degree of protection of human rights for Tunisians and non-Tunisian residents of the country alike.

The process of constitution making adopted by the NCA was highly sensitive to internal and external political dynamics, in that it allowed for deliberation and extensive consultation and constantly sought consensus within the assembly on contentious issues. This, more than anything, is the strength of the Tunisian model and though time-consuming, has proved its value. The assembly was successful in producing a text that is not only generally sound on key human rights issues but that is also overwhelmingly backed by deputies from many political ideologies. This was of critical symbolic value during a political transition of this kind. However, the Tunisian model also offers rich lessons regarding what to avoid when engaging in constitution making, from a process standpoint.

Based on the Carter Center's observation of the constitution-making process, and in a spirit of respect and support, the Center offers the recommendations below to the NCA, Assembly of the Representatives of the People, Tunisian civil society, and policymakers and scholars engaged in constitution-making processes elsewhere in the region and beyond.

Implementation of the Constitution

The Tunisian government and the Assembly of the Representatives of the People should consider the following:

Rights

- Review and reform Tunisia's existing legal framework to ensure that domestic law and regulations reflect and respect the country's international commitments on human rights and the rights enshrined in the new constitution.
- Prohibit discrimination on the grounds of race, color, language, religion, political or other opinion, national or social origin, property,

birth, and other status. Ensure that these rights apply to all people in Tunisia, citizens and foreigners alike, in accordance with international law.

- Commit to fight not only violence against women but all kinds of discrimination against women. To this end, adopt concrete measures within the assembly to protect women's rights and to advance gender parity in elected assemblies.
- Specify in relevant legislation Tunisia's obligation to adopt specific mechanisms to guarantee the progressive realization of economic, social, and cultural rights to the maximum of the country's available resources.

Enforcement

- Judges should interpret the law, including the constitution, to favor the enforcement of a right or fundamental freedom, and to take into account the interpretation of human rights treaties by international or regional courts and commissions, as a minimum standard.
- Judges and legislators should protect the freedom of religion or belief, including the freedom to adopt, change, or renounce a religion or belief, and ensure that any limitations are consistent with the general limitations clause, which delineates how rights should be interpreted in their application.
- In the event that a state of emergency is declared, ensure that any restrictions to rights and freedoms are specific, necessary, proportionate, and subject to judicial review and that they will expire after a defined period of time. Furthermore, specify that rights considered absolute in international law remain protected and ban their restriction under emergency powers.

Tunisian Institutions

- Incorporate provisions into the legal framework to ensure the independence of the judiciary in regard to appointment, promotion, and discipline, including the security of tenure. The removal of judges should be restricted to cases of serious misconduct, following a fair trial, and, in accordance with the constitution, by reasoned decision of the High Judicial Council following its establishment.
- Put in place and implement a medium- to long-term plan to educate the public about the constitution.

To the Assembly of the Representatives of the People

- Conduct extensive lessons-learned exercises ahead of drafting Rules of Procedure.
- Consider enabling the commission on Rules of Procedure to meet on a regular basis to evaluate the functioning and application of the rules; not just at times of crisis.
- Ensure that the Rules of Procedure provisions on attendance and participation are clear and detailed and implement these provisions in a rigorous and transparent manner.
- Consider giving the Provisional Commission to Review the Constitutionality of Draft Laws the mandate to review the new assembly's Rules of Procedure.
- Ensure that the assembly's secretariat offers appropriate logistical and administrative support to the commissions. Ensure that legal advisers are able to focus on research and drafting instead of logistical support.
- Consider stating in unequivocal terms in the Rules of Procedure that commission meetings as well as plenary sessions are open to the general public. The assembly should establish formal and fair criteria and procedures to grant access and observer status to civil society organizations and interested citizens.
- Establish a communication department and devote sufficient resources to devising and implementing a communication strategy and to liaising with the media. Such a strategy should include a website with important information and documentation, sufficient resources to disseminate information on the assembly's work, including through social media, and official staff spokesmen and communication experts.
- Create an interparty working group in charge of liaising with civil society, the media, and the

international community and prepare strategic plans and budgets to present to potential donors.

- Fully commit to the principle of transparency and the right to information enshrined in the constitution by publishing and disseminating in a timely manner all official assembly documents — minutes, reports, decisions, submissions, attendance records, and details of the votes — including by posting them on the assembly's website.
- Plan and pursue mechanisms to genuinely engage the public in the legislative process and the work of the assembly at large. Deputies should be provided with logistical and administrative backstopping to conduct outreach.
- Consider putting in place informal, issue-based caucuses. Experiences from other countries suggest that such groups can help to build trust between political groups in the assembly, increase the visibility of certain issues, and contribute to better legislative and policy agendas. The assembly should also consider providing both political blocs and these informal groups with logistical and administrative support to increase their effectiveness.

To the International Community

- Continue to support the capacity of media, civil society, and constituent and legislative bodies in conducting outreach and communication in a coordinated and responsive manner.
- Improve coordination among international actors working with constituent bodies and legislative assemblies to avoid duplication. Be sensitive to the rhythm of the institution and its priorities and workload.
- Ensure sufficient support to civil society work outside the capital and encourage regionally sensitive projects and initiatives.

To Tunisian Civil Society

- Build capacity in lobbying and monitoring the work of the Assembly of the Representatives of the People and other state institutions.
- Conduct awareness-raising on the constitution in all parts of the country.

To Constitution-Making Bodies in Other Countries

- Devote careful thought to the Rules of Procedure and internal decision-making processes.
- Consider putting in place detailed provisions regarding participation of members in assembly work and enforce sanctions fairly, transparently, and consistently.
- Formalize the role of legal and linguistic experts in the Rules of Procedure to ensure greater clarity of their role and maximize their impact.
- Establish a detailed work plan and time table for the adoption of the constitution at the very beginning of the process to ensure realistic planning and progress as well as to provide the public with greater visibility on the way forward.
- Design comprehensive public participation mechanisms in the drafting process and put in place the necessary means for its effective realization.
- Plan and implement awareness-raising and information campaigns on a regular basis using the full range of media and other tools available. Campaigns should present the limitations of public participation as well in order to avoid disappointment and frustration.
- Set up a formal procedure to analyze, process, and record inputs made during consultations with civil society and the public.
- Appoint people at the constitution-making body in charge of liaising with civil society, the media, and the international community and prepare strategic plans and budgets to present to potential donors.
- Conduct extensive hearings prior to and while drafting and integrate consensus-building mechanisms in the process from the outset.
- Open to the public the debates and discussions within the constitution-making body. Establish formal and objective procedures to grant access and observer status to media, civil society organizations, and interested citizens.

- Publish and disseminate all important documentation in a timely manner. This recommendation requires devoting thought and resources to logistical and administrative issues.
- Develop outreach activities once the constitution is adopted and use all means available, including in-person meetings, to engage the public on the content of the constitution and to respond to questions.

Appendix A

Acknowledgments

The Carter Center would like to express appreciation to a number of individuals and organizations whose cooperation and efforts contributed to the Center's observation efforts in Tunisia.

The Center thanks first the government of Tunisia and the Independent High Authority for Elections for inviting the Center to observe the 2011 elections. We thank the National Constituent Assembly for their subsequent collaboration and welcome throughout the process.

The Center greatly appreciates the assistance of the U.S. State Department's Middle East Partnership Initiative and the governments of Switzerland and Norway. Together, their support allowed The Carter Center to monitor Tunisia's transition since early 2011, up to and including the adoption of a constitution and the 2014 elections. This support, reinforced by funding from the government of the Netherlands, has also allowed the Center to contribute to the development of capable and enduring civil society organizations in Tunisia.

The Center is grateful to its talented and committed international field office staff over three years and offers its sincere thanks to the constitution-making monitoring team. Field office directors Sabina Vigani (2011–2012) and Marion Volkmann (2012–2014) and Sara Abbas, constitutional analyst, led these efforts. Other key members of the team included Héla Mathari, legal consultant; Nedra Cherif, political analyst; Ahlem Eddhif, constitution-making analyst; and Insaf Guerchi, program associate. The Carter Center also benefited from the expertise of Don Bisson, field office director (2014); Jonathan Stonestreet, senior electoral analyst and interim field office director; Baya Kara, deputy field office director; and Michel Paternotre, senior legal and electoral analyst, who passed away in February 2013.

Likewise, the Center could not have conducted its work without the efforts of additional dedicated and talented staff. The Center extends special thanks to national staff members Arwa Marzouk, Nadia Samet, and Narjess Tahar for their contributions to the Center's analysis, public statements, and translations. Sami Stambouli was essential to the financial running of operations of the project. Anouar Gaaloul managed the logistics and together with Abdelwaheb Ben Aba ensured transportation of the Center staff during the entire project. We would also like to recognize the efforts of Carter Center program fellows Salemme Alouini, Selima Djait, Meriem Fethi, Marco Nembrini, and Anne Wolf.

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This final report is dedicated to the memory of Michel Paternotre, who passed away much too soon.

Appendix B

The Carter Center Monitoring Team

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Appendix C

Terms and Abbreviations

ARTD	Association for Research on the Democratic Transition (Association pour la Recherche sur la Transition Démocratique)
ATDC	Tunisian Association of Constitutional Law (Association Tunisienne de Droit Constitutionnel)
CPR	Congress of the Republic (Congrès pour la République)
CSID	Center for the Study of Islam and Democracy
CSR	Council for the Protection of the Revolution (Conseil de Sauvegarde de la Révolution)
DRI	Democracy Reporting International
EMB	Election management body
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
International IDEA	International Institute for Democracy and Electoral Assistance
IPCCPL	Provisional Commission to Review the Constitutionality of Draft Laws (Instance Provisoire de Contrôle de la Constitutionalité des Projets de Loi)
ISIE	Independent High Authority for the Elections (Instance Supérieure Indépendante pour les Elections)
LTDH	Tunisian League for Human Rights (La Ligue Tunisienne des Droits de l'Homme)
MDS	Democratic Socialist Movement (Mouvement des Démocrates Socialistes)
NCA	National Constituent Assembly (Assemblée Nationale Constituante)
NSF	National Salvation Front
OPPP	Provisional Organization of Public Authorities (Organisation Provisoire des Pouvoirs Publics)

PDP	Progressive Democratic Party (Parti Démocrate Progressiste)
POCT	Tunisian Workers' Communist Party (Parti Ouvrier Communiste Tunisien)
Quartet	The Tunisian General Labor Union (UGTT), the Tunisian Union for Industry, Commerce and Handicrafts (UTICA), the Tunisian League for Human Rights (LTDH), and the Bar Association
RCD	Democratic Constitutional Rally (Rassemblement Constitutionnel Démocratique)
UGTT	General Union of Tunisian Workers (Union Générale Tunisienne du Travail)
UNDP	United Nations Development Program
UTICA	Tunisian Union for Industry, Trade and Handicraft (Union Tunisienne de l'Industrie, du Commerce et de l'Artisanat)

Appendix D

Key Reference Documents and Resources

Amnesty International

"Tunisia: Submission for Consideration by the National Constituent Assembly on the Guarantee of Civil, Political, Economic, Social, and Cultural Rights in the New Constitution," 2012. "Last opportunity for Tunisian lawmakers to enshrine human rights for all in Tunisia's new Constitution": http://www.amnesty.org/en/region/tunisia

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International Commission Jurists

"Fact-Finding Reports, Tunisia–The Draft Consitution Should Be Amended To Meet International Standards," February 2013: www.icj.org/tunisia-the-draft-constitution-should-be-amended-to-meet-international-standards/

International IDEA

"A Practical Guide to Constitution Building," 2011: http://www.idea.int/cbp/knowledge_resources.cfm#

International Peace

"Constitution-Making and Reform: Options for the Processes," 2011

Human Rights Watch

"Tunisia: Solidify Rights Protections in Constitution," 2012; "Tunisia: Fix Serious Flaws in Draft Constitution," 2012; "Tunisia: Draft Constitution Still Slights Rights," 2013; "Tunisia: Revise the Draft Constitution," 2013; "Tunisia: Let Constitution Herald Human Rights Era," 2014: http://www.hrw.org/middle-eastn-africa/tunisia

National Democratic Institute

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Reporters Without Borders

"Cautious Welcome for Pledge That Constitution Will Not Mention Blasphemy," 2012: http://en.rsf.org/tunisia.html

United Nations Assistance to Constitution-Making Processes

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"Enquête nationale sur les attentes des jeunes à l'égard du processus constitutionnel et de la transition démocratique en Tunisie," (French and Arabic only), 2013; "Projet d'appui au processus constitutionnel, à l'Assemblée parlementaire et au Dialogue national, Mai 2012–Juin 2014, Rapport d'activités," 2014: http://www.tn.undp.org/content/tunisia/fr/home.html

United Nations Constitutional Support

"A Newsletter on U.N. Constitutional Support Issue," 2014: http://peacemaker.un.org/Constitutions/Newsletter

Articles

- Al-Ali Zaid and Ben Romdhane Donia: "Tunisia's New Constitution: Progress and Challenges to Come," Open Democracy, Feb. 16, 2014
- Feldman, Noah: "Tunisia Tweets Its Way to Democracy," Bloomberg, Jan. 3, 2014
- Guellali, Amna: "The Problem with Tunisia's New Constitution," World Policy Journal, Feb. 3, 2014
- Resende, Michael Meyer and Weichselbaum Geoffrey: "The Tunisian Arts of Compromise," Open Democracy, Jan. 29, 2014

Websites

National Constituent Assembly (NCA):
http://www.anc.tn/site/main/AR/index.jsp

Al Bawsala's observatory of the NCA — marsad:
http://www.marsad.tn/

International IDEA's specialized website:
http://www.constitutionnet.org/about

Office of the High Commissioner for Human Rights (OHCHR)–Tunisia:
http://www.ohchr.org/EN/Countries/MENARegion/Pages/TNIndex.aspx

United Nations Support to Constitution-Making Processes:
http://www.unrol.org/article.aspx?n=Constitution-making

A photographic documentation of the democratic process can be found under:
http://thierrybresillon.photoshelter.com/#!/index/C0000ri8pGK7Ixqs

Appendix E

Statements and Press Releases

NEWS

THE CARTER CENTER

ONE COPENHILL ATLANTA, GA 30307

FOR IMMEDIATE RELEASE
May 11, 2012
CONTACT: Atlanta, Deborah Hakes +1 404 420 5124; Tunis, Sabina Vigani +216 23 63 49 79

The Carter Center Encourages Increased Transparency and Public Participation in Tunisia's Constitution Drafting Process; Calls for Progress to Establish Independent Election Management Body

The Carter Center office in Tunisia has found that issues of transparency and participation in the country's recently established National Constituent Assembly (NCA) are coming to the forefront and recommends the establishment of a detailed work plan and timeline to help structure NCA work and increase visibility on the process and accountability to stated objectives.

In a report released today, the Center also noted that while there is political will to anchor the principle of an independent election management body in the Constitution, there has not been tangible progress toward its effective establishment.

A summary of key Carter Center findings and recommendations is below. The full report may be found at www.cartercenter.org.

KEY FINDINGS

The Constitution drafting process:

- The Carter Center is concerned that the lack of a detailed and public work plan limits the ability of the NCA and its commissions to plan and structure their work, and simultaneously decreases public understanding of and confidence in the NCA's activities and process.
- The NCA's Rules of Procedure do not sufficiently detail the prerogatives of the Constitutional Drafting and Coordination Committee to ensure consistency in the methods of work.
- The short time period between the finalization of the draft Constitution and the moment it is voted on jeopardizes efforts to disseminate and explain the text to citizens, as well as to gather opinions and views of the public.

Transparency and accessibility of the process:

- The Carter Center welcomes the NCA's positive initiative to allow media coverage of NCA work, thereby informing citizens about issues debated in commissions and plenary sessions.
- While the NCA acknowledges the importance of transparency, it does not ensure civil society organizations' full access to debates and relevant information. Article 54 of the Rules of Procedure state that commissions' meetings are public was interpreted inconsistently and largely restrictively.
- Queries of civil society organizations to attend NCA plenary and commissions' sessions were met with unresponsiveness.
- The Carter Center welcomes the publication of reports by two NCA commissions, but notes that publication and dissemination of official documents, including verbatim records and meeting notes, are not systematic.
- While media campaigns on the work of the NCA might raise public awareness of the Constituent Assembly's work and importance, no such outreach campaigns have taken place.

Public participation and consultation:

- The Carter Center notes positively that the Rules of Procedure provides time for NCA members to reach out to the general public and inform citizens about the process.
- However, such outreach initiatives rely almost solely on the individual commitment of NCA members rather than on an institution-driven consultation process. The Carter Center is concerned that no formal mechanisms have been created for NCA members to inform and consult their constituencies and to report back to the NCA.
- The Carter Center welcomes efforts by civil society organizations to bring together NCA deputies and citizens, but emphasizes that such initiatives should be considered as complementary to and not a substitute for NCA-driven citizen consultation.
- While commissions have consulted experts on various occasions, the NCA could take advantage of foreign expertise from countries with similar Constitution drafting experience to enhance public participation and consultation, and to build on recent Tunisian initiatives with regard to nationwide and diverse consultation mechanisms.

Preparing for the next election cycle:

- Tunisian stakeholders concur that the country should reflect on these first democratic elections by building upon positive achievements and drawing lessons from weaknesses to improve the next electoral process.
- The Carter Center welcomes the inclusion in the government program of a proposal for the next elections to be held in spring 2013. However, the Center is concerned that a draft law on the independent election management body has not yet been submitted to the NCA, contrary to previous announcements by the government.

RECOMMENDATIONS

- Establish a detailed work plan for the NCA, including intermediary objectives, to ensure better planning and structured work as well as to provide the public with greater visibility on the way forward and progresses achieved.
- Ensure that plenary sessions of the NCA and commission debates are open, and establish a formal procedure to grant access and observer status to civil society organizations and interested citizens.
- Publish and disseminate in a timely manner all NCA official documents – minutes, reports, decisions, and submissions – including by posting them on its website.
- Provide support to NCA members in planning and implementing activities during the week devoted to consultations in the constituencies, and develop synergies with local civil society organizations engaged in facilitating such consultations.
- Establish a formal procedure to receive, analyze, and process submissions, as well as to record comments and suggestions expressed during consultations between NCA members and citizens.
- Ensure prompt submission by the government of the draft law on the election management body and timely consideration by the NCA to allow adequate time for planning and preparations for the next elections.
- Ensure that recommendations from relevant stakeholders are taken into account and positive achievements are built upon, while considering the draft law on the election management body.

Following its observation of the Constituent Assembly elections, The Carter Center remained in Tunisia to follow the constitutional drafting process and developments related to the establishment of institutional and legal frameworks for subsequent elections. The Carter Center is assessing these processes against Tunisia's national laws and international treaty obligations to which the country has obligated itself, including, among others, the International Covenant on Civil and Political Rights.

This report presents The Carter Center's findings and recommendations based on meetings with a wide range of stakeholders including NCA members and administrative staff, political parties' representatives, civil society organizations, and Tunisian academics Furthermore, the Center's staff attended some commissions' meetings and plenary sessions of the NCA. The Center appreciates the commitment demonstrated by all interlocutors in sharing information and discussing potential areas for improvement, and acknowledges that Tunisia's October 2011 election of the NCA tasked with drafting a new Constitution is a milestone for the country's transition to democracy.

The Carter Center's full report may be found at www.cartercenter.org.

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THE
CARTER CENTER

The Carter Center Encourages Increased Transparency and Public Participation in Tunisia's Constitution Drafting Process; Calls for Progress Toward Establishment of Independent Election Management Body

May 11, 2012

Tunisia's October 2011 election of a National Constituent Assembly (NCA) tasked with drafting a new Constitution is a milestone for the country's transition to democracy ever since a popular revolution forced the ouster of the former regime. Members of the assembly began the drafting process on Feb. 14, 2012, which will set the course for the values and principles of the future Tunisian state, system of government, electoral system, and institutional framework. In addition to drafting a Constitution, the NCA has also assumed legislative powers to review discriminatory laws inherited from the former regime and enact new legislation to govern the country and prepare for the next cycle of elections.

Following its international election observation mission, conducted from July to November 2011, The Carter Center retained a small presence in Tunisia to monitor the constitutional drafting process and developments related to the establishment of the institutional and legal framework for the next elections. The Carter Center attended some commissions' meetings and plenary sessions of the NCA. The Center met also with a wide range of stakeholders, including: NCA members and administrative staff, civil society organizations, political parties' representatives and Tunisian academics to understand the functioning of the NCA and assess the constitutional drafting process against the NCA Rules of Procedure and international obligations to uphold principles of transparency and participation in public affairs of one's country and other fundamental freedoms.[1] Furthermore, comparative examples of Constitution drafting processes demonstrate the added value of a genuinely transparent and participatory constitutional drafting process, particularly in terms of increased understanding and ownership by the people.[2]

1 Article 25, International Covenant on Civil and Political Rights (ratified by Tunisia on March 18, 1969) which states that every citizen shall have the right and the opportunity (…) to take part in the conduct of public affairs, directly or through freely chosen representatives.

2 Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes, « Constitution-Making and Reform: Options for the Process », published by Interpeace, Nov 2011. Lessons Learned From Constitution-Making: Processes With Broad Based Public Participation, Democracy Reporting International (DRI) – 2011, IDEA, A Practical Guide to Constitution Building

This statement outlines the Carter Center's findings and recommendations in support of a credible and genuine constitutional drafting process, and the timely resumption of election preparations.

The Constitution drafting process:

Constitutional Commissions

The NCA has created six permanent commissions, each of which are responsible for drafting articles under specific chapters of the future Constitution[3]: 1) preamble, fundamental principles, constitutional review; 2) rights and freedoms; 3) legislative and executive powers and the relationships between the powers; 4) judicial, administrative, financial and constitutional justice; 5) constitutional bodies; and 6) regional and local public authorities.

These commissions are each composed of 22 members, proportionally allocated according to their political representation in the NCA. Members are allowed to be part of several commissions providing that they are not of the same category.[4] One of the six commissions is presided over by a woman. Three female members were elected as deputies and six as rapporteurs. The presence of commission members during meetings is obligatory: any member who is absent from more than three consecutive sessions without authorization can be disqualified.[5] The president of each commission is tasked with facilitating the work of his or her commission to create consensus among the various parliamentary blocks.[6] A commission may entrust specific issues to one of its members to conduct in-depth research or establish a working group and prepare a report.[7] Commissions can also consult experts on a given issue, such as representatives of the government, institutions, civil society or academics.[8] Decisions are taken by a majority of those present.[9] In total, almost two-thirds of the NCA members are actively involved in the constitutional drafting process. While all members will eventually discuss and vote on the final text, other members are entrusted with drafting new and reviewing existing laws.

Aside from permanent commissions, the NCA also established a Constitutional Drafting and Coordination Committee tasked with coordinating commission work, preparing a general report on the constitutional drafting project before its submission to the plenary assembly, and establishing a final version of the report.[10] The Constitutional Drafting and Coordination Committee is composed of NCA President Mustapha Ben Jaâfar from Ettakatol, NCA General Rapporteur Habib Khedher from Ennahdha, his two deputies and the presidents and rapporteurs of the permanent commissions. The Rules of Procedure do not outline in detail what the committee's prerogatives imply in practice, such as the methods and pace of work of different commissions. The Carter Center suggests that the NCA should consider providing this committee with clearer prerogatives to ensure more consistency in the methods of work.

3 Article 65, NCA Rules of Procedure (RoP)

4 Article 48, RoP

5 Article 53, RoP

6 Article 57, RoP

7 Article 58, RoP

8 Article 59, RoP

9 Article 60, RoP

10 Article 104, RoP

Adoption of the Constitution

Once the commissions have agreed on the wording of articles for which they are responsible, the complete draft of the Constitution together with a general report on the Constitution and the reports of the commissions will be transmitted to all the members of the NCA, the president, and the prime minister. According to the Rules of Procedure, this should be done two weeks before the draft Constitution will be discussed by the plenary session of the Assembly, in view of its adoption.[11] The NCA will consider and adopt the draft Constitution article by article through an absolute majority vote and then in its entirety by a two-thirds majority. Should members of the NCA disagree on the final text, and not reach a two-thirds majority, the Constitution will be submitted to a popular referendum.[12] The law is silent as to the possible recourse if the draft is rejected by a popular referendum.

The time period between the finalization of the draft and its submission to NCA vote will prove crucial to disseminate and explain the text to the public at large, and increase its legitimacy before the vote.

The Carter Center is concerned that the two-week period foreseen by the Rules of Procedure may be insufficient to plan for such outreach efforts. The Center recommends therefore that adequate time be devoted between the finalization of the draft and the moment it is voted on to gather public opinions and views.

Timeframe for the adoption of the Constitution

All political parties represented in the High Authority for the Achievement of Revolutionary Objectives, except for the Congress for the Republic (CPR), signed a declaration on Sept 15, 2011, limiting the timeframe of NCA activities to one year. The constitutional act on the provisory organization of public authorities, often referred to as the "small Constitution" adopted on Dec 16, 2011, has no mention, however, of a specific time period, nor has the NCA established a timeline detailing its work plan. While acknowledging declarations by Troika leaders referring to spring 2013 as the end of the current transitional period, implying the adoption of the Constitution and the holding of elections, the Carter Center considers that the establishment of a comprehensive work plan, with intermediary objectives, would allow for better planning and commitment to stated objectives. In addition, such a work plan, that should be public, would increase much needed visibility and understanding among the Tunisian people about the complexity of the process. The Carter Center urges the NCA to establish a clear work plan for the commissions to plan their work accordingly and meet stated objectives.[13]

Transparency and accessibility of the process

A transparent constitutional drafting process is one where the public is aware of what is occurring at each stage of the process and can access information easily. Such a process increases the accountability of the constitutional drafting body to the public and the public's confidence that their voices

11 Article 105, RoP

12 Article 3 of the constitutional Act n°2011-6 dated December 16, 2011 related to the provisional organization public authorities

13 For an overview of country cases and good practices, see: "Constitution-Making and Reform : Options for the Process", published by Interpeace, November 2011.

have been heard.[14]

Access to the debates of the NCA

The NCA Rules of Procedure suggest that NCA members acknowledge transparency as an important principle, as Article 54 states that commission meetings are public. Meetings behind closed doors are the exception to the principle and can only be held following the request of the majority of commission members. While access to media representatives has been granted without restriction so far, Article 54 has been interpreted inconsistently and mostly restrictively when it comes to civil society organizations, thus hindering their effective access to the debates. This issue has created controversy among members of the NCA. Some of them deem that the spirit and the letter of Article 54 should be respected; others suggest that each commission should be entitled to decide who may attend its sessions and when. Others, still, refer to a debate held during a plenary session of the NCA on Feb 28, where the general rapporteur explained that during the preparatory work for the adoption of the Rules of Procedure, some deputies advocated for the right of civil society organizations to observe the commissions' work, though the NCA decided against this.[15] Despite several inquiries, the Carter Center could not acquire any written record of this restrictive interpretation of Article 54.

NCA plenary sessions are also open to the public in accordance with the procedures established by the NCA Bureau[16], which is composed of the NCA president and nine members.[17] The Carter Center notes that no such procedures have been issued and information regarding public access to plenary sessions varies according to the interlocutor and from one session to the next. The Center urges the NCA Bureau to establish and disseminate procedures that comply with the Rules of Procedure and allow for smooth and indiscriminate access to plenary sessions.

The Carter Center welcomes the NCA's positive initiative to allow media coverage of NCA work, thereby informing citizens on issues debated in commissions and plenary sessions.[18] The Center encourages media representatives to provide substantive coverage of this important process, and to help bridge the gap between elected officials and their constituents. However, the Center deems it equally important for civil society organizations to be able to directly follow NCA work, providing them with a better position with which to elaborate informed analysis and meaningfully contribute to the Constitution drafting process, both through advocacy and awareness raising efforts.[19] Several civil society organizations officially requested to attend NCA plenary and commission sessions, but have yet to receive a response. This unresponsiveness has led some organizations to request a meeting with President Ben Jaâfar, which to date has not taken place. Advocating for increased transparency, the organization Al Bawsala issued a petition calling for civil society organizations to have access to the

14 The UN Human Rights Committee recommends that constitutional reform should be a "transparent process and on a wide participatory basis" (see Concluding observations to the 2005 state report on Bosnia and Herzegovina, CCPR/C/BIH/CO/1, paragraph 8.d.)

15 The debate can be viewed online at http://www.anc.tn/site/main/AR/docs/vid_debat.jsp?id=28022012s&t=s (starting at minute 101).

16 Article 76, RoP

17 Article 28, RoP

18 Tunisia Live, live-streams from some commissions, and offers recordings of others through their Ustream channel. There is however a limited number of Ustream users in Tunisia and therefore this outreach effort does not reach many citizens (http://www.ustream.tv/channel/tunisia-live3).

19 Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes, paragraph 4, http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf

NCA and its commissions. To date, the petition has garnered some 40 signatures by NCA members.[20] The Carter Center recommends that the NCA abides by the spirit of the Rules of Procedure and ensures that plenary sessions of the NCA and commissions' debates are open, and establish a formal procedure to grant access and observer status to civil society organizations and interested citizens.

Access to official documents

The Rules of Procedure also require commissions to post reports prepared by commission rapporteurs or their deputies on the NCA website, after internal commission approval.[21] These reports are meant to describe activities or specific topics of discussion. Two special commissions, Administration Reform and Fight against Corruption and Martyrs Families and Injured of the Revolution, have published such reports thus far. The Carter Center encourages this good practice that ensures access to relevant information by interested parties.

The Rules of Procedure do not require verbatim records of meetings to be published. Such documents would be a valuable source of information for interested citizens, highlighting issues debated during the sessions. Some assembly members have taken the initiative to publish meetings notes and official verbatim records prepared by the rapporteurs on their personal Facebook pages or blogs. Despite this practice, many members are reluctant to officially publish the minutes of working sessions, to avoid leaving the public with the perception that the work of the NCA is slow. The Center notes that several local civil society organizations are advocating for increased access to information, calling on the NCA to publish systematically any official document and highlighting the need for more staff dedicated to public information.[22] The Carter Center emphasizes that the right of access to information is essential to guarantee transparency and to permit the active participation of all stakeholders in the constitutional drafting process.[23] This right implies that the authorities should undertake all possible measures to guarantee simple, rapid, effective, and practical access to all information of general interest.[24]

Outreach efforts

The Carter Center notes that thus far no outreach campaign on the work of the NCA has been put in place. Such campaigns, when well conceived, may raise public understanding of NCA members' work and the importance of the process. The Center therefore encourages the NCA to consider launching a comprehensive information campaign using all forms of media. The campaign should focus also on opportunities for the public to participate in the process.

20 https://www.change.org/fr/pétitions

21 Article 62, RoP

22 Bus Citoyen, Opengov TN, Mouwatinoun, Al Bawsala

23 ICCPR, Article 19 (2)

24 Human Rights Committee, General Comment No. 34 "Article 19: Freedoms of opinion and expression", para.19

Political parties could also play an important role in educating their supporters on the mandate of the NCA, their contributions to the constitutional drafting process, and their positions on issues under consideration that will shape the State's relationship with its citizens for the future. Some political parties, including Ennahdha, POCT, and PDP, have drafted a text outlining their respective party's positions on central constitutional issues. The Carter Center encourages political parties to conduct increased constituent outreach and inform the public about their work within the NCA, their party's position on important constitutional issues, and the constitutional drafting process overall.

Public participation and consultation

A participatory constitutional drafting process is one in which citizens are informed about the process and choices at stake, and are given a genuine opportunity to directly express their views to decision makers involved in the drafting and debating of the Constitution.[25] Lessons learned from countries undergoing constitutional drafting processes, both post-conflict and in democratic transitions, highlight the benefits of public consultations in terms of increased legitimacy, added relevance, and stronger acceptance of the new constitutional order.[26]

Opportunities for citizen involvement

Article 79 of the NCA Rules of Procedure foresee one week a month, in principle the fourth week of each month, for NCA members to reach out directly to citizens. The week from March 19 - 25, 2012, was the first opportunity for NCA members to get in touch with the population. The Carter Center observed that no information about planned meetings or activities was available with the administrative services of the NCA, its website, or other media outlets. NCA members who met with The Carter Center explained that activities during the week "in the regions", as it is often referred, are left to their own initiative and individual commitment. There is no administrative, financial, or logistical support provided by the NCA for outreach activities. Some members appear very committed to report back to their constituencies and were able to organize on their own, while others relied on their political party's structure to prepare meetings. According to their own account many have used methods such as door-to-door outreach or visiting popular market places. The Carter Center welcomes the efforts of NCA members to inform and consult their constituencies, but notes that no mechanisms have been created to formally report back to the NCA on citizen recommendations and comments.

The Carter Center encourages the NCA to provide support in planning and implementing activities during the week devoted to consultations in the constituencies. In an effort to receive citizen

25 The "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms", adopted by the UN General Assembly on Dec 9, 1998, states in its article 8 that participation in the conduct of public affairs, includes, inter alia, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms. By analogy, this should also apply to constitutional drafting processes.

26 Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes. Lessons Learned From Constitution-Making: Processes With Broad Based Public Participation, Democracy Reporting International (DRI) - 2011

feedback on NCA work, the Center suggests the establishment of a formal procedure to receive, analyze, process and record such inputs. Synergies with local civil society organizations engaged in promoting such consultations could also be developed for increased impact. Some civil society organizations have already organized town hall meetings and information sessions, bringing together NCA members and citizens in different regions of the country.[27] The Carter Center supports such initiatives encouraging citizens to play an active role in this historical process. However, initiatives by civil society organizations should be seen as complementary to, and not a substitute for, NCA-driven citizen consultation, aimed at creating a sense of ownership and building consensus around the future Constitution.

The week devoted to outreach was cancelled in April, as it coincided with NCA consideration of the government's program, draft State budget, and supplementary budget. The Carter Center acknowledges that the prerogatives of the NCA do not only involve Constitution drafting. For this reason, engaging and consulting with citizens should be considered an important aspect of the work of the constituent body given the current economic situation facing the country and the fact that many Tunisians are showing growing dissatisfaction and impatience towards decision-makers. By reaching out to their constituents, NCA members can build public awareness on other areas of NCA progressive achievements and reinforce their legitimacy.

Experts' hearings

Article 59 of the Rules of Procedure entitles the commissions to consult experts on a given issue, such as government and institution representatives, academics and civil society organizations. The commissions have conducted several hearings with Tunisian and international experts and some NCA members have undertaken study trips to the European Court of Human Rights and the German Constitutional Court in Karlsruhe. The Carter Center suggests that the NCA take advantage of this procedure to also hear foreign expertise from countries that have experienced similar Constitution drafting processes, such as South Africa,[28] Bolivia, or Uganda[29] and benefit from their experiences on designing mechanisms to ensure public participation and increased ownership of Constitution drafting processes. The NCA could also build on recent Tunisian initiatives in nationwide and diverse consultation mechanisms, including those utilizing the Internet, conducted by several ministries.[30] Such consultations, to be effective, should be coupled with a widespread and well-designed informa-

27 Several organizations, including, amongst others, ATIDE, Jeunesse Sans Frontières, with the support of international partners, organized such meetings various regions, in Ben Arous, Beja, El Kef, Kairouan, Sfax and Tunis.

28 The South African constitutional process was coupled with a very high level of public education on the issues and public input (via email, meetings, surveys, and contributions on the internet). Public participation included several components: publication and media broadcasts of all the constitutional debates, consultation by each of the parties at the village level, radio broadcasts educating the public on the constitutional process, and 2 million submissions from the general population. UNDP, Constitution-Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries; Lessons Learned From Constitution-Making: Processes With Broad Based Public Participation, DRI - 2011

29 In Bolivia, the Constituent assembly organized public participation and then formed committees to collect the public input. In Uganda, an independent commission educated the public and collated views. IDEA, A Practical Guide to Constitution Building, p.17

30 Ministry for Regional Development, Ministry for Human Rights and Transitional Justice, Ministry in charge of administrative reform (http://www.consultations-publiques.tn)

tion campaign.

Preparing for the next election cycle

The 2011 Constituent Assembly elections have been largely acknowledged by national stakeholders and the international community as a meaningful step in the democratization process of Tunisia. Tunisian stakeholders concur that the country shall take stock from these first democratic elections, by building upon positive achievements and drawing lessons from weaknesses to improve the next electoral process.

The final report on the electoral process issued on Feb. 21 by the High Independent Authority for the Elections provides key direct insights to inform discussions and decisions about the future institutional and legal framework for the elections. In the same spirit, national and international observers groups came together on Feb. 23 at the initiative of The Carter Center, to identify joint priority recommendations for consideration by decision-makers. At other workshops organized by international partners, NCA members, government officials and representatives of the judiciary gathered to reflect and provide comparative experiences on issues such as existing models of election management body and the legal framework for future elections.[31]

The Carter Center welcomes the government proposal for the next elections to be held on March 20, 2013. While Prime Minister Jebali declared on April 26 that a draft law on the future election management body would be transmitted to the NCA within days, The Carter Center notes that this announcement hasn't taken effect by the time of writing. A draft law by the government has been leaked but has not been officially submitted to the NCA. The Carter Center encourages the NCA to ensure that inputs from relevant national and international stakeholders are taken into consideration.

The Center also stresses the government and the NCA, in their respective roles, should lay the groundwork without undue delay for the effective preparation of the next elections. In light of the lessons learned from the 2011 elections, The Carter Center underscores the need to ensure sufficient time for election preparation, starting with voter registration, an update of the voter list and implementation of a robust voter education campaign.

Conclusion and recommendations

The Carter Center has conducted several meetings with relevant stakeholders to understand the work of the NCA and assess strengths and weaknesses of the constitutional drafting process thus far. The Center appreciates the commitment demonstrated by all interlocutors in sharing information and discussing potential areas for improvement. In a view to further entrench the objectives of the revolution towards the establishment of a transparent and participatory governance system, The Carter Center encourages the NCA and the government to consider the following recommendations:

- Establish a detailed work plan for the NCA, including intermediary objectives, to ensure better

31 "Building Key Principles into the Design of the Future Electoral Management Body: Tunisian and International Perspectives", workshop organised by the United Nations Development Programme (UNDP), the European Union (EU), and the International Foundation for Electoral Systems (IFES), Feb. 27, 2012. "What future legal framework for Tunisian elections? National and international perspectives", workshop organized by IFES in partnership with the EU, the UNDP, The Carter Center and Democracy Reporting International, March 12-13, 2012.

planning and structured work as well as to provide the public with greater visibility on the way forward and progresses achieved.

- Ensure that plenary sessions of the NCA and commission debates are open, and establish a formal procedure to grant access and observer status to civil society organizations and interested citizens.
- Publish and disseminate in a timely manner all NCA official documents – minutes, reports, decisions, and submissions – including by posting them on its website.
- Provide support to NCA members in planning and implementing activities during the week devoted to consultations in the constituencies, and develop synergies with local civil society organizations engaged in facilitating such consultations.
- Establish a formal procedure to receive, analyze, and process submissions, as well as to record comments and suggestions expressed during consultations between NCA members and citizens.
- Ensure prompt submission by the government of the draft law on the election management body and timely consideration by the NCA to allow adequate time for planning and preparations for the next elections.
- Ensure that recommendations from relevant stakeholders are taken into account and positive achievements are built upon, while considering the draft law on the election management body.

NEWS
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The Carter Center Recognizes Tunisia's National Constituent Assembly Progress; Calls for Increased Public Participation, Outreach, and Transparency

In a report released today, The Carter Center commends Tunisia's National Constituent Assembly (NCA) on its progress in introducing a constitutional draft. Moving forward, the Center urges the NCA drafting commissions to ensure that the future Constitution upholds Tunisia's international treaty obligations on human rights and fundamental freedoms. A renewed commitment to transparency and participation also is important to address significant questions remaining in the final text.

The compilation and release of the commissions' work in mid-August has generated many reactions from Tunisian civil society organizations, opposition members, constitutional experts, and international actors. The most controversial issues raised are the status of women, criminalization of the defamation of the sacred, and the structure of the future political system. Vague wording of some articles, incoherencies, and some blatant omissions – such as the enshrinement of the right to vote – are regrettable, and should be addressed by the NCA.

The absence of a clear work plan and constantly shifting deadlines, considered by many as unrealistic, have resulted in increased public distrust in the Constitution making process. A definitive and realistic work plan, reflecting a consensus among NCA members, should be officially adopted as soon as possible in order to define clearly next steps. NCA members should explain to citizens why investing additional time will be beneficial to the process and the final product: a Constitution representing all Tunisians in their diversity, forming the bedrock for a new Tunisian democratic state and written for longevity.

In its report, The Carter Center notes that the NCA has failed to conduct sufficient outreach campaigns on its work, even though such campaigns may raise public understanding of the NCA's work and increase its legitimacy. Media coverage of the NCA's work has sometimes lacked depth, and more balanced professional coverage of the process could help bridge the gap between elected officials and their constituents.

The Center welcomes recent initiatives by the NCA to consult citizens through online consultations on the NCA website, the organization of civil society organization debates, and the inclusion of a national debate on the Constitution in NCA draft calendars. The time foreseen in different versions of the calendar is insufficient though to allow for a thorough national consultation on the draft Constitution. Adequate time should be given to allow for hearing citizen input, accurately recording their views, and thorough analysis and deliberation.

The Carter Center commends that by mid-June 2012, all provisional reports of the six constitutional commissions were published on the NCA website along with, up until the time of this report, 22 reports from other commissions. The Center notes, however, that other documents such as results of votes, NCA member attendance lists, and verbatim records of commission meetings are not being published despite the fact that the right of access to information is essential to guarantee transparency and permit active participation among all stakeholders in the Constitution making process.

While the NCA Rules of Procedure suggest that members acknowledge transparency as an important principle, access for civil society organizations to both working sessions of the commissions and plenary Assembly sessions has been inconsistent and generally restrictive, hindering their effective access to the debates.

The Carter Center can attest that the majority of NCA members are aware of the historical task they have been entrusted with and are committed and hard-working. However, repeated unjustified absences of some members in working and plenary sessions have led to a negative perception of the NCA by Tunisian citizens. In accordance with the "little Constitution" adopted on Dec. 16, 2011, if the final draft of the Constitution does not achieve a two-thirds majority during one of two readings, a referendum will take place. According to proposed calendars by the Coordination Committee outlining the way forward, this is scheduled for May 1, 2013. The Carter Center notes that to be able to hold such a constitutional referendum, a functioning electoral management body needs to be created to ensure a credible democratic process with effective citizen participation. Regrettably, while there is political will to anchor the principle of an independent election management body in the Constitution, there has not been tangible progress toward its effective establishment.

The Carter Center recommends the following:

- Ensure that provisions of the future Constitution uphold Tunisia's international treaty obligations on human rights and fundamental freedoms.
- Establish a detailed work plan and time table for the adoption of the Constitution to ensure better planning and progress as well as to provide the public with greater visibility on the way forward.

- Plan for sufficient time to prepare and conduct a much needed national debate on the Constitution, since an inclusive and participatory process is more likely to engender consensus around the new constitutional framework.
- Establish a formal procedure to receive, analyze, and process submissions, as well as to record comments and suggestions expressed during consultations between NCA members and citizens.
- Create a functioning electoral management body as soon as possible to ensure that in the case of a constitutional referendum, a credible, inclusive process can be conducted within the proposed time frames.
- Improve communication with the media and Tunisian citizens by taking advantage of expert advice and financial support offered by the international community to strengthen outreach activities.
- Encourage media representatives to provide substantive and balanced professional coverage of this important process, and to help bridge the gap between elected officials and their constituents.
- Implement the provisions of the Rules of Procedure that foresee sanctions in case of repeated unjustified absences to encourage greater accountability and input on critical issues.
- Ensure that plenary sessions of the NCA and commission debates are open to observers, and establish a formal, transparent, and objective accreditation system to grant access and observer status to civil society organizations and interested citizens.
- Publish and disseminate in a timely manner all NCA official documents – minutes, reports, decisions, and submissions – including by posting them on its website.

Following its observation of the Constituent Assembly elections, The Carter Center remained in Tunisia to follow the Constitution drafting process and developments related to the establishment of institutional and legal frameworks for subsequent elections. The Center is assessing these processes against Tunisia's national laws and international treaty obligations to which the country has obligated itself, including, among others, the International Covenant on Civil and Political Rights.

This report presents the Carter Center's findings and recommendations based on meetings with a wide range of stakeholders including NCA members and administrative staff, political parties' representatives, civil society organizations, and Tunisian academics. Furthermore, the Center's staff attended some commission meetings and plenary sessions of the NCA. The Center appreciates the commitment demonstrated by all interlocutors in sharing information and discussing potential areas for improvement, and acknowledges that Tunisia's October 2011 election of the NCA tasked with drafting a new Constitution is a milestone for the country's transition to democracy.

The Carter Center's full report may be found at www.cartercenter.org.

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THE
CARTER CENTER

The Carter Center Recognizes Tunisia's National Constituent Assembly Progress; Calls for Increased Public Participation, Outreach, and Transparency

Sept. 26, 2012

After the fall of the authoritarian regime of President Ben Ali, authorities charged with leading Tunisia through the transition period found the existing legal framework to be inadequate to govern the country in this new phase. On March 3, 2011, Fouad Mebazaa, Tunisia's interim president, suspended the former Constitution and announced that a new Constitution should be written by a democratically-elected body to reflect the will of the Tunisian people whose Revolution had enabled regime change and opened the road towards democratic governance. In a historic election on Oct. 23, 2011, Tunisians elected a National Constituent Assembly (NCA) and entrusted its members with drafting a new Constitution.

The elaboration of a Constitution represents a unique and important historic opportunity to establish and agree upon the fundamental principles of a society, including the protection of civil and political freedoms, the organization of checks and balances, and the shape and role of democratic institutions. Participation of civil society can positively influence the institutional architecture and increase ownership. The process may be long, complex, and at times tedious. Successful Constitution making, however, enhances national cohesion and benefits many generations to come.

Tunisia's Constitution will be a cornerstone of the country's newly democratic state and its governing institution. If successful, it could serve as an example for other countries in transition in the region. It was with great anticipation therefore that Tunisia's elected officials presented the results of their efforts over several months The Carter Center congratulates NCA members for the release of the first comprehensive draft document. As NCA members consider the draft Constitution in the Plenary Assembly, they will grapple with many significant outstanding questions. In this report, The Carter Center offers an overview of the drafting process, its assessment of these activities and recommendations aimed to support a genuine and credible Constitution drafting process.

The Carter Center has observed the work of the NCA since its formation in November 2011 and the subsequent Constitution drafting process, meeting on a periodic basis with a broad representation of political and civic stakeholders, attending NCA sessions and following public debate related to its development. The Center assesses the Constitution making process and the draft Constitution against

international obligations to uphold fundamental political and civic freedoms, including principles of transparency and participation in public affairs of one's country.[1]

The Constitution drafting process

Members of the Assembly began the Constitution drafting process on Feb. 13, 2012. The NCA created six permanent commissions, each responsible for drafting articles under specific chapters of the future Constitution. The commissions conducted several hearings with Tunisian and international experts, representatives of the government, institutions, civil society and academics, and studied relevant texts. Some NCA members also undertook study trips to countries that have experienced similar Constitution making processes. The commissions worked independently from each other, without a common methodology or work plan.

The July 15 deadline for the commissions to submit their drafts, which had been set on June 7 by NCA President Mustapha Ben Jaâfar, came relatively late in the process and surprised some NCA members. As the deadline bore down, the drafting process accelerated noticeably at the expense of carefully worded consensus on controversial and sensitive matters. On July 28, the Constitutional Drafting and Coordination Committee authorized the Legislative and Executive Powers Commission to submit multiple versions of articles related to the structure of the political system upon which no consensus had been established.[2] Aimed at moving the process forward and avoiding blockage on this sensitive aspect, the same methodology was then adopted by several other commissions on various difficult issues. As a result the six commissions followed different procedures – some commissions presented different variants of these articles while others tried to achieve consensus or presented only articles that had received a majority of votes from commission members.[3]

By Aug. 10, all six commissions had submitted their drafts to the Coordination Committee. The compilation of the six commissions' work – sometimes presented as the first draft of the Constitution – was released on Aug. 14. At the time of writing, and according to the general rapporteur on the Constitution and deputy-president of the committee, Habib Khedher, the Coordination Committee is reviewing the commissions' drafts, and providing feedback and recommendations to each commission on the submissions. The Coordination Commission is not authorized to change the content of the suggested text. Commissions will subsequently resume their work and proceed to another round of expert hearings.

The Carter Center notes that the release of the compilation of the commissions' work in mid-August generated a strong reaction by Tunisian civil society organizations, opposition members, constitutional experts and international actors, among others. Significant questions remain regarding the content of

1 Article 25, International Covenant on Civil and Political Rights (ICCPR) (ratified by Tunisia on March 18, 1969) which states that every citizen shall have the right and the opportunity (…) to take part in the conduct of public affairs, directly or through freely chosen representatives.

2 The constitutional Drafting and Coordination Committee is tasked with coordinating commission work, preparing a general report on the constitutional drafting project before its submission to the plenary Assembly, and establishing a final version of the report (Article 104 of the Rules of Procedure (RoP)). It is composed of NCA President Mustapha Ben Jaâfar from Ettakatol, NCA General Rapporteur Habib Khedher from Ennahdha, his two deputies and the presidents and rapporteurs of the permanent commissions.

3 Thirty articles of the first draft have been submitted with numerous variants, ranging from two to five options for a single article.

the final text on several controversial issues, including the status of women, criminalization of the defamation of the sacred and the structure of the political system.

Vague wording of some articles and some blatant omissions – including the enshrinement of the right to vote – are regrettable, and should be addressed. The Assembly should also make sure that incoherencies in the draft are corrected. In that regard, it should ensure that the supremacy of international law over domestic law, as foreseen in draft article 38, is not contradicted by other provisions as it is currently the case (draft article 17 indeed state that "respect for international conventions is compulsory if they do not contravene this Constitution").[4] Similarly the equality between men and women, enshrined in article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ratified by Tunisia, and recognized in draft article 22, should not be diluted by other provisions, such as current article 28, referring to the complementarily roles of men and women inside the family.[5] Additionally, the Tunisian state also has an obligation to prohibit discrimination based on sex, religion, or other statuses at any time.[6] As a signatory of the International Covenant on Civil and Political Rights, Tunisia is obligated to ensure everyone's right to freedom of expression, whether through public speeches or other means.[7]

The Carter Center therefore urges NCA commissions, when reviewing their drafts, to ensure that provisions of the future Constitution uphold Tunisia's international treaty obligations on human rights and fundamental freedoms including the freedom of opinion and expression, the freedom of religion and equality between men and women.[8]

Timeframe for the adoption of the Constitution

The absence of a clear work plan and insufficient outreach efforts by the NCA, which could have helped raise public understanding of the complexity of the process, have resulted in increasing distrust of the drafting process. Growing public dissatisfaction and impatience toward decision-makers, in return has prompted political leaders to announce deadlines considered by many as unrealistic.
The announcement made by the rapporteur general on Aug. 13 that the adoption of the final draft

4 Article 27 of the Vienna Convention on the Law of Treaties (ratified by Tunisia on June 23, 1971) states that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

5 The committee responsible for monitoring and interpreting the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (ratified by Tunisia in 1985) has recognized that complementarity is a lesser standard than full equality. For a more detailed analysis on Tunisia's international treaty obligations on human rights see http://www.hrw.org/news/2012/09/13/letter-members-tunisian-national-constituent-assembly.

6 Article 2 (1) of the ICCPR states, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

7 Article 19 (2) of the ICCPR states, "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."

8 Freedom of opinion and expression (art. 18 UDHR, art. 19 ICCPR), Freedom of religion (art.18 ICCPR), Equality between men and women (art. 2 CEDAW).For a more detailed analysis on Tunisia's international treaty obligations on human rights see http://www.hrw.org/news/2012/09/13/letter-members-tunisian-national-constituent-assembly.

of the Constitution would be postponed by several months to an undetermined date between February and April 2013 was not surprising in view of the drafting process delays. It was, however, a disappointment to many Tunisian citizens who anticipated a defined end to the transitional period – expectations that had been nourished by numerous political actors who repeatedly mentioned Oct. 23 as a final point for the Constitution drafting, despite evident constraints in meeting this deadline.

While it is true that two important documents limit the timeframe of NCA activities to one year[9], the constitutional act on the provisional organization of public authorities, often referred to as the "little Constitution", which has primacy over all other laws, makes no mention of a specific time period. In addition, it should not be forgotten that the NCA officially started Constitution drafting on Feb. 13, 2012, because it had first to adopt several core documents such as the "little Constitution," the NCA's Rules of Procedure, and to prepare the composition of the constituent commissions. Finally, it should be highlighted that comparative examples show that participatory Constitution making processes have been lengthy processes, varying between 18 and 24 months and that allowances have been made to extend original estimates or stipulated deadlines.[10]

Several calendars discussed by the Coordination Committee are now on the table for the coming months. Overall, the suggested timelines are quite similar, and differ only in the amount of time dedicated to holding national consultations. None of these calendars has so far been officially adopted.

The Carter Center reiterates that a definitive and realistic work plan, reflecting a consensus among NCA members, should be officially adopted as soon as possible in order to define clearly the next steps of the Constitution drafting process. In addition, NCA members should explain to citizens why investing additional time will be beneficial to the process and the final product: a Constitution representing all Tunisians in their diversity, forming the bedrock for a new Tunisian democratic state and written for longevity. Establishing a clear path for the process will facilitate the work of the NCA as well as contribute to restoring citizens' trust in their elected representatives.

Public consultations and citizens involvement

In a May 2012 statement on the Constitution making process, The Carter Center highlighted the benefit of a participatory process in terms of increased legitimacy and stronger acceptance of the new constitutional order and urged the NCA to create a more inclusive, transparent process.[11] Such a process is one in which citizens are informed about the process and choices at stake, and are given a genuine opportunity to directly express their views. According to a UN General Assembly

9 The decree 1086 dated August 3, 2011 calling for the elections of the NCA mentions a one year mandate. In addition on Sept. 15, 2011, all political parties represented in the High Authority for the Achievement of Revolutionary Objectives, except for the Congress for the Republic (CPR), signed a declaration limiting the timeframe of NCA activities to one year.

10 See example cited in *Constitution-Making and Reform: Options for the Process*, published by Interpeace, November 2011. P.49: "The constitutional convention for the United States took nearly four months; ratification by the states took a further forty months. (…) The Eritrean process took 38 months from the proclamation of the constitutional Assembly to ratification of the Constitution. The South African process took five years from the beginning of multiparty negotiations to the adoption of the final Constitution. The Ugandan commission took from 1989-1993 to prepare a draft Constitution, and the final Constitution was adopted in 1995". See also *Rédaction d'articles ou d'amendements constitutionnels autour du cas tunisien*, Democracy Reporting International (DRI), 2012.

11 *Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes*, 2009.

Declaration, participation in the conduct of public affairs includes the right of citizens to submit proposals to state institutions "for improving their functioning and draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms."[12]

The Center thus welcomes recent initiatives by the NCA, in particular by the team in charge of relations with civil society organizations, to consult citizens by various means. On Sept. 12, the NCA launched a consultation mechanism on their official website to allow citizens to make suggestions on issues of importance to them.[13] Such a consultation, to be effective, should be coupled with a widespread and well-designed information campaign and should ideally also benefit citizens with no internet access. Public administration workers in the regions could assist in relaying public comments to the NCA. In addition, the NCA organized two days of debates with civil society organizations in September. The enthusiasm with which civil society organizations responded to the invitation, with more than 300 participants, shows the thirst for involvement of civil society in the constitutional debate.[14] However several civil society organizations, including many leading ones such as the Tunisian League for Human Rights (LTDH), the International Federation of Human Rights (FIDH), the Association of Tunisian Democratic Women (ATFD) and the Euro-Mediterranean Human Rights Network (EMHRN), boycotted the event regretting among other things that no procedure was put in place to take into consideration the comments and recommendations made by civil society organizations during these two days.[15]

The Carter Center equally welcomes the fact that the draft calendars prepared by NCA members include a period of national debate on the Constitution. Comparative examples show that public participation empowers citizens by acknowledging their sovereignty, increasing their knowledge and capacity, and preparing them for participation in public affairs and the exercise and protection of their rights.[16]

The time allocated to public consultations in countries which have conducted similar exercises has varied significantly. But in processes that were considered highly participatory, public meetings have been held countrywide, targeting not only the main cities but also rural areas. Constitution drafting bodies have organized hundreds of meetings and engaged tens of thousands of citizens to better explain the process and issues at stake.[17]

12 The right to take part in the conduct of public affairs is enshrined in Article 25 ICCPR. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the UN General Assembly on Dec. 9, 1998, states in its article 8 that participation in the conduct of public affairs, includes, inter alia, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.

13 See: http://www.anc.tn/site/main/AR/contribution/contribution_citoyen_constit.jsp.

14 It should be noted that more than 300 civil society organizations wanted to participate, but the NCA had to limit the number of participants to that number because of logistical reasons.

15 http://www.tap.info.tn/fr/fr/politique/300-politique/33042-des-associations-et-organisations-boycottent-le-dialogue-sur-le-projet-de-constitution.html

16 *Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes*, 2009. C*onstitution-Making and Reform: Options for the Process*, published by Interpeace, November 2011, p.49-50 and 86.

17 Processes that are deemed participatory are for instance: Papua New Guinea [1975], Uganda [1995], South Africa [1996], and Kenya [2005]). Public consultation on a draft Constitution or concrete proposals has taken from one week in Timor-Leste [2002] to about four months in Eritrea [1997]. The Timor-Leste period was recognized as too short, but that

As inclusive and participatory processes are more likely to engender consensus around a constitutional framework, The Carter Center urges the NCA to allocate sufficient time for a national debate on the Constitution. In addition, to ensure that the voices of the citizens are effectively taken into consideration, the Center encourages the NCA to set up a formal procedure to analyze, process, and record inputs made during all these various consultation mechanisms.[18]

While NCA-driven consultations are instrumental to create a sense of ownership and build consensus around the future Constitution, initiatives by civil society organizations are also fundamental to mobilize support and lobby constituent assemblies. The Carter Center applauds multiple initiatives by civil society organizations: some have organized town hall meetings and information sessions across the country[19] while others have conducted awareness campaigns[20] or established internet sites aimed at informing citizens and gathering their views on the process.[21] The Carter Center welcomes such initiatives that encourage citizens to play an active role in this historic process.

Referendum

According to the proposed calendars, the NCA will consider the entire final draft of the Constitution for adoption on March 1, 2013. If the text is not approved at that time by a two-thirds majority, the Assembly will consider the text for a second time on March 27, using the same majority requirement. If the final draft of the Constitution is not adopted during that session a referendum would be scheduled for May 1, 2013.[22] There are no legal provisions foreseen if a referendum on the draft Constitution is not successful.

Following the strong reactions by many Tunisian stakeholders to the first draft of the Constitution at its release, many political actors have said publically that passage of the Constitution may indeed require a referendum. Given the potential need for a referendum, The Carter Center urges steps to establish a functioning electoral management body as soon as possible to ensure a credible and inclusive democratic process in the case of a constitutional referendum. A credible and inclusive process that can be conducted within the proposed timeframes requires sufficient time for election preparation, starting with voter registration and an update of the voter rolls.

was the result of pressure to complete the process. Constitution-*Making and Reform: Options for the Process*, published by Interpeace, November 2011, p.50.

18 *Lessons Learned From Constitution-Making: Processes With Broad Based Public Participation*, DRI, 2011.

19 Some of these were: Free Sight Association held public meetings in various governorates to present and discuss the Constitution draft; I-Watch organized a mock NCA session to introduce youth to the functioning of the Assembly, Atide, Jeunesse Sans Frontières, Conscience Politique, Ofyia Center, Association Majida Boulila and others organized public forums to an occasion for the public at large to meet and interact with NCA members on matters related to the Constitution making process.

20 See for example the action organized by the youth association Sawty: http://www.youtube.com/watch?v=W7m3opFHJSI&feature=share.

21 See for example the website of Al Bawsala, which offers an observatory of the NCA and an interactive platform for voter/politician interaction www.marsad.tn, the website of Mouwatana wa Tawassol which seeks to serve as a hub for information and data related to the NCA and activities by CSOs all around the country http://www.mouwatana.org and the website http://www.tunisie-constitution.org which allows citizens to comment on the former Constitution of Tunisia and give their opinion on various topics.

22 Article 3 of the Constitutional Act n°2011-6 dated Dec. 16, 2011, related to the provisional organization public authorities.

Transparency and accessibility of the process

In addition to ensuring broad participation, Constitution drafting processes should provide for transparency and accessibility of the drafting process. A transparent Constitution drafting process is one where the public is aware of what is occurring at each stage of the process and can access information easily.[23]

Outreach and communication

The Carter Center notes that the NCA has failed to conduct sufficient outreach campaigns on its work, even though such campaigns may raise public understanding of the NCA's task and increase its legitimacy. While the Center welcomes the fact that media representatives are granted unrestricted access to the NCA, communication by senior NCA members with the media, including through the official website, has not always been sufficient and regular.

Some NCA members have attributed this shortcoming to the lack of means and logistical support available to conduct communication campaigns. While The Carter Center acknowledges that effective communication strategies require expertise and means, it notes that many donors, institutions, and experts have offered to support the NCA in this endeavor, both technically and financially, they received only general expressions of interest without concrete follow-up on the part of the NCA. Furthermore, actions such as regular press conferences with the media, during which NCA officials could answer questions of journalists, do not involve high financial costs.

The Center encourages the NCA to strengthen its communication with the media and Tunisian citizens by taking advantage of expert advice and the financial support offered by the international community to strengthen its outreach activities. The Center equally encourages media representatives to provide substantive and balanced professional coverage of this important process, and to help bridge the gap between elected officials and their constituents.

Access to the debates of the NCA

While the NCA Rules of Procedure suggest that its members acknowledge transparency as an important principle, provisions related to the access both to working sessions of the commissions and the plenary sessions of the Assembly have been interpreted inconsistently and mostly restrictively when it comes to civil society organizations, thus hindering their effective access to the debates. [24] The Carter Center also notes that contrary to what is foreseen in the Rules of Procedure, no procedures were established by the NCA Bureau[25] regarding public access to plenary sessions.[26] Access to the NCA therefore still depends on the good will of individual NCA members, making it more and more difficult for civil society organizations that have provided criticisms and recommendations to the institution to have access to it.

23 The UN Human Rights Committee recommends that constitutional reform should be a "transparent process and on a wide participatory basis" (see Concluding observations to the 2005 state report on Bosnia and Herzegovina, CCPR/C/BIH/CO/1, paragraph 8.d.).

24 The RoP foresee that commission meetings as well as plenary sessions are public Articles 54 and 76 respectively.

25 The Bureau is composed of the NCA president and nine other NCA members, Article 28, RoP.

26 Article 76.2 RoP.

The Center strongly recommends that the NCA establish a formal procedure to grant full access and observer status to civil society organizations and interested citizens. The procedure put in place for the open door days with civil society in September, when registration forms could be downloaded from the NCA website, shows that the NCA has the means to deal with an accreditation system based on objective criteria.

As it is currently reviewing its Rules of Procedure, The Carter Center recommends that the NCA clarify Articles 54 and 76 related to the access to the commissions and to plenary sessions, respectively, and ensure that debates are open to the public.

Accountability

The Carter Center can attest that the majority of NCA members are aware of the historical task with which they have been entrusted, and are committed and hard working. However, a polemic arose when the very sensitive question of the political system was debated on July 4 in the Legislative and Executive Powers Commission. Only 15 of 22 commission members were present, of which nine were from the same political party. In other instances, significant discussions were conducted without the full participation of all commission members. This is partly due to the fact that some members are part of several commissions, whose work sometimes overlaps, yet other absences occurred without apparent justification. The media has widely covered these absences, which have led to a negative perception of the NCA by Tunisian citizens.

The Center encourages the NCA to implement the provisions of the Rules of Procedure that foresee sanctions in case of repeated unjustified absences to create increased accountability of NCA members to their work and the expectations of their constituents.[27] In addition, while revising its Rules of Procedure, the NCA should consider introducing financial penalties (such as the nonpayment of bonuses) in cases of recurring absences.

Access to official documents

The Rules of Procedure require commissions to post reports prepared by commission rapporteurs or their deputies on the NCA website, after internal commission approval.[28] By mid-June 2012, all provisional reports of the six constitutional commissions were published on the NCA website[29] and, up until the time of this report, 22 reports from other commissions have been published.[30] The Carter Center commends these efforts and encourages this good practice that ensures access to relevant information by interested parties to continue.

The Rules of Procedure do not require verbatim records of meetings to be published. Such documents are, however, a valuable source of information for interested citizens, highlighting issues debated during the sessions. Some Assembly members have taken the initiative to publish meetings notes and official verbatim records on their personal Facebook pages or blogs. The Center notes that on

27 Article 53, RoP foresees that the presence of commission members during meetings is obligatory and allows for the disqualification of any member who is absent from more than three consecutive sessions without authorization.

28 Article 62, RoP.

29 http://www.anc.tn/site/main/AR/docs/rapports/constits/liste_rapports.jsp.

30 http://www.anc.tn/site/main/AR/docs/rapports/rapports_commissions.jsp.

Aug. 29, a coalition of activist groups – Al Bawsala, the Nawaat association, as well as citizens of the Tunisian collective OpenGov TN – lodged a formal complaint to the Administrative Tribunal against the NCA for violating the provisions of the Decree-Law related to the access of administrative documents of public bodies.[31] The lawsuit specifically charges the Assembly with failing to publish the results of votes, deputies' attendance lists, and the verbatim records of the meetings.
In this regard, The Carter Center welcomes the recent declaration made by the NCA president according to which NCA members' attendance lists as well as verbatim records of the commissions' meetings would be released on the NCA website beginning Sept. 17. Despite this commitment, at the time this report was published, none of these documents were accessible on the website.

The Carter Center emphasizes that the right of access to information is essential to guarantee transparency and to permit the active participation of all stakeholders in the constitutional making process.[32] This right implies that the Tunisian authorities have an obligation under international public law to undertake all possible measures to guarantee simple, rapid, effective, and practical access to all information of general interest.[33]

Conclusion and recommendations

The Carter Center has conducted meetings with relevant stakeholders, including NCA members and administrative staff, civil society organizations, political parties' representatives, and Tunisian academics to understand the work of the NCA and assess strengths and weaknesses of the constitutional making process thus far. The Center appreciates the commitment demonstrated by all interlocutors in sharing information and discussing potential areas for improvement. With a view to further consolidate the gains of the Revolution towards the establishment of a transparent and participatory system of governance, The Carter Center encourages the NCA to consider the following recommendations:

- Ensure that provisions of the future Constitution uphold Tunisia's international treaty obligations on human rights and fundamental freedoms.
- Establish a detailed work plan and time table for the adoption of the Constitution to ensure better planning and progress as well as to provide the public with greater visibility on the way forward.
- Plan for sufficient time to prepare and conduct a much needed national debate on the Constitution, since an inclusive and participatory process is more likely to engender consensus around the new constitutional framework.
- Establish a formal procedure to receive, analyze, and process submissions, as well as to record comments and suggestions expressed during consultations between NCA members and citizens.
- Create a functioning electoral management body as soon as possible to ensure that in the case of a constitutional referendum, a credible, inclusive process can be conducted within the proposed

31 Decree-Law 41 dated May 26, 2011.

32 ICCPR, Article 19 (2).

33 Human Rights Committee, General Comment No. 34 "Article 19: Freedoms of opinion and expression", para.19.

time frames.

- Improve communication with the media and Tunisian citizens by taking advantage of expert advice and the financial support offered by the international community to strengthen its outreach activities.
- Encourage media representatives to provide substantive and balanced professional coverage of this important process, and to help bridge the gap between elected officials and their constituents.
- Implement the provisions of the Rules of Procedure that foresee sanctions in case of repeated unjustified absences to encourage greater accountability and input on critical issues.
- Ensure that plenary sessions of the NCA and commission debates are open to observers, and establish a formal, transparent and objective accreditation system to grant access and observer status to civil society organizations and interested citizens.
- Publish and disseminate in a timely manner all NCA official documents – minutes, reports, decisions, and lists of presence – including by posting them on its website.

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NEWS
THE CARTER CENTER
ONE COPENHILL ATLANTA, GA 30307

FOR IMMEDIATE RELEASE
February 8, 2013
CONTACT: Atlanta, Deborah Hakes +1 404 420 5124; Tunis, Jonathan Stonestreet + 00216 21 768 208;

Carter Center Statement on the Assassination of Chokri Belaid

The Carter Center strongly condemns the assassination of Mr. Chokri Belaid, a leader of the Popular Front coalition, in what appears to be a politically motivated act.

"The assassination of Mr. Belaid is tragic, and an attack not only against Mr. Belaid and his freedom to speak his opinions freely, but to all Tunisians who have expressed their will to live in a free and democratic society," former U.S. President Jimmy Carter said.

The Carter Center also condemns the acts of violence perpetrated against political parties, activists, journalists, and other citizens in recent weeks, as well as those against religious shrines. These attacks, including those that have occurred after the assassination of Mr. Belaid, are contrary to the principles of a democratic society in which citizens can express freely their political opinions and religious beliefs.

The Carter Center appeals to all Tunisians and the political leadership to exercise restraint, to reject violence, and to renew the spirit of peaceful dialogue and open debate that has characterized post-revolutionary Tunisia. The Center further urges the authorities to condemn all acts of political violence and to investigate and take appropriate measures in response.

The Carter Center expresses its condolences to Mr. Belaid's family and colleagues.

NEWS
THE CARTER CENTER
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June 12, 2013
FOR IMMEDIATE RELEASE
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The Carter Center Congratulates Tunisia's National Constituent Assembly on Final Draft of Constitution and Urges Safeguards for Human Rights

The Carter Center, aiming at supporting a successful transition to democracy in Tunisia, has evaluated the country's working constitutional draft and assessed the extent to which it is consistent with the country's obligations under public international law. While the draft underscores the authorities' strong commitment to democratic reform following the Revolution, it continues to fall short on critical guarantees of human rights and fundamental freedoms. In a report released June 10, The Carter Center elaborates on these and other areas of concern, in order to assist the National Constituent Assembly (NCA) in its drafting process.

On June 1, Tunisia NCA President Mustafa Ben Jaâfar officially presented a final draft of a new Tunisian Constitution to the media. This draft now will undergo an article-by-article debate in the NCA, giving plenary members one last opportunity to consider revisions.

The Carter Center recognizes the importance of the work carried out by the NCA, the extent of the progress made throughout the different drafts of the Constitution, and the willingness of Assembly members to take into account the opinions and views expressed throughout the process by political representatives, civil society, and citizens. Overall, the various consultation mechanisms were productive in reaching consensus on key issues. The NCA has demonstrated its ability to take into account numerous suggestions, including the overall structure of the draft, the internal coherence of the text, and in particular concerns expressed regarding the protection of certain fundamental rights and liberties. Nevertheless, The Carter Center notes that, despite this progress, several important issues should be addressed.

The Center calls upon NCA members to ensure that the future Constitution upholds Tunisia's international treaty obligations on human rights and political freedoms, including the freedom of religion, expression, association, and assembly. The current text lacks clear provisions articulating strong

protections for these and other fundamental liberties, and does not adequately address the limited conditions under which international law allows such fundamental rights to be restricted. The Center further urges NCA members to ensure protections for the significant advances that Tunisia has made regarding the role of women and minorities in society, and to establish clear constitutional protections for women's rights and against discrimination in all its forms, including discrimination based on religious beliefs. To protect these rights and the overall gains of the Revolution, the Center recommends that the Constitutional Court be granted full and effective authority in the new Constitution to consider the constitutionality of legislation and judicial cases upon its creation.

The Center also encourages the members and leadership of the NCA to commit fully to their work and to efforts to ensure broad popular understanding of the future Constitution. While the Center notes that the majority of Assembly members are diligent in carrying out their responsibilities, the recurring absence of some members in plenary and working sessions has contributed to a negative perception of the NCA by Tunisian citizens. To address such concerns, the Center encourages all NCA members to participate fully in the article-by-article consideration of the text before its final adoption, so as to fulfill their representative duties, and to broadly disseminate information regarding the deliberations and decisions made.

In the spirit of collaboration and in support of the work of the NCA, The Carter Center offers the following recommendations for consideration by its members during the article-by-article review. In order to conform fully with international law, the Constitution should:

- Enshrine the principle of non-discrimination. Relevant language should prohibit discrimination on the grounds of race, color, language, religion, political or other opinion, national or social origin, property, birth, and other status to all people in Tunisia, citizens and foreigners alike.

- Articulate the principle of equality between men and women in all its facets. The Center also would welcome a constitutional provision that encourages the State to adopt positive measures to achieve the effective and equal empowerment of women.

- Ensure that the scope of the right to freedom of religion and conscience covers all facets of these rights, including the freedom to adopt, change, or renounce a religion or belief.

- Reflect Tunisia's international legal obligations, which stipulate that any restrictions to rights and freedoms should also be limited to those necessary and proportional to secure a legitimate aim. This would require adding language to the Article 48 (general limitation clause) to bring the clause into conformity with international law.

- Provide for full protection for fundamental rights, including those pertaining to freedom of expression, assembly, association, and the right of access to information. The current limitations in these articles remain vague and vary in scope, which could cause an erosion of individual rights in the future.

- Guarantee that domestic law reflects and respects Tunisia's international commitments. Article 19 should refer to treaties "duly approved and ratified" so as to encompass all international treaties ratified by Tunisia.

- Give the Constitutional Court full power to consider the constitutionality of laws from the moment of its creation under the Constitution.
- Clearly specify allowable limitations on rights during a state of emergency situation, and to restrict potential limitations by time and scope to meet the exigencies of the situation. Further, the Constitution should protect rights that are considered non-derogable in international law, and ban their restrictions under emergency powers.
- Open the requirements for the presidency to all qualified Tunisians, regardless of religious affiliation, and reconsider maximum age restrictions for the office.
- Include a reference to the equality of the vote to each article related to voting rights.
- Include references to the fundamental characteristics of genuine elections in the provisions on referenda.
- Set clear deadlines for the entry into force of the various provisions of the Constitution.

In addition, The Carter Center:

- Calls upon all political parties to ensure the presence and active participation of their respective NCA members during the article-by-article vote of the Constitution and urges members to fulfill the duties for which they were elected, or if they are unable to do so, to consider stepping down in favor of the next candidate from their electoral list. The NCA should implement the provisions of the Rules of Procedure providing penalties for members who do not comply with these guidelines.
- Urges the NCA to launch a comprehensive information campaign using all forms of media during the article-by-article vote on the draft Constitution. Citizens should be made aware of the final content of the draft and its importance in establishing the fundamental legal principles of Tunisian society. To this end, the NCA should hold regular press conferences to allow media access to reliable information to perform their role in disseminating news to the public.
- Encourages the NCA to consider amending the "little Constitution" to provide for the case in which an eventual referendum on adoption of the Constitution is unsuccessful.

Background: Following its observation of National Constituent Assembly elections in October 2011, The Carter Center maintained a presence in Tunisia to monitor and assess the Constitution drafting process and preparations for the next electoral cycle. The Center assesses these processes against Tunisia's international treaty obligations, including, among others, the International Covenant on Civil and Political Rights.

This report presents the Carter Center's findings and recommendations based on meetings with a wide range of stakeholders including Assembly members and staff, political party representatives, civil society organizations, and academics. The Center's staff attended commission meetings and plenary sessions of the Assembly, and the Center is grateful for the cooperation demonstrated by all interlocutors in sharing information and discussing potential areas for improvement.

The Carter Center's full report may be found at www.cartercenter.org.

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THE
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The Carter Center Congratulates Tunisia's National Constituent Assembly on Final Draft of Constitution and Urges Safeguards for Human Rights

June 12, 2013

A year and a half after the historic elections of Oct. 23, 2011, and the establishment of a National Constituent Assembly (NCA), Tunisia is reaching a decisive moment of the process of drafting its new Constitution.

The article-by-article vote and first complete reading of the Constitution draft, which are to take place in the coming weeks, constitute the final stage of the Constitution drafting process, during which essential decisions will be taken that will shape the future of Tunisia for the next generations. The new Constitution should establish a foundation for building democratic institutions, protecting individual rights and freedoms, and consolidating the gains of the Revolution. The success of the transitional process in Tunisia will provide a model for other countries, both in the Arab region and elsewhere, for an effective peaceful transfer of power from authoritarianism to democratic governance.

The Carter Center has observed the work of the NCA since its formation in November 2011 and the subsequent Constitution drafting process, meeting regularly with a broad representation of political and civic stakeholders, attending NCA sessions, and following public debate and experts' workshops related to the development of the Constitution. The Carter Center also monitored the national consultations that followed the release of the second draft Constitution on Dec. 14, 2012. The Center assesses the Constitution drafting process and the draft Constitution against Tunisia's international obligations to uphold fundamental political and civic freedoms, including principles of transparency and participation in public affairs of one's country.[1]

In this report, The Carter Center offers an overview and an assessment of the Constitution drafting process, and an analysis of the evolution of the content in the different drafts of the Constitution.

1 Article 25 of the International Covenant on Civil and Political Rights (ICCPR) (ratified by Tunisia on March 18, 1969) states that "every citizen shall have the right and the opportunity (…) to take part in the conduct of public affairs, directly or through freely chosen representatives…."

The Center calls upon NCA members to ensure that the future Constitution upholds Tunisia's international treaty obligations on human rights and fundamental freedoms, including on the freedom of religion, the principle of non-discrimination, the protection of women's rights and the conditions to restrict these and other fundamental rights.

The Constitution drafting process

As the NCA undertook its duties to draft a new Constitution, its members were highly attuned to the responsibilities of their role and the unique opportunity to have a lasting impact on the identity and governance of post-Revolution Tunisia. As they embarked on a comprehensive and deliberative process, it was not without difficulty. While the NCA should be commended for the deliberative and careful consideration of a new Constitution, the absence of a realistic and detailed roadmap for the work of the NCA, the absenteeism of some NCA members and a lack of clear communication in the process has hindered its progress.

Timeframe for the adoption of the Constitution

In spite of many calls for it to do so, the NCA never communicated a clear timetable for the Constitution drafting process.[2] A road map would have helped the NCA to better structure its work as well as to provide the public with greater visibility on the transitional process. NCA members also underestimated the extent to which its legislative functions as well as external political events would extend the Constitution drafting process. The announcement of various dates and timeframes for the completion of the Constitution throughout the drafting process – none of which have been respected – contributed to a lack of clarity on the progress of the NCA's work as well as a public dissatisfaction with the pace of the drafting process.

The absence of a clear roadmap for the completion of the Constitution also contributed to controversy as well as to questioning of the continued legitimacy of the NCA after Oct. 23, 2012. Most political parties had morally committed, ahead of the NCA elections, not to exceed a one-year period to draft the Constitution.[3] As the process unfolded, however, the parties agreed within the NCA to extend the Constitution drafting exercise. Comparative examples show that participatory Constitution drafting processes have been lengthy processes, with an average duration varying between 18 and 24 months and that allowances are not uncommon in order to extend original estimates or stipulated deadlines.[4]

Drafting process

Members of the NCA began the Constitution drafting process on Feb. 13, 2012. The NCA created six constitutional commissions, each responsible for drafting articles under specific chapters of the future

2 "The Carter Center Encourages Increased Transparency and Public Participation in Tunisia's Constitution Drafting Process; Calls for Progress toward Establishment of Independent Election Management Body," May 11, 2102; "The Carter Center Recognizes Tunisia's National Constituent Assembly Progress; Calls for Increased Public Participation, Outreach, and Transparency," Sept. 26, 2012.

3 "Declaration on the Transitional Process", signed on Sept. 15, 2011, by 11 of the 12 parties represented at this time in the "The High Authority for the Realization of the Objectives of the Revolution, Political Reform, and Democratic Transition." However, the constitutional act on the provisional organization of public authorities, often referred to as the "little Constitution", which has primacy over all other laws, makes no mention of a specific time period.

4 See example cited in *Constitution-Making and Reform: Options for the Process*, published by Interpeace, November 2011. P.49. See also *Rédaction d'articles ou d'amendements constitutionnels autour du cas tunisien*, Democracy Reporting International (DRI), 2012.

Constitution.[5] The commissions conducted several hearings with Tunisian and international experts, representatives of the government, institutions, civil society, and academics, and studied relevant texts addressing constitutional issues and drafting processes. Some NCA members also undertook study trips to countries that have experienced similar Constitution drafting processes and other locations to study constitutional law. Aside from permanent commissions, the NCA also established a Constitutional Drafting and Coordination Committee (Drafting Committee). This committee, tasked with coordinating the work of the commissions, did not hold regular meetings until September 2012. Prior to this time the commissions worked independently of each other, without a common methodology or work plan.[6]

In August 2012, the six constitutional commissions submitted their respective first drafts to the Drafting Committee, which pointed out inconsistencies, gaps, repetitions, and unclear phrasing, but did not make substantive changes to the content of the articles. The commissions worked to include the comments of the Drafting Committee as they revised their respective sections and progressively released their new drafts between the end of September and mid-December. In September 2012, the NCA organized a two-day dialogue session on the content of the draft Constitution that gathered 300 civil society organizations. The NCA also launched a consultation mechanism on its official website to allow citizens to make suggestions on constitutional issues of importance to them.

A second compilation of the commissions' work, known as the second draft of the Constitution, was released on Dec. 14, 2012, two days before the launching of a national consultation process. Public consultations started with two sessions with students' representatives in Tunis and Sfax. They were followed by public sessions held through January 2013 in Tunisia's 24 governorates, at a rate of six governorates each weekend. Meetings with expatriate constituencies in France and Italy were also organized in January and February 2013.[7]

While national consultations took place from December to February 2013, the NCA held general debates in plenary on the various chapters of the draft Constitution, enabling NCA members, including those who did not participate in the six constitutional commissions, to present their views on the various articles.[8]

New urgency was injected into the Constitution drafting process by a governmental crisis, the perceived lack of improvement in the economy, and increasing political violence, which culminated in the assassination of political party leader Chokri Belaid on Feb. 6, 2013. Confronted with this political crisis, the NCA accelerated the Constitution drafting process, including by revising the Rules of Procedure (RoP) in March 2013 after much debate. The amendments aimed to clarify the prerogatives of the Drafting Commission and the constitutional commissions regarding the incorporation of

5 1) Preamble, fundamental principles, constitutional review; 2) Rights and freedoms; 3) Legislative and executive powers and the relationships between the powers; 4) Judicial, administrative, financial and constitutional justice; 5) Constitutional bodies; and 6) Regional and local public authorities.

6 The Constitutional Drafting and Coordination Committee is composed of NCA President Mustapha Ben Jaâfar from Ettakatol, NCA General Rapporteur Habib Khedher from Ennahdha, his two deputies and the presidents and rapporteurs of the permanent commissions. Article 103, RoP

7 The Carter Center attended almost half of the dialogue sessions in Tunisia, with observers present in the governorates of Tunis, Sfax, Sousse, Monastir, Gabès, Beja, Zaghouan, Nabeul, Ben Arous, Ariana, Medenine, Tozeur.

8 The first anniversary of the Oct. 23, 2011, elections was marked by a general discussion by the plenary on the Constitution's Preamble and General Principles, as well as on revision procedures and final provisions, while other commissions continued to review their drafts. The general discussion by the plenary on the other chapters took place between Jan. 17, 2013 and Feb. 25, 2013.

the recommendations and suggestions made during the national consultations and the plenary discussions on the second draft Constitution. The amendments also streamlined the procedures for debate by limiting the number of amendments to the draft Constitution that could be proposed in plenary sessions.

In line with the revised RoP, the six constitutional commissions reviewed the recommendations and suggestions emanating from the general debate in plenary sessions, the dialogue with civil society, and the national consultations from March 21 to April 10, 2013.

On April 10, the updated drafts from each commission were sent to the Drafting Committee but were not publicly released. The Drafting Committee reviewed the final drafts of the six commissions. However, the wording of the revised Article 104 of the RoP did not clearly delineate the scope of the Drafting Committee's authority when consolidating and harmonizing the drafts.[9] This later resulted in controversy when the Drafting Committee made substantive edits to articles that had been finalized within the commissions and decided between various proposals for the design of the political system without further consultation with the commissions.

The Drafting Committee's consolidated document (also referred to as the third draft of the Constitution) was leaked to the media and subsequently officially released on April 22, 2013. The draft was then submitted to a group of experts selected by the NCA Bureau on the basis of proposals made by the presidents of the constitutional commissions. Some of the selected experts, including renown constitutionalists, declined to be part of the review group, citing concerns about the ambiguity in the experts' scope of work and the fact that certain experts were not on the list.[10] The remaining nine experts worked from April 23 to May 2, 2013, on the draft Constitution, at first separately and then together with the Drafting Committee.

In the meantime, two national dialogues were held to discuss remaining points of contention in the Constitution, as well as political, economical and security issues in Tunisia. The first national dialogue, convened by the President of the Republic, was held with most of the leading political parties, while the second, convened by the General Union of Tunisian Workers (UGTT), continued a process begun in 2012 and brought together a wider range of parties and civil society groups.

The Drafting Committee resumed its work after the end of the two national dialogues in order to incorporate agreements reached on constitutional issues during the sessions. The Committee also added a tenth chapter dealing with transitional provisions. By doing so, the Committee followed a different process for this chapter than for all the others, which were drafted by constitutional commissions.

On June 1, 2013, NCA President Mustafa Ben Jaâfar officially presented the final draft of the Constitution to the media. There were strong reactions to this draft, with some members claiming that agreements reached during the national dialogues were not respected and some claiming that the Drafting Committee had overstepped its authority by making substantive changes to the articles agreed in the six commissions. A number of NCA members stated their intention to file a lawsuit regarding the Drafting Committee's actions.

9 Article 104 as amended in March 2013 provides that "the Committee meets to prepare the final version of the draft Constitution *based* (emphasis added) on the work of the commissions and with the help of experts."

10 Kais Said was the first expert to decline. Iyadh Ben Achour, Chafik Sarsar and Hafidha Chekir declined after a joint letter to NCA President, which requested further clarification regarding the role of the experts (i.e., whether their work was merely of a linguistic nature or also content related), remained unanswered.

In accordance with Article 104 of the amended RoP, the draft was then resubmitted to the constitutional commissions, which had an opportunity to make a last assessment of their sections and submit a report summarizing their comments within 48 hours. All commissions met on June 4, with the exception of the Commission on Executive and Legislative Powers. Its president refused to call for a meeting of the commission in protest of the Drafting Committee's procedure to finalize the Constitution draft.[11] Without a report from all of the commissions, the draft Constitution has not moved forward. At the time of writing, discussions were underway regarding how to resolve this issue.

Upon resolution of this situation, the draft Constitution, together with the commission reports, will be submitted to the President of the Republic and the Prime Minister. 15 days after that submission, the NCA will begin to consider and vote on each of the 146 articles separately.

Following the revised RoP, amendments must be submitted by a group of at least five deputies; each deputy can take part in one group per article. Suggested amendments have to be submitted a minimum of four days before the plenary debate on the concerned chapter.[12]

The NCA must review and approve each article individually by an absolute majority of all members of the NCA, before passing to a vote on the entirety of the Constitution. The full Constitution must be approved by a two-thirds majority of all members. Should the NCA not reach a two-thirds majority, a second vote on the same text will be held within a period of one month. If the Constitution is again not approved by a two-thirds majority, it will be submitted to a national referendum.[13] In this case, the Constitution would be approved if an absolute majority of those who cast ballots approve it; there is no minimum threshold for participation. There are no legal provisions foreseen if the Constitution is rejected in a referendum.

If a constitutional referendum is required, a legal framework for conducting the referendum would be needed and the electoral management body would have to be given the necessary means and time to ensure a credible and inclusive democratic process.

The Carter recommends that the NCA consider amending to the 'little Constitution' to provide for the possibility in which the Constitution is rejected in a referendum.

Need for further outreach and communication

In its May and September 2012 statements on the Constitution drafting process, The Carter Center highlighted the benefit of a participatory and accessible process in terms of increased legitimacy and stronger acceptance of the new constitutional order and urged the NCA to create a more inclusive, transparent process.[14] Unfortunately, the NCA has taken few steps to implement an effective national public outreach campaign during the drafting process, and has communicated on an irregular basis

11 M. Chetoui complained that the constitutional commissions did not receive authentic copies of the last draft. He also contested the liberties taken by the Drafting Committee to modify the content of the Constitution draft and to bring changes to articles that had been agreed upon by the constitutional commissions. Moreover, he argued that the support of experts was limited by the fact that only linguists reviewed the draft but no experts in constitutional law.

12 Art. 106 (new), amended RoP.

13 Article 3 of the Constitutional Act n°2011-6 dated December 16, 2011 related to the provisional organization public authorities

14 The UN Human Rights Committee recommends that constitutional reform should be a "transparent process and on a wide participatory basis" (see Concluding observations to the 2005 state report on Bosnia and Herzegovina, CCPR/C/BIH/CO/1, paragraph 8.d.).

with the public.

For instance, although in March 2013 the NCA had set a non-binding deadline of April 27 for completing the draft, the postponement of the start of the article-by-article discussion of the Constitution by the plenary was not communicated to the public through a press conference or by a press release. Instead, it was only during the course of a visit of French senators on May 6 that Assembly President Ben Jaâfar informed journalists that the vote by the plenary would not start before June.[15] A week later, a member of the Drafting Committee posted an updated calendar adopted by the Committee on his private Facebook page, indicating that the Committee would submit the Constitution to the President of the Republic on May 22 and the article-by-article vote would start on June 8. When the deadline was extended, NCA officials again did not offer a formal explanation, or communicate the potential timelines to the public. By the end of May, NCA members and the general public expected the Constitution to be released at any moment, and confusion was created by contradictory statements made in the press and on social networks by different actors involved in the process until it was eventually released on June 1.

Recent surveys indicate that there is little awareness among citizens regarding the content of any of the different drafts of the Constitution and the issues at stake[16]. While the NCA's initiatives to consult citizens by various means were a positive effort to raise public understanding of and support for the Constitution drafting process, the Center notes that the consultations involved only around 5000 citizens and that only 217 people submitted responses via the internet consultation mechanism on the NCA website.

The Carter Center notes that, beyond these consultation mechanisms, the NCA did not undertake any further outreach or information campaign on the draft Constitution or on the work of the NCA. More broadly, the NCA has not had an effective communication strategy. While the Center welcomes the wide access that the NCA granted to media representatives, direct communication by senior NCA members with the media, including through press conferences and the official website, has not been sufficient and regular. A well conceived outreach campaign might have raised public understanding of the NCA members' work and the importance of the process, as well as the perceived legitimacy of the Constituent Assembly.

The Center encourages the NCA, in order to fulfill its representative role, to launch a comprehensive information campaign using all forms of media during the article-by-article vote on the draft Constitution. Citizens should be made aware of the final text of the Constitution and the importance of current discussions and their outcome, as the future Constitution will establish the fundamental principles of the Tunisian society, including those intended to protect civil and political freedoms, provide checks and balances between state institutions, and determine their form and role.

As the article–by-article vote will be the last opportunity for the NCA to raise public understanding about the Constitution drafting process, The Carter Center urges the NCA to redouble its outreach

15 "MBJ la Constitution sera présentée au vote en plénières à partir de juin2013". www.tuniscope.com/index.php/article/25032/actualites/politique/mbj-juin-585523#.UYodHqJ96KF

16 A study conducted by the UNDP indicates that 56.3 percent of surveyed youth are unaware of the content of the draft Constitution and that 68.8 percent feel little or not involved in the Constitution drafting process see « Enquête nationale sur les attentes des jeunes à l'égard du processus constitutionnel et de la transition démocratique en Tunisie », Rapport de synthèse, April 2013. See also *Prioritizing patriotism: Tunisian citizens express their views*, NDI, June 2013

efforts, including by taking advantage of expert advice offered by various international organizations. The planned establishment within the NCA of a media center and special area to hold press conferences is a welcome development, and the Center recommends that the NCA makes full use of these facilities

The Carter Center also reiterates its call for the NCA to hold regular press conferences to answer journalists' questions. The article-by-article vote will take several weeks of discussion and it will be crucial that the NCA and its members provide updates on the content of the debates, on the articles that were passed or rejected, and explanations of the process, so that the media has adequate access to information and can provide thorough and informed coverage to the public. The Center also encourages media representatives to provide substantive and balanced professional coverage of this important phase, and to help bridge the gap between elected officials and their constituents.

Attendance and Accountability

Given the range of their responsibilities, from drafting the Constitution to adopting legislation to evaluating candidacies and appointing members of special commissions, the majority of NCA members appear to be very committed and diligent in carrying out their work. However, in many commission sessions that it attended, The Carter Center observed that commissions worked without the full presence of its members, even during crucial discussions and votes on sensitive articles of the Constitution. This is partly due to the fact that some members are part of several commissions, whose work sometimes overlapped; yet other absences occurred without apparent justification. In addition to the absences, Carter Center observers noted that commission sessions could frequently not begin on time because the quorum of the absolute majority of members was not reached, leading to significant delays in the commissions' work. In this regard, the Center welcomes the amendment of Article 52 of the RoP reducing the amount of time (from one hour to half an hour) after which commissions can start working even if the quorum of members is not reached.

The problem of absenteeism and late arrival also affected votes in plenary session. However, Article 80 of the RoP, which sets the functioning rules of the plenary session, has not been amended in the same sense as Article 52. On several occasions during the votes on other legislation, including the law to establish an election management body, the required absolute majority quorum required to start the debates was only reached after one hour and was sometimes lost during the sessions as members left the plenary session during the debates.[17] In an effort to put pressure on members to attend sessions, the NCA introduced a system of magnetic cards in late November 2012 for each member as a means to control not only absenteeism and tardiness, but also to facilitate vote tracking. The revised RoP also mandate the publishing of the attendance records of plenary and commission sessions by the NCA Bureau within three days of the end of the session. The list should specify whether the absence was justified.[18] The Carter Center regrets that such a list has never been published as of yet, although some NCA members continue to be absent during the sessions.

Recent statistics prepared by the civil society organization Al Bawsala show that the average attendance rate during 124 votes on different pieces of legislation monitored was 62 percent, with attendance by parliamentary groups ranging from 79 percent for the Ennahdha bloc and 45 percent for the Ettakatol bloc. The five members that are or have been serving in both Ministerial and NCA member functions have the lowest rate of presence. Apart from these special cases, the presence of individual

17 The votes on the ISIE law took place from November 8 to Dec. 12, 2012.

18 Article 126 RoP.

members varies considerably, ranging from nine percent to 100 percent attendance.

The Carter Center calls upon all political parties to ensure the presence and active participation of their respective NCA members during the article-by-article vote of the Constitution and strongly encourages members to fulfill the duties for which they were elected. NCA members who are not in a position to attend debates and voting sessions, because of illness or additional responsibilities within another state institution, should consider resigning from their NCA mandate so that they may be replaced by the next candidate from their electoral list.[19] Such a step was taken by many members of the government, including recently by Khalil Zaouia, Minister for Social Affairs who resigned from his NCA mandate. The Center also encourages the NCA to implement the provisions of the RoP that foresee financial penalties in case of repeated unjustified absences in order to increase NCA members' accountability to their constituents.[20]

The Carter Center notes that on several occasions, and notably during the vote on amendments of the RoP, some NCA members were not able to vote due to technical issues with their magnetic cards. The Carter Center recommends that before the start of the article-by-article debate a test be conducted to identify and resolve any technical problems, to ensure that all NCA members will be able to vote.

Evolution of critical issues in the different drafts

While recognizing the principle of State sovereignty in terms of choices made by the NCA and keeping in mind that the draft Constitution is the product of the Tunisian people, The Carter Center has followed the development of crucial issues that marked the different steps of the Constitution drafting process. The Center assesses provisions of the draft Constitution against Tunisia's international obligations to uphold fundamental political and civic freedoms, including principles of human rights, comprised within the international and regional human rights treaties that the country has ratified.[21]

Religion in the Constitution

The right to freedom of religion or belief is a key principle of international law, and it is essential that it is protected and spelled out in a country's Constitution. This right, as defined by Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights (ICCPR), is a wide-ranging right covering a large number of issues.

Since the beginning of the Constitution drafting process, the place of religion in the new Constitution has mobilized political parties and civil society. From the first draft, the preamble contained both explicit and implicit references to religion. In addition to these references, some believed that *Sharia* should be identified as a formal source of legislation while others firmly opposed this. Before the release of the first draft a consensus was reached not to mention *Sharia* directly and to keep the emblematic first article of the 1959 Constitution, which reads as follows: "Tunisia is a free, independent, and sovereign state. Its religion is Islam, its language is Arabic, and its form of

19 Article 123, RoP.

20 Article 126, RoP.

21 These treaties include amongst others the International Covenant on Civil and Political Rights (ICCPR) ratified by Tunisia in 1969, the International Covenant on Economic, Social and Cultural Rights (ICESC) ratified by Tunisia in 1969, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ratified by Tunisia in 1985, the African Charter on Human and Peoples' Rights (AfCHPR) ratified by Tunisia in 1981, The Vienna Convention on the Law of Treaties ratified by Tunisia in 1971, the International Convention on the Elimination of all Forms of Racial Discrimination ratified by Tunisia in 1966 and the Convention on the Rights of the Child ratified by Tunisia in 1989.

government is a Republic." This article affirms the Arabic-Muslim identity of Tunisia without clearly defining Islam as the State religion.

However, a debate arose with the introduction of an article (Article 148 of the second draft which became Article 136 in the third draft and then 141 in the fourth one) which, instead of stating that certain articles cannot be amended, enumerates several non-amendable concepts of the new Constitution. According to this article, one of the elements that cannot be amended is "Islam as the State religion." This is different than the wording of Article 1. In addition, another element that cannot be amended is "the civil nature of the State," thereby creating the potential for conflict between these two concepts.

Additional religious elements included in all four drafts are the requirement for candidates running for the position of President of the Republic to have Islam as their religion, and the prescribed oaths of office sworn by elected officials, which are religious in nature.

The establishment of a High Islamic Council was also a controversial matter in the Constitutional Bodies Commission. The issue was also debated during the national consultations and the general discussions on the second draft Constitution in plenary sessions. The High Islamic Council did not figure in any of the drafts. However, the provisions on the composition of the Constitutional Court were changed between the second and third drafts in a way that some NCA members said would allow for the inclusion of religious law scholars on the Court. Namely, while in the second draft the Constitutional Court was to be entirely composed of lawyers having a minimum of 20 years of professional experience, the third draft lowered these prerequisites, requiring a majority of lawyers with a minimum of ten years experience. An intermediate solution is proposed by the fourth draft, which opted for a two-thirds composition of lawyers with a minimum of 15 years of experience.

Although the notion of a State religion is accepted under international human rights law, this should not result in any "impairment of the enjoyment of the other rights recognized by the ICCPR under the ICCPR (…) nor in any discrimination against adherents to other religions or non-believers".[22]

The requirement for a candidate for president to have a particular religion appears to contravene Articles 25 and 26 of the ICCPR, which lay down the principle of participation in public affairs and equality before the law.

The Carter Center recommends that the Constitution state explicitly that the mention or references to religion should not be used to restrict other rights and freedoms, nor should it result in discrimination against persons with another religion or without any religion. The Center encourages the NCA to open the requirements for the presidency to all qualified Tunisians, regardless of religious affiliation, and not to discriminate on the basis of religion.

Structure of the political system

International law obligations do not dictate a specific political system, and it is the choice of the Tunisian people to decide on the design of structure of the public authorities and the balance of powers among them. The content of the Constitution should, however, ensure that all requisite elements of a democratic system are respected. The balance of power implies collaboration between the different powers of the state and the creation of mechanisms of mutual control and of countervailing powers.

The choice of the political system has been particularly contentious. Options supported by parlia-

22 Human Rights Committee, General Comment 22, para. 9 and 10.

mentary groups varied between a presidential system, a parliamentary system or a mixed system. Although the principle of separation of powers has been established since the first draft, the debate has revolved around the balance of powers between the executive and the legislative, and between the President of the Republic and the prime minister.

Both in the first and second draft several aspects of the political system remained unresolved. In the absence of consensus within the Commission on Executive and Legislative Powers (Powers Commission), its members decided to put forth two or three options for consideration for several articles. In the third draft, the Drafting Committee made a choice between the different options the Powers Commission had presented in favor of a political system that would give considerable power to the parliament and government, while providing for the direct election of the President, whose prerogatives would be strictly limited.

The fourth draft did not change substantially the prerogatives of political power holders, but introduced some precisions to clarify their respective roles. A new provision (Article 70), introduced at the beginning of the chapter on executive powers, clearly states that both the President of the Republic and the government, led by a head of government, "hold the executive power." The changes introduced in the fourth draft, resulting to some extent from positions agreed during the national dialogues, were however not seen as sufficient by many opposition members and others.

The role and rights of the political opposition, not mentioned in the first and the second drafts, is a specific positive outcome of the national consultations held in December 2012 and January 2013.[23] The third draft includes a reference to the role and the rights of the opposition as an integral element of the Assembly of Representatives of the People (Article 57), and in the fourth draft similar language (Article 59) was extended to grant "the opposition the right to create and preside an inquiry commission every year".[24] The Carter Center supports this addition, which will provide for a clearer protection of the views of the political minority and is an essential element of any democracy.[25]

Status of international law

Contrary to international norms, the current draft of the Constitution does not adequately confirm the primacy of international law. The first draft referred to international law in Article 17 (Article 15 in the second draft), which read as follow: "Peace, based on justice, shall be the basis of relations with other countries and peoples. International treaties shall, where no contradiction with the provisions of the present Constitution exists, be respected." This article only took conventional treaty law into account, without any mention to customary international law, which is also binding on Tunisia. In addition, as it was worded, the article would have conditioned the respect of Tunisia's international commitments to internal law, which is in contradiction with the Vienna Convention on the Law of Treaties ratified by Tunisia. This Convention states in Article 27 that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Furthermore, the wording

23 The UNDP report on the national consultation process highlights that the inclusion of the rights of the opposition in the Constitution was insisted upon in the governorates of Monastir, Bizerte et Sidi Bouzid p. 49-50.

24 While Article 59 refers to inquiry commissions, it does not give any further information on their status and prerogatives. These commissions are not mentioned in any other article of the Constitution.

25 The Human Rights Council adopted a resolution that emphasizes the crucial role played by the political opposition and civil society in the proper functioning of a democracy. (A/HRC/RES/19/36). See also *The constitutional rights of the opposition*, DRI Briefing Paper 34, February 2013

of the article did not determine the place of international law in the hierarchy of legal norms.

In this respect, the third draft was an important improvement, as Article 15 was suppressed. It was replaced by an Article 21 (Article 19 in the fourth draft) which specifies the rank of international treaties in Tunisia – they are to be infra-constitutional and supra-legislative.[26] However, this article stops at this statement and does not clearly state that Tunisia commits itself to respect all its international obligations, which comprise also customary law. Furthermore, the treaties referenced in the article are those approved by the Assembly of Representatives of the People, which is the name of the future legislative body. This could have as a consequence that treaties that were approved by the former legislative body would not necessarily have the same legal status. According to the UN Human Rights Committee, which interprets the ICCPR, the rights enshrined in the Covenant belong to the people living in the territory of the State party. The Committee underlines that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party.[27]

The Carter Center recommends that the Constitution should ensure that domestic law clearly reflects and respects Tunisia's international commitments. Article 19 should refer to treaties "duly approved and ratified" instead of specifying that these treaties are those approved by the Assembly of People's Representatives, in order to avoid any differentiation between international treaties ratified by Tunisia in terms of their applicability, as this would be contrary to the Vienna Convention.

Universality of human rights

There has been an ongoing debate throughout the drafting process regarding the universality of human rights, affected by the overall discussion of the place of religion in the Constitution. The evolution of the preamble in this respect is to some extent the positive result of a constant focus by Tunisian civil society organizations and the willingness of the NCA to consider their arguments. In the first draft, the preamble made no mention of the universality of human rights but only referred to "noble human values". In the second draft, the preamble added a reference to "principles of human rights" but did not include their universality. The word "universal" was added in the third draft, but the reference to the universality of human rights was undermined by the simultaneous addition of the limiting phrase "insofar as they are in harmony with the cultural specificities of the Tunisian people." In the fourth draft, the universality of human rights is recognized, but with a wording referring to their supreme nature (the supreme and universal human rights principles). This wording is ambiguous as it may imply that there is a hierarchy of universal human rights, with some more important than others.

While The Carter Center welcomes the positive evolution throughout the different drafts that led to the recognition of human rights in their universal aspect in the preamble, it recalls that the universal human rights are indivisible, interdependent and inter-related. The Constitution should clearly reflect this principle.

Rights and freedoms

International law regarding rights and freedoms is rich in instruments, many of them ratified by Tunisia, starting with the 1966 international Covenants relating respectively to civil and political rights

26 Article 21: "The international agreements approved by the Chamber of Deputies and then ratified shall be superior to laws and inferior to the Constitution."

27 Human Rights Committee, General Comment 26.

and to economic, social and cultural rights as well as the Arab Charter on Human Rights, the African Charter on Human and Peoples' Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child.

The chapter on Rights and Freedoms is one of the chapters that has evolved the most, reflecting lively discussions over the past year, especially regarding freedom of religion, freedom of conscience, freedom of expression, gender equality and the protection of women's rights.[28]

There has been a reorganization of rights and freedoms throughout the different drafts, with several rights being listed in the chapter on general principles. In the fourth, most of these rights have been included in the chapter on the rights and freedoms. Only the freedom of religion remains in the general principles chapter, which could be interpreted to mean that it merits less protection than other rights and freedoms.

As the NCA reviews the final draft of the Constitution, the Center urges its members to uphold Tunisia's international treaty obligations on human rights and political freedoms. Specifically, The Carter Center wishes to draw attention to the following issues in the draft Constitution:

- Freedom of religion and freedom of conscience

Article 18 of the ICCPR states that "Everyone shall have the right to freedom of thought, conscience and religion" and that "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

These freedoms were not included in one single article of the draft Constitution but spread out in different chapters. While the freedom of thought, added in the third draft, is coupled with the freedom of opinion, expression, information and publication in Article 40 (Article 30 in the fourth draft), the freedom of religion, which was included from the beginning, is found in Article 6 in the general principles chapter.

Freedom of conscience – the freedom of an individual to hold or consider a fact, viewpoint, or thought – has been a contentious issue. Some NCA members did not want to include it, as it was perceived as a protection of apostasy. A reference to freedom of conscience was only included in the final draft, after the conclusion of the political negotiations under the national dialogue processes. Freedom of conscience has been integrated into Article 6, which focuses on the State's duty to protect religion and religious rights. Article 6 is now worded as follows "The state is the guarantor of religion. It ensures freedom of belief, of conscience and worship, protects the sacred, and ensures the neutrality of places of worship with respect to partisan use."

The right to freedom of religion or belief, as defined by international standards, is a wide-ranging right covering a large number of distinct yet interrelated issues.[29] The Carter Center encourages the NCA to widen the scope of the right to freedom of religion and conscience to cover all facets of these

28 The Constitution also protects the right to strike; initial limitations on this right have been the subject of protest by trade unions and were removed in the fourth draft (Article 35). In the fourth draft, the principle of continuity of public service was added to Article 14 spelling out the obligations incumbent on the public administration.

29 UN Special Rapporteur on Freedom of Religion or Belief, *Rapporteur's Digest on Freedom of Religion or Belief (excerpts of the Reports from 1986 to 2011), p.4.*
http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf

rights, including the freedom to adopt, change or renounce a religion or belief.[30] Further, the NCA should consider incorporating the language regarding the right of freedom of religion and conscience into the rights and freedoms' chapter to ensure that it is granted the same legal value.

- The principle of non-discrimination

Under international law, Tunisia has an obligation to prohibit discrimination based on sex, religion, or other status.[31]

The only article that deals with the principle of non-discrimination is Article 20 (Articles 6 and 7 of the third draft were merged) states that "all citizens, male and female alike, shall have equal rights and duties, and shall be equal before the law with no discrimination".[32] While this wording establishes equality among citizens, and should be applauded, it might allow for inequality for foreigners, who could be subject to unfair discrimination. In accordance with the ICCPR, equality before the law is a right of the individual and is not limited to citizens.[33] In addition, it seems to imply that the prohibited ground of discrimination is only based on gender.

In addition to the strengthening of protection for the principle of equality, the Center recommends that a separate principle of non-discrimination be included to enshrine this right in constitutional law. In addition, the Constitution should prohibit discrimination on all grounds, including race, color, language, religion, political or other opinion, national or social origin, property, birth, or other status, towards all people and not only citizens.

- Protection of women's rights and equality

Under international law, and Tunisian obligations, women are guaranteed equal treatment. Article 2 of the ICCPR guarantees equal treatment to all individuals,[34] and Article 3 requires that State parties commit "to ensure the equal right of men and women to the enjoyment of all civil and political rights". A similar provision exists in the International Covenant on Economic, Social and Cultural Rights[35] as well as in Article 2 of CEDAW.[36]

The first draft ignited a heated debate on women's rights in Tunisia, as it mentioned the complementary roles of men and women inside the family without any reference to the equality of men and

30 Article 18 of the ICCPR andArticle 18 of the Universal Declaration of Human Rights.

31 Article 2 (1) of the ICCPR states, "Each State Party (…) undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

32 There is also a reference to non-discrimination in the Preamble.

33 Article 2 § 1 ICCPR stipulates that States undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant", Article 26, ICCPR "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

34 "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.".

35 Article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

36 Article 2 (a): "State parties [...] undertake: To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle"

women.[37] Widely criticized, the notion of "complementarity" was abandoned in the second draft. More generally, the rights of women in the first draft were mostly considered in the context of the family.[38] In the third and fourth draft, women are considered independently from the family. Gender equality is, however, not fully consecrated since Article 20 only applies to citizens (male and female alike) and not more generally to men and women.

With regard to women's rights, Article 45 provides that "the State guarantees the protection of women's rights and supports their gains." The same article goes on to say "the State guarantees equal opportunity between men and women to assume responsibilities. The State guarantees the elimination of all forms of violence against women." This provision only partially embodies the principle of equality between men and women. It refers to equal opportunity in "assuming responsibilities" as well as to "the elimination of violence" and not to the broader right to equal opportunities in political, economic, cultural, and social spheres and to the elimination of discrimination against women.

The Center Carter encourages the NCA to spell out the principle of equality of men and women in all its facets. It would also welcome a provision that requests the State to adopt positive measures in all areas so as to achieve the effective and equal empowerment of women.[39] Considering Tunisia's leading role in the advancement and protection of women's rights and its historical precedence within the Arab region with regards to the role of women in society, the NCA should ensure that the new Constitution fully protects these advances.

- Restriction on fundamental rights

While the enshrinement of fundamental rights and freedoms is crucial in a Constitution, it is also important to delineate when appropriate limited restrictions can be applied. International law permits limited restrictions on rights and freedoms, under certain conditions, in an effort to balance the interests of the individual with those of others and with those of the state.[40]

These restrictions are best done through a general limitation clause which applies to all rights protected by the Constitution. Such a clause would facilitate application of the norms by the legislature, the executive and judges, and the public's ability to grasp the limitation concept being used. [41]

The Carter Center welcomes the inclusion in the fourth draft of a general limitation clause, in Article 48, which delineates how rights should be interpreted in their application. The provision states that rights can only be restricted by a law and that restrictions should not touch upon the essence of the rights. Further, provision states that the law shall only be adopted to protect the rights of others for reasons of public security, national defense or public health. Judges shall ensure the protection of these rights from any violation. However to be in conformity with international law obligations, The Carter Center recommends that language be added to the article stating that any restrictions must be necessary and proportional to secure a legitimate aim.[42]

37 The committee responsible for monitoring and interpreting the CEDAW has recognized that complementarity is a lesser standard than full equality.

38 In the first draft the State was entitled to "protect women's rights, preserve the unity of the family and maintain its cohesion."

39 Human Rights Committee, General Comment No. 28, para. 3

40 Article 29 II and 30 of the Universal Declaration of Human Rights (UDHR) and Article 5 ICCPR

41 *Lawful Restrictions on Civil and Political Rights*, DRI, Briefing Paper 31, October 2012

42 See the proposed language for such a clause by HRW. Restrictions are only permitted when (1)They are defined

In addition, to ensure that rights are treated equally when it comes to their restriction, language limiting rights in specific articles should be removed. In the fourth draft, restrictions to freedom of expression, assembly, association and the right of access to information, remain vague and still vary in scope, which may lead to the erosion of these rights.

The Carter Center also strongly encourages the NCA to specify that during state of emergency situations,[43] limitations will only be those that are necessary for a specific period of time to meet the exigencies of the situation, and that rights that are considered non-derogable in international law should never be limited under emergency powers. [44]

- Election Rights

The essential elements of democratic elections are delineated by Article 25 of the ICCPR, which provides for the right "To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors…"

The right to vote did not appear in the first draft, an unfortunate omission that was addressed in the second draft. Regarding the characteristics of genuine elections identified in the ICCPR, the Constitution requires that the legislative, presidential, and local elections have to be universal, free, direct and secret.[45] The words "genuine and transparent" were added to these attributes in the fourth draft, a very positive step that reinforces the democratic nature of elections.

However, the principle of equality is a significant omission in all the articles related to voting rights. Equality is a fundamental element of the right to vote and is directly mentioned in the Universal Declaration of Human Rights as well as the ICCPR. The equality of the vote refers to the principle of "one person, one vote" and ensures that no citizen's right to vote can be greater or less than that of another citizen. It is also the basis of measures to combat election fraud, since such fraud is fundamentally a violation of equality. Equality of the vote also means that every citizen's vote should have the same value. For example, the number of citizens or voters per elected representative should be generally equal when representatives are elected from different constituencies. To guarantee the equality of the vote, The Carter Center recommends that specific references to this principle be added to each article related to voting rights.

Article 73 sets out the conditions for election to the office of President of the Republic, including a maximum age of 75. U.N. Comment 25, which is the interpretive document for Article 25 of the ICCPR, notes that the right to be elected is protected against any form of discrimination.[46] It further states that any restrictions on the right to be elected and on the right of people to freely choose their

in a clear law; (2) They are permissible for a reason set out in a human rights treaty as a permissible reason to limit that specific right; (3) They are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; (4) They are not directly or indirectly discriminatory; and (5) The scope of a limitation referred to in the Constitution is proportionate to the interest to be protected, and shall not be interpreted to jeopardize the essence of the right concerned or be interpreted in a restrictive way. In *Tunisia: Revise the Draft Constitution*, May 2013 http://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution

43 Article 79 allows the President to impose a "état d'exception" in the event of an imminent danger threatening the entity, security, and independence of the country.

44 Article 4 ICCPR and Human Rights Committee, General Comment 29.

45 Articles 54 (legislative elections), 74 (presidential elections), and 130 (local elections).

46 U.N. General Comment 25, para 3.

representative "must be justifiable on objective and reasonable criteria."[47] U.N. Comment 25 identifies minimum age as a potentially reasonable restriction for holding office, as is lack of mental capacity.

Under these conditions, candidacy requirements should be restricted as little as possible to meet these narrow objectives. While the provisions for maximum age may endeavor to address mental and physical capacity to hold public office, age does not consistently reflect these qualities and may therefore discriminate against otherwise fit candidates. The Carter Center encourages the NCA to reconsider age restrictions for the office of the presidency and allow voters to determine a given candidate's capacity to govern. The Center notes that only the office of the presidency is subject to age restrictions, while similar requirements are not delineated in the draft Constitution for the office of the prime minister.

Finally, the characteristics of democratic elections are not specified for referenda. The Carter Center recommends that a reference to the fundamental characteristics of genuine elections be added to the provisions on referenda.

Transitional provisions

A new chapter was added to the fourth draft Constitution dealing with transitional provisions. This tenth chapter was absent from all previous drafts, and its addition by the Drafting Committee is welcome in principle. Nevertheless, the process followed to draft this chapter differed from the other chapters, as no discussions were held in the constitutional commissions on its content. Instead the Drafting Committee adopted the transitional procedures at the very last stage of the process, leaving little time for members to discuss and reflect on their implications.

The transitional provisions, grouped into two articles (145 and 146), regulate the entry into force of the Constitution once adopted, since a number of articles will not come into force until after elections or until after the NCA or the new legislative Assembly has created the institutions foreseen in the Constitution.

There are two apparent gaps in the transitional provisions. The first concerns the ability for individuals to address the judiciary to ensure respect of their constitutional rights and freedoms.

Article 146 states that the Constitutional Court's power to find laws unconstitutional does not enter into effect until three years after the formation of the Court.

The Court's role as guardian of these rights is to consider the constitutionality of laws, which is the exclusive competence of the Constitutional Court, both by "a priori" and "a posteriori" control. The first is prior to the entry into force of the law, and is open to public authorities only, while "a posteriori" control is by consequence of a judicial trial, where an individual argues that a statutory provision is unconstitutional. The court in question must then refer the matter to the Constitutional Court for decision.

Until the establishment of the Constitutional Court, the Administrative Court will be assigned the authority of "a priori" control. However, under the current draft, Article 146 states that no court has the authority to consider the constitutionality of a law "a posteriori" prior to the establishment of the Constitutional Court and during the first three years of activity of the Constitutional Court. This means that there is no judicial means of challenging the constitutionality of legislation enacted by the

47 Ibid., para 15.

NCA prior to the entry into force of the Constitution, or that of legislation adopted by the Chamber of Deputies prior to the revolution, until three years after the formation of the Constitutional Court.

The second gap is the absence of clearly defined deadlines for the entry into force of the various provisions of the Constitution. For instance, no clear deadlines have been established to create the High Judicial Council, to establish the Constitutional Court, and for the end of the mandate of the NCA, potentially leaving the door open to indefinite delays regarding the full entry into force of the Constitution.

The Carter Center encourages the NCA to give the Court the full power to consider the constitutionality of laws from the moment of its creation in order to ensure full protection of rights and freedoms acknowledged in the Constitution. The Carter Center also calls upon the NCA to set deadlines for the entry into force of the various provisions of the Constitution.

Conclusion and recommendations

The Carter Center has conducted meetings with relevant stakeholders, including NCA members and administrative staff, civil society organizations, political parties' representatives, and Tunisian academics, to understand the work of the NCA and assess the strengths and weaknesses of the Constitution drafting process thus far. The Center appreciates the commitment demonstrated by all interlocutors in sharing information and discussing potential areas for improvement. In the hope of further consolidating the gains of the revolution towards the establishment of a democratic system of governance, that protects the fundamental civil and political rights of Tunisian citizens, The Carter Center encourages the NCA to:

Outreach and communication

- Launch a comprehensive information campaign using all forms of media during the article-by-article vote on the draft Constitution. Citizens should be made aware of the final content of the draft and its importance in establishing the fundamental legal principles of Tunisian society, including those intended to protect civil and political freedoms, provide checks and balances between state institutions, and determine the form and role of those institutions.

- Hold regular press conferences to answer journalists' questions about the process. The essential dissemination of information discussed above can only occur if citizens, through the media, have regular updates on the debates, including which articles are passed and rejected and why.

- Assist media representatives in providing substantive and balanced professional coverage of this important phase and to help bridge the information gap between elected officials and their constituents.

Accountability and attendance

- Encourage political parties to ensure the presence and active participation of their respective NCA members during the article-by-article vote of the Constitution and strongly encourages members to fulfill the duties for which they were elected. NCA members who are not in a position to attend debates and voting sessions, because of illness or additional responsibilities within another state institution, should consider resigning from their NCA mandate in favor

of the next candidate from the list on which they were elected.

- Implement the provisions of the RoP providing for financial penalties in case of members' repeated unjustified absences. Enforcement of these provisions will increase NCA members' accountability to their constituents.

- Conduct a test, before the start of the article-by-article debate, to identify and resolve any technical problems with the electronic voting system in order to ensure that all NCA members will be able to vote.

Substantive elements of the Constitution

In order to conform fully with international law, the Constitution should:

Religion

- Open the requirements for the presidency to all qualified Tunisians, regardless of religious affiliation, and not to discriminate on the basis of religion.

International law

- Guarantee that domestic law reflects and respects Tunisia's international commitments. Article 19 should refer to treaties "duly approved and ratified" so as to encompass all international treaties ratified by Tunisia.

Freedom of religion and conscience

- Ensure that the scope of the right to freedom of religion and conscience covers all facets of these rights, including the freedom to adopt, change, or renounce a religion or belief.

The principle of non-discrimination (Article 20)

- Enshrine the principle of non-discrimination in one specific provision.

- Prohibit discrimination on the grounds of race, color, language, religion, political or other opinion, national or social origin, property, birth, and other status, and apply these rights to all people in Tunisia, citizens and foreigners alike.

Women's rights

- Articulate the principle of equality between men and women in all its facets. The Center would also welcome a constitutional provision that encourages the State to adopt positive measures to achieve the effective and equal empowerment of women.

Restriction of fundamental rights

- Reflect Tunisia's international legal obligations, which stipulate that any restrictions to rights and freedoms should also be limited to those necessary and proportional to secure a legitimate aim. This would require adding language to the Article 48 (general limitation clause) to bring the clause into conformity with international law.

- Provide for full protection for fundamental rights, including those pertaining to freedom of expression, assembly, association and the right of access to information. The current limitations in these articles remain vague and vary in scope, which could cause an erosion of individual rights in the future.
- Specify allowable limitations on rights during a state of emergency situation, and to restrict potential limitations by time and scope to meet the exigencies of the situation. Further, the Constitution should protect rights that are considered non-derogable in international law, and ban their restrictions under emergency powers.

Election rights

- Include a reference to the equality of the vote in each article related to voting rights.
- Reconsider maximum age restrictions for the office of the presidency.
- Include references to the fundamental characteristics of genuine elections in the provisions on referenda.

Transitional provisions

- Give the Constitutional Court the full power to consider the constitutionality of laws from the moment of its creation.
- Set clear deadlines for the entry into force of the various provisions of the Constitution.

Approval of the Constitution

- The NCA should consider amending the "little Constitution" to provide for the case in which an eventual referendum on adoption of the Constitution is unsuccessful.

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Tunisia: Strengthen New Constitution's Rights Protection

Tunis, July 24th, 2013

(Tunis, July 24, 2013) – It is critically important to bring Tunisia's new Constitution in line with international human rights standards and Tunisia's obligations under international law, four human rights organizations said today.

Al Bawsala, Amnesty International, Human Rights Watch and The Carter Center have independently followed the Constitution-drafting process from its outset and have built a consensus around key issues of concern.

A Consensus Commission is currently in place at the National Constituent Assembly (NCA), and is charged with building consensus around the main contested issues in the final draft of the Constitution, which was presented to the public on June 1, 2013. The commission's work may prove critical as the Assembly prepares to vote on the Constitution article by article, then in its entirety. With the aim of supporting a successful transition to democracy in Tunisia, in which human rights are respected, the groups urge the Consensus Commission and the NCA more broadly to consider the following recommendations:

- Include a general clause directly incorporating into Tunisian law human rights as defined by customary international law and international treaties ratified by Tunisia, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights. Amend the phrasing of "the supreme/noble and universal human rights principles," as it may be interpreted to imply that there is a hierarchy of universal human rights, with some more important than others.

- Guarantee that domestic law reflects and respects Tunisia's international commitments on human rights. The Constitution should state that all treaties "duly approved and ratified" by Tunisia without exception have a status superior to national law. The Assembly should also include a clause stating that the rights and freedoms set out in the Constitution bind the legislature, the executive, the judiciary, and all organs of the state.

- Include a clause stating that judges should always interpret the law, including the Constitution,

in a way that most favors the enforcement of a right or fundamental freedom, and specifically say that they should take into account the interpretation of human rights treaties from any official treaty body, including courts and commissions, as a minimum standard.

- Strengthen the guarantees for economic, social and cultural rights, by specifying that Tunisia has an obligation to progressively achieve the full realization of these rights to the maximum of the country's available resources, including by providing for specific mechanisms to implement these rights gradually.

- Enshrine the principles of equality and non-discrimination before the law and extend it to anyone subject to the jurisdiction of the Tunisian authorities, citizens and foreigners alike. The Constitution should specify that discrimination, direct and indirect, is prohibited on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and that discriminatory laws or state policies are unconstitutional.

- Articulate the principle of equality between men and women in all its facets. The Constitution should specify that men and women are equal and entitled to full equality in law and practice, as well as to equal opportunities in all areas of life – whether civil, cultural, economic, political or social, as defined in international human rights standards. The Assembly should consider adding a provision to direct the state to adopt positive measures in all areas to achieve the effective and equal empowerment of women.

- Ensure that the scope of the right to freedom of religion and conscience covers all facets of these rights, including the freedom to adopt, change, or renounce a religion or belief, as well as the freedom to not practice a religion at all and the freedom to practice in public and private.

- Provide for the full protection of fundamental rights, including those pertaining to freedom of expression, assembly, health, education, food, water, association, movement and the right of access to information.

- Delete the restrictions outlined in the articles pertaining to freedom of expression, assembly, association, movement and the right of access to information, as they could allow for arbitrary restriction of fundamental rights in national laws, and an erosion of individual rights in future. Instead, the Constitution should stipulate that any restrictions to rights and freedoms should be limited to those reasonable, necessary and proportional to secure a legitimate aim. This would include adding language to article 48 (the general limitation clause) clearly stating that the rights and freedoms affirmed by the Constitution may only be restricted when such restrictions are permitted under international human rights law.

- Clearly specify that any restrictions to rights and freedoms in a state of emergency must be specified by law, demonstrably necessary for the purpose of protecting a legitimate aim, in a manner that is proportionate to protect that aim, for a specific period of time to meet the exigencies of the situation, and subject to judicial review. Furthermore, specify that rights considered non-derogable, or absolute, in international law remain protected, and ban their restriction under emergency powers.

- State clearly a prohibition on cruel, inhuman and degrading treatment or punishment and uphold the principle of *nonrefoulement, i.e.* the forced return to a serious risk of persecution.

- Incorporate international standards on independence of the judiciary, including the unambiguous affirmation of security of tenure, in regards to appointment, promotion and discipline with removal of judges possible only for serious misconduct, following fair trial guarantees and when decided upon by a high judicial council.

- Grant the Constitutional Court, immediately upon its creation, the full power to consider the constitutionality of existing laws and proposed laws, and to strike down laws and articles of laws that violate the rights provisions of the Constitution. Extend the right to verify the constitutionality of new laws, which in the current draft belongs only to the President of the Republic, to members of the People's Assembly according to a formula to be determined by the Constitution. And

- Set clear deadlines for the entry into force of the various provisions of the Constitution.

For more detail on the above recommendations, please see:

- Amnesty International publication, June 5, 2013, "Last opportunity for Tunisian lawmakers to enshrine human rights for all in Tunisia's new Constitution" http://www.amnesty.org/en/library/asset/MDE30/005/2013/en/10fae36f-a04f-4237-9767-b0ca42225178/mde300052013en.pdf

- The Carter Center publication, June 12, 2013, "The Carter Center Congratulates Tunisia's National Constituent Assembly on Final Draft of Constitution and Urges Safeguards for Human Rights" http://cartercenter.org/news/pr/tunisia-061213.html

- Human Rights Watch publication, May 13, 2013, "Tunisia: Revise the Draft Constitution" http://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution

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Carter Center Statement on the Assassination of NCA Deputy Mohamed Brahmi

The Carter Center strongly condemns the assassination of Mohamed Brahmi, a National Constituent Assembly deputy and leader of the Popular Currant (*Courant Populaire, El Tayyar El Chaabi*). His assassination comes on the anniversary of the declaration of the Republic of Tunisia and just six months after the targeted killing of opposition leader, Chokri Belaïd.

The past year has seen acts of violence perpetrated against political party members, activists, journalists, and other citizens. The Center condemns all such acts in the strongest terms, and appeals to Tunisians and to all social and political actors in the country to exercise restraint, reject violence, and redouble efforts at dialogue during this critical leg of the country's transition. The Center further renews its call for authorities to take on all necessary measures against political violence and to strongly condemn hate speech. The Center urges the authorities to investigate the assassination of Brahmi, Chokri Belaïd, and other apparently politically motivated crimes, in order to prevent a culture of impunity from taking root in Tunisia.

The Center also urges authorities to institute stronger protections for freedom of speech, political beliefs, and religious beliefs, including through the new Constitution, which Brahmi dedicated much of his service to achieving at the National Constituent Assembly.
The Carter Center expresses sincere condolences to Brahmi's family, friends, colleagues, and all Tunisians.

For Immediate Release

Tunisia: Strengthen New Constitution's Human Rights Protection
Guarantee Equality for All; Affirm International Law Obligations

(Tunis, January 3, 2014) – Tunisia should bring its nearly completed draft constitution in line with international human rights standards and the country's obligations under international law, four human rights organizations said today. The National Constituent Assembly (NCA) will begin voting on the constitution article by article on January 3, 2014.

Among the most urgently needed amendments are a clear affirmation that human rights conventions already ratified by Tunisia are binding and have supremacy over domestic law and inclusion of an anti-discrimination provision that articulates the principle of equality between men and women in all its facets.

The article-by-article vote and first complete reading of the draft constitution are the final stage of the constitution-making process, leading to the adoption of a constitution that will shape the future of Tunisia for the next generations. The rules the assembly set for passage require a separate vote on each article, with a simple majority required for passage. The assembly must then approve the entire draft in a separate vote. If the draft fails to pass by a two-thirds majority, it will be submitted again for voting with the same two-thirds majority required. If the second attempt fails, it goes next to a national referendum.

Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center have followed the process since it began with the creation of the NCA to draft the constitution on November 23, 2011. The groups issued a joint statement on July 24, 2013, with key recommendations for strengthening human rights and freedoms in the constitution.

Following the release of the final draft of the constitution on June 1, the assembly created a "Consensus Commission" tasked with reaching broad agreement on the most contentious issues in the draft. The commission worked intermittently, and at times intensively, to resolve differences, against a backdrop of political crisis triggered by the assassination of Mohamed Brahmi, a member of the assembly, on July 25.

The commission produced a new draft incorporating elements of compromise and also adopted

some of the recommendations by rights groups. On January 2, 2014, the plenary session of the NCA amended the internal rules of procedure, making the recommendations of the Consensus Commission binding on the various blocs within the NCA.

Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center commended efforts by the Consensus Commission to reach agreements before the start of the voting process in order to avoid blockages during the plenary discussions, and to ensure that the process is as inclusive as possible. Several of the commission's recommendations could help to strengthen constitutional protections for rights and freedoms, the groups said. Yet some do not go far enough, and several key issues remain unaddressed.

The organizations urged the assembly to address remaining gaps in the new draft and to consider the following recommendations for language not proposed for revision by the Consensus Commission:

- Reconsider the death penalty in the new constitution. Article 21 of the draft constitution provides that "the right to life is sacred, and it cannot be infringed upon except in grave cases provided for by the law". The wording of this article is vague in that it does not specify which cases can legitimize infringements of the right to life and under what conditions. The four organizations believe that the death penalty constitutes a violation of the right to life and the right to be free from cruel, inhuman or degrading treatment or punishment.

- Amend the phrase "the supreme/noble and universal human rights principles" in the preamble by deleting "noble/supreme," as it may be interpreted to imply that there is a hierarchy of universal human rights. The terminology "supreme/noble" was included in the fourth draft to replace a controversial reference to the "cultural specificities of the Tunisian people." While the new formulation in the preamble which references universal human rights is an improvement, the apposition of "noble/supreme" might reintroduce relativity and erode the very meaning of universal human rights, which are by nature indivisible, interdependent and inter-related

- Amend article 19 to ensure that all treaties duly ratified by Tunisia have a status superior to national law; the current article grants supremacy only to treaties ratified by the Assembly of the People's Representatives, which is the name of the future legislative body. This could mean that treaties approved by former legislative bodies would not have the same superior legal status. Article 19 should refer to any treaties "duly approved and ratified" instead of specifying only those approved by the Assembly of the People's Representatives, to avoid such differentiation.

- Further strengthen article 48 by providing that judges should interpret the law, including the constitution, to give priority to enforcement of a right or fundamental freedom, and to take into account the interpretation of human rights treaties from any official treaty body, including courts and commissions, as a minimum standard.

- Strengthen guarantees for economic, social and cultural rights by specifying that Tunisia has an obligation to achieve progressively the full realization of these rights to the maximum of the country's available resources, including by providing for specific mechanisms to achieve these rights.

- Enshrine the principles of equality and non-discrimination before the law and extend it

to anyone subject to the jurisdiction of Tunisian authorities, including both citizens and foreigners. Article 20 should specify that discrimination, direct and indirect, is prohibited on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and that discriminatory laws or state policies are unconstitutional. The current draft limits the protection of rights to citizens and does not specify the prohibited grounds of discrimination.

- Articulate the principle of equality between men and women in all its facets. The constitution should specify that men and women are equal and entitled to full equality in law and practice, as well as to equal opportunities in all areas of life – whether civil, cultural, economic, political, or social, as defined in international human rights standards. Article 45 should specify equality in opportunity *and rights* between men and women. It should amend the phrase: "the state takes all necessary measures to eliminate violence against women" to include "all forms of discrimination and violence." Also add a provision to direct the state to adopt positive measures in all areas to achieve the effective and equal empowerment of women.

- Clearly specify in article 79 that any restrictions to rights and freedoms during a state of emergency must be specified by law, demonstrably necessary for the purpose of protecting a legitimate aim, in a manner that is proportionate to protect that aim, for a specific period of time to meet the exigencies of the situation, and subject to judicial review. Furthermore, specify that rights considered non-derogable, or absolute, in international law, such as the prohibition of torture, slavery and the right to freedom of thought and conscience remain protected, and cannot be restricted under emergency powers.

- State clearly a prohibition on cruel, inhuman and degrading treatment or punishment and uphold the principle of *nonrefoulement,* which forbids the forced return to a serious risk of persecution.

- Incorporate in article 104 international standards on independence of the judiciary, including the unambiguous guarantee of security of tenure and independence from the executive with respect to appointment, assignment, promotion and discipline. In particular, removal of judges should be possible only for serious misconduct by a reasoned decision of an independent supervising institution, the High Judicial Council which guarantees the right to due process. In addition, the chapter on the judiciary should include strong guarantees of the independence of the prosecution from the executive branch.

The groups also urged the NCA to adopt the language proposed by the Consensus Commission in the following areas:

- Adopt the draft language recommended by the Consensus Commission to remove excessive restrictions on rights and freedoms in the majority of provisions, including the freedom of movement, expression and information, and assembly.

- Adopt the Consensus Commission's draft language strengthening the wording of article 48 (general limitation clause for rights and freedoms). The commission's proposed language better reflects Tunisia's international legal obligations by stipulating that any restrictions on rights and

freedoms should be limited to those "necessary and proportional to secure a legitimate aim."

- Adopt the commission's draft language regarding the transitional provisions, granting the Constitutional Court - which shall be created within a year of the results of the legislative elections – immediately upon its creation the full power to consider the constitutionality of existing laws and proposed laws, and to strike down laws and articles of laws that violate the rights provisions of the constitution (chapter 10) and granting the right to refer new laws to the Constitutional Court not only to the President of the Republic, as previously envisaged, but also to the prime minister as well as to 30 members of the Assembly of People's Representatives (article 117).

For more details on the above recommendations, please see:

- Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center publication, July 24, 2013, "Tunisia: Strengthen New Constitution's Rights Protections"
http://www.cartercenter.org/news/pr/tunisia_072413.html
http://www.hrw.org/news/2013/07/24/tunisia-strengthen-new-constitution-s-rights-protection-0

- The Carter Center publication, June 12, 2013, "The Carter Center Congratulates Tunisia's National Constituent Assembly on Final Draft of Constitution and Urges Safeguards for Human Rights"
http://cartercenter.org/news/pr/tunisia-061213.html

- Amnesty International publication, June 5, 2013, "Last opportunity for Tunisian lawmakers to enshrine human rights for all in Tunisia's new Constitution"
http://www.amnesty.org/en/library/asset/MDE30/005/2013/en/10fae36f-a04f-4237-9767-b0ca42225178/mde300052013en.pdf

- Human Rights Watch publication, May 13, 2013, "Tunisia: Revise the Draft Constitution"
http://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution

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For Immediate Release

Tunisia: Improve Guarantees for Judicial Independence

Ensure Judiciary Has Powers to Protect Human Rights

(Tunis, January 14, 2014) – As Tunisia's National Constituent Assembly (NCA) is discussing the chapter on the judicial powers in a new constitution, Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center urge members to strengthen guarantees for judicial independence.

The judiciary under former President Zine el Abidine Ben Ali was subservient to the executive branch and lacked independence. It is essential that Tunisia's new constitution fully guarantee the independence of the judiciary and the impartiality of justice, the groups said.

"Tunisians deserve a constitution that has crystal clear guarantees for an independent judiciary," said Marion Volkmann, director at The Carter Center Office in Tunis. "Tunisia's new constitution should signal a real departure from a past marred by political interference by the executive and ensure the judiciary has the necessary power and independence to protect human rights."

Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center have followed the constitution-making process since it began in February 2012. Their January 3, 2014 joint statement made recommendations for strengthening human rights and freedoms in the constitution.

The draft chapter on judicial power contains several important articles that incorporate general principles on the independence of the judiciary. For example, article 100 stipulates that: "the judiciary is an independent authority that ensures the prevalence of justice, the supremacy of the constitution, the sovereignty of the law, and the protection of rights and

freedoms." The independence of judges is confirmed in so far as they are accountable, in the performance of their duties, solely to the constitution and the law. Article 106 prohibits any outside interference in the judiciary.

The four organizations welcome these provisions, which accord with international standards. The UN Basic Principles on the Independence of the Judiciary, for example, require that principles relevant to the independence of the judiciary should be set out in the country's constitution.

However, the draft chapter contains weak guarantees for the tenure of judges, contrary to international standards, for example the UN Basic Principles on the Independence of the Judiciary and the Principles and Guidelines on the Right to Fair Trial in Africa. While prohibiting removal of judges or their transfer without their consent, the draft envisages exceptions "in accordance with guarantees provided for by the law," a formulation that could be misused by the executive and legislative powers and risks undermining the essence of this protection.

Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center therefore recommend that the NCA state clearly in article 104 that any disciplinary measure against a judge should be possible only for serious misconduct, as determined by the High Judicial Council and by respecting guarantees of due process.

The draft constitution provides for the creation of a High Judicial Council with a mandate of "ensuring the prevalence of justice and respect for the independence of the judiciary, proposing reforms and making recommendations with respect to draft laws related to the judiciary, and deciding on the professional conduct of and disciplinary measures for judges" in article 111. The draft proposes that half of the members of this council will be judges, the remainder non-judges.

The Consensus Commission, tasked with reaching broad agreement on the most contentious constitutional issues, proposed an amendment that would raise the number of judges on this council to two-thirds, "the majority of them elected by their peers and the rest appointed," with the remaining third comprising individuals of demonstrable independence and expertise.

However, this formulation falls short of ensuring full independence of the judiciary on two levels. First, the judges elected by their peers could be a minority on the council, which could leave it under the control of members appointed either by the executive or by parliament. Several international instruments recommend that such bodies have a substantial proportion or even a majority of members elected by the judiciary. For example, the 1998 European Charter on the Statute for Judges "envisages the intervention of an authority independent of the executive and legislative powers within which at least one-half of those who sit are judges elected by their peers following methods guaranteeing the

widest representation of the judiciary."

Second, the proposed amendment does not indicate how the non-judge members should be selected, whether directly by the government, an election by parliament, or any other procedure. This leaves excessive discretion to government authorities regarding the procedures for their selection and does not offer sufficient constitutional guarantees for their independence from the two other branches of the state.

Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center recommend that the NCA state in article 109 that at least half of the High Judicial Council be composed of judges elected by their peers. They further recommend that the constitution should specify appointment procedures to ensure that the selected non-judges enjoy broad confidence and legitimacy and that any appointment by parliament should require no less than a two-thirds majority.

The constitution has also extended the guarantees of independence to the public prosecution, which "shall form part of the judiciary and shall enjoy the same safeguards." Article 112 requires public prosecutors to "discharge their duties in accordance with state prosecution policy in compliance with procedures laid down in law." The four organizations recommend that the NCA retain that formulation and reject an amendment changing it to "governmental prosecution policy," and specify that this policy should be consistent with rights and freedoms protected in the constitution and international human rights standards.

For more background, please see below.

For more details on other provisions of the constitution, please see:

- Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center, January 3, 2014, "Tunisia: Strengthen New Constitution's Human Rights Protection, Guarantee Equality for All, Affirm International Law Obligations" http://www.cartercenter.org/news/pr/tunisia-010314.html
- The Carter Center, June 12, 2013, "The Carter Center Congratulates Tunisia's National Constituent Assembly on Final Draft of Constitution and Urges Safeguards for Human Rights" http://cartercenter.org/news/pr/tunisia-061213.html
- Amnesty International, June 5, 2013, "Last opportunity for Tunisian lawmakers to enshrine human rights for all in Tunisia's new Constitution" http://www.amnesty.org/en/library/asset/MDE30/005/2013/en/10fae36f-a04f-4237-9767-b0ca42225178/mde300052013en.pdf
- Human Rights Watch, May 13, 2013, "Tunisia: Revise the Draft Constitution" http://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution

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Background
The NCA began voting on the constitution in plenary session on January 3, 2013. To date, it has completed voting on the preamble, general principles, rights, and freedoms, and the legislative and executive powers chapters. The article-by-article vote and first complete reading of the draft constitution will be the final stage of the constitution-making process. The rules the assembly set for passage require a separate vote on each article, with a simple majority required for passage. The assembly must then approve the entire draft in a separate vote. If the draft fails to pass by a two-thirds majority, the draft will be submitted again for voting with the same two-thirds majority required. If the second attempt fails, the draft goes next to a national referendum.

NEWS
THE CARTER CENTER
ONE COPENHILL ATLANTA, GA 30307

Jan. 29, 2014
FOR IMMEDIATE RELEASE

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The Carter Center Commends Tunisian Assembly on Historic Achievement

The Carter Center congratulates Tunisian National Constituent Assembly members and the Tunisian people on the promulgation of its new constitution.

The adoption of a new constitution marks a historic milestone in Tunisia's transition towards democracy. The Center commends the Tunisian people who, despite many challenges, worked together to elaborate a constitution that reflects the diversity of the Tunisian people and strongly protects their democratic rights.

The Tunisian experience not only lays the foundations for a democratic state there, but also serves as a reference point for other countries in transition.

"By adopting a new constitution through a peaceful and consensual process, Tunisia has sent a message of hope to other countries in the region that are struggling to achieve freedom and democracy," former U.S. President Jimmy Carter said.

The approval of the new constitution is only one step on the road toward democracy. The Carter Center encourages all Tunisian stakeholders to support the newly approved transition government during the remaining transitional period, create the legal institutions provided for in the constitution, and hold genuine elections in the coming months, while also maintaining the spirit of consensus that has been critical to the success of the constitutional process.

Following its observation of the October 2011 National Constituent Assembly elections, The Carter

Center is monitoring the constitution-making process and developments related to the establishment of institutional and legal frameworks for subsequent elections. The Center assesses these processes against Tunisia's national laws and international treaty obligations.

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NEWS
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FOR IMMEDIATE RELEASE
April 10, 2014

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The Carter Center Welcomes Human Rights Protections in Tunisia's New Constitution; Calls for Immediate Steps to Implement

The Carter Center released today a statement tracing the evolution of key issues in the text of Tunisia's constitution and highlighting elements, including measures to protect citizens from discrimination, provide security of tenure for judges, and safeguard fundamental freedoms during a state of emergency, which should be strengthened. Tunisian authorities should take legislative action to address these concerns.

"Tunisia's new constitution lays a solid foundation for rule of law and the protection of human rights," said former U.S. President Jimmy Carter. "What is critical now is to conduct a thorough revision of the legal framework to bring it into alignment with the constitution and ensure the full realization of the rights enshrined in the text. In addition, a provisional commission should be established in time to review the constitutionality of draft laws, especially the electoral legislation currently under discussion."

The Carter Center has monitored Tunisia's constitution-making process since February 2012, when the National Constituent Assembly's six constitutional commissions first began their work. Throughout the process, the Center assessed the various drafts against the country's international obligations regarding political and civil rights. This statement focuses on the content of the adopted constitution

as well as on the adoption phase. Key recommendations from the statement are below, and the full statement is available at www.cartercenter.org and at www.facebook.com/TCCTunisia.

In the spirit of goodwill and support for Tunisia's continued democratic transition, The Carter Center offers the following recommendations:

RIGHTS

- Review and reform Tunisia's existing legal framework to ensure that domestic law and regulations reflect and respect the country's international commitments on human rights and the rights enshrined in the new constitution.
- Incorporate into organic laws guarantees of the principle of the equality of the vote and prohibitions of discrimination on the grounds of race, color, language, religion, political or other opinion, national or social origin, property, birth, and other status. Ensure that these rights apply to all people in Tunisia, citizens and foreigners alike, in accordance with international law.
- Encourage the State to fight not only violence against women but all kinds of discrimination against women. Adopt concrete measures to protect women's rights, such as mechanisms to advance gender parity in nomination lists.
- Specify in relevant legislation Tunisia's obligation to adopt specific mechanisms to guarantee the progressive realization of economic, social, and cultural rights to the maximum of the country's available resources.

ENFORCEMENT

- Judges should interpret the law, including the constitution, to favor the enforcement of a right or fundamental freedom, and to take into account the interpretation of human rights treaties, including from courts and commissions, as a minimum standard.
- Encourage judges and legislators to protect freedom of religion or belief, including the freedom to adopt, change, or renounce a religion or belief, and to ensure that any limitations are consistent with the general limitation clause in the constitution.
- In the event that a state of emergency is declared, ensure that any restrictions to rights and freedoms are specific, necessary, proportionate, and subject to judicial review, and that they will expire after a defined period of time. Furthermore, specify that rights considered absolute in international law remain protected and ban their restriction under emergency powers.

INSTITUTIONS

- Incorporate provisions into the legal framework to ensure the independence of the judiciary in regard to appointment, promotion, and discipline, including the security of tenure. The removal of judges should be restricted to cases of serious misconduct, following a fair trial, and, in accordance with the constitution, by reasoned decision of the High Judicial Council, after its establishment.
- Establish a provisional commission promptly to review the constitutionality of draft laws so as to include the draft electoral legislation currently under debate. The commission should

have the authority and resources necessary to carry out its duties independently and effectively.

- Consider giving the provisional commission the right to review the Rules of Procedure of the future Assembly of the People's Representatives.
- As was done in the constitution adoption process, facilitate civil society and media access to commission and plenary discussions of the elections law, as well as all future laws debated by the National Constituent Assembly.
- Intensify outreach campaigns to educate the public about the constitution.

Background: Following its observation of National Constituent Assembly elections in October 2011, The Carter Center maintained a presence in Tunisia to monitor and assess the constitution-making process and preparations for the next electoral cycle. The Center has met regularly with a broad range of political and civic stakeholders, attending assembly sessions and following public debates and civil society workshops related to the process.

The Center assessed the evolution of the constitutional drafts against Tunisia's international obligations to uphold fundamental political and civic freedoms, and commented on the inclusiveness of the process and the extent to which it upholds principles of transparency, and participation of citizens in the public affairs of their country.

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####

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THE
CARTER CENTER

The Carter Center Welcomes Strengthened Rights Guarantees in Tunisia's New Constitution; Urges Immediate steps for its implementation

April 10, 2014

Three years following the fall of the Ben Ali regime and more than two years following the election of the National Constituent Assembly (NCA), Tunisians made a decisive step in their quest to break away from the country's authoritarian past, officially adopting a new constitution on Jan. 27, 2014. Though the road to the constitution proved rife with challenges, a spirit of openness to compromise and consensus-building prevailed, ensuring that Tunisia could reach this historic milestone.

Over the course of the two-year process, the text evolved significantly, in many instances towards greater clarity and a higher degree of protection for fundamental freedoms and human rights. The adoption of the constitution is a key step in the country's transition, but on its own is not sufficient to guarantee a successful transition from authoritarianism to democracy.

The Carter Center has monitored the constitution-making process in Tunisia since February 2012, when the NCA began working on the constitution. The Center met regularly with a broad range of political and civic stakeholders, attended NCA sessions, and followed public debates and civil society workshops related to the process. Throughout, the Center assessed the evolution of the various drafts against Tunisia's international obligations to uphold fundamental political and civic freedoms, and commented on their content as well as the process that produced them, including its inclusiveness and the extent to which it upheld principles of transparency and participation of citizens in the public affairs of their country.[1]

In this statement, The Carter Center offers an overview of the constitution-making and adoption processes and an analysis of several key content-related issues in the adopted constitution. The statement notes that Tunisia's new constitution offers many protections for rights and freedoms, and lays the foundation for an independent judiciary. The Center notes, however, that some articles are broadly worded and risk being interpreted in ways that contradict other provisions of the constitution. The implementation phase, specifically the process to bring Tunisia's laws and regulations into

1 Article 25 of the International Covenant on Civil and Political Rights (ICCPR) (ratified by Tunisia on March 18, 1969) states that "every citizen shall have the right and the opportunity (…) to take part in the conduct of public affairs, directly or through freely chosen representatives…."

alignment with the human rights commitments laid down in the constitution, will be important in securing a strong foundation for the respect of these commitments. This process should be carried out in a way that provides the highest degree of protection of human rights for Tunisians and non-Tunisian residents of the country alike.

The Constitution-Making Process

The Legal Framework

Two legal texts govern the vote on the constitution – the Provisional Organization of Public Authorities law (commonly referred to using the French acronym "OPPP" or as the "little constitution"[2]) and the NCA's Rules of Procedure (RoP). The latter does not have the status of law, but guides the work of the assembly.

Article 3 of the OPPP, adopted by the NCA on Dec. 16, 2011, specifies that an absolute majority of NCA members is required to adopt each article, and that a two-thirds majority is needed for the adoption of the constitution in its entirety. In addition, Article 3 specifies that if the NCA fails to reach the required majority during the first reading, the vote is to be repeated within one month. Should the plenary fail to adopt the constitution once again with the required two-thirds majority, the draft constitution is subject to a referendum, where its adoption requires an absolute majority of votes.

The Rules of Procedure underwent four amendments after their initial passage in January 2012 and contained several provisions concerning the vote process.[3] The NCA's voting procedures were regulated by the general section of the RoP relative to the plenary (Articles 83-93), the section relative to attaining quorum in plenary votes (Articles 94-97), and chapter IV (Articles 103-107), which is dedicated entirely to the review and adoption of the constitution. RoP Article 107 states that the adoption of the draft constitution shall be in accordance with Article 3 of the OPPP.

Background to the Vote

The NCA commenced its work on the constitution in February 2012, when the six constitutional commissions put in place by the NCA first met.[4] Each commission worked to draft articles under specific chapters. The process concluded two years later, in February 2014, when the adopted constitution was published in the Official Gazette and entered into force.

In August 2012, the constitutional commissions produced their first drafts ("first draft of the constitution"). The draft sections were reviewed by the Coordination and Drafting Committee (the

2 Constitutional Act n°2011-6 dated Dec. 16, 2011 related to the Provisional Organization of Public Authorities.

3 The NCA adopted its rules of procedure on the Jan. 20, 2012, (published in the Official Gazette, the JORT, on 14 February 2012). The first amendment took place on March 15, 2013, (published in the JORT on March 22, 2013). Articles 24, 36, 38, 52, 61, 62, 72, 82, 85, 87, 89, 91, 100,104, 106, 108, 109, 114, and 126 were amended. Article 88 bis was also added. The second amendment of the RoP took place on Nov. 4, 2013 (published in the JORT on Nov. 29, 2013). Articles 36, 79, 106, 126 and 89 were amended. The third amendment took place on Nov. 27, 2013 (published in the JORT onDec. 6, 2013). Articles 36 (new) and 79 (new) were amended as well as article 20. The fourth amendment of the RoP took place on Jan. 2, 2014 (published in the JORT on Jan. 14, 2014). Article 41 was amended and an article 106 bis added.

4 Each of the six constitutional commissions looked at one of the following topics: 1) Preamble, fundamental principles, constitutional review; 2) Rights and freedoms; 3) Legislative and executive powers and the relationships between the powers; 4) Judicial, administrative, financial and constitutional justice; 5) Constitutional bodies; and 6) Regional and local public authorities.

Drafting Committee)[5] and sent back to the commissions, which then continued to work on the text. A second compilation of the commissions' work, known as the second draft, was released on Dec. 14, 2012, two days before the launch of a national consultation process throughout the country.[6]

While national consultations took place from December to February 2013, the NCA debated the various chapters of the draft constitution in plenary sessions. This debate enabled NCA members, including those who did not participate in the constitutional commissions, to present their views on the draft.[7] In line with the newly revised RoP, the constitutional commissions reviewed the recommendations from this general debate, as well as from the dialogue with civil society that took place in September 2012, and national consultations.[8] This review process took place from March 21 – April 10, 2013. On April 10, 2013, the updated drafts from each commission (henceforth referred to as *2bis*) were sent to the Drafting Committee for additional review, but were not publicly released.

The amended RoP addressed the scope of the Drafting Committee's authority when consolidating and harmonizing the draft chapters.[9] Various political blocs interpreted the language differently. This confusion later resulted in controversy when the Drafting Committee made substantive edits to articles that had been finalized within the various thematic commissions, and also elected to include only one of several proposals for the design of the political system without further consultation with the commissions.

The Drafting Committee's consolidated document was leaked to the media and subsequently officially released on April 22, 2013. A group of experts, who had been selected by the NCA Bureau on the basis of proposals made by the presidents of the constitutional commissions, then reviewed the draft.[10] In the meantime, key actors held two national dialogues to discuss remaining points of contention in the constitution, as well as political, economic, and security issues in Tunisia. The first national dialogue, convened by the President of the Republic, included most of the leading political parties, while the second, convened by the General Union of Tunisian Workers (UGTT), continued a process begun in 2012 and brought together a wider range of parties and civil society groups. The Drafting

5 The Coordination and Drafting Committee was composed of the NCA's President, the NCA's General Rapporteur, his two deputies, and the presidents and rapporteurs of the constitutional commissions.

6 Public consultations started with two sessions which brought together students' representatives in Tunis and Sfax. They were followed by public sessions held through January 2013 in Tunisia's 24 governorates, at a rate of six governorates per weekend. Meetings with expatriate constituencies in France and Italy were also organized in January and February 2013. The Carter Center attended approximately half of the dialogue sessions in Tunisia.

7 The first anniversary of the Oct. 23, 2011, elections was marked by a general plenary discussion on the Constitution's Preamble and General Principles, as well as on revision procedures and final provisions, while other commissions continued to review their drafts. The general discussion by the plenary on the other chapters took place between Jan. 17, 2013 and Feb. 25, 2013.

8 Article 104 of the Rules of Procedure as amended in March 2013 states that: "Constitutional commissions shall review the comments and propositions from the general debate and the national consultations on the constitution in a period not exceeding ten working days starting from the date of receipt of the reports."

9 Article 104 as amended in March 2013 provides that "the Committee meets to prepare the final version of the draft Constitution *based* (emphasis added) on the work of the commissions and with the help of experts."

10 Some of the selected experts, including renowned constitutionalists, declined to be part of the review group. The experts expressed concerns about the ambiguity in the experts' scope of work and the fact that certain experts were not on the list. Kais Said was the first expert to decline. Iyadh Ben Achour, Chafik Sarsar and Hafidha Chekir declined after a joint letter to NCA President, which requested further clarification regarding the role of the experts (i.e., whether their work was merely of a linguistic nature or also content related), remained unanswered.

Committee resumed its work even before the end of the second national dialogue and incorporated some of the agreements reached on constitutional issues during the sessions. The Committee also added a tenth chapter dealing with transitional provisions to clarify the process and timelines for the anticipated transition from the previous constitutional order to the new one, including parliamentary and presidential elections.

The NCA released the final draft of the constitution (also referred to as the fourth or final draft of the constitution) on June 1, 2013. It was immediately met with protests by some deputies who argued that it was unfaithful to the work of the six constitutional commissions. In particular, some opposition members argued that the Drafting Committee had overstepped its mandate in changing the content of some articles already drafted by the commissions (in "draft *2bis")* and in adding a chapter on transitional provisions without consulting the commissions.

To overcome the crisis, the NCA's leadership devised a 23-member ad hoc commission to address the remaining points of contention. NCA President Mustapha Ben Jaâfar chaired the Consensus Commission, which represented the various political blocs at the time as well as some independent NCA members. The commission sought to identify contentious issues in the final draft and then to reach agreement on them. The aim was to facilitate general discussion as planned, as well as the article-by-article vote, and to allow for the adoption of the constitution with as broad a base of support as possible.[11]

The constitution-making process met its most serious challenge shortly after the formation of the Consensus Commission. The assassination of NCA deputy Mohamed Brahmi on July 25, 2013, sparked a deep political crisis, triggering the majority of the opposition to suspend their participation in the assembly. Less than two weeks later, President Ben Jaâfar suspended NCA activities, pending the launch of a national dialogue to resolve the crisis.[12] The Tunisian General Labour Union (UGTT), The Tunisian Union for Industry, Commerce and Handicrafts (UTICA), The Tunisian League for Human Rights (LTDH), and the Bar Association, together often referred to as the Quartet, officially launched a national dialogue process in October 2013, following months of behind-the-scenes negotiations by political parties. This forum has provided a platform for political actors to reach consensus on contentious issues, including the constitution.[13] The NCA resumed activity soon after the launch of the national dialogue discussions.

While the focus of the National Dialogue was largely on the formation of a new government, the NCA's Consensus Commission assumed the task of putting the constituent process back on track.[14]

11 The crisis had extended to the general discussion on the fourth and final draft, which took place between July 1-15, 2013, and whose first session was interrupted by the protests of some deputies. The announcement by the NCA's leadership of the formation of the Consensus Commission helped ease tensions and allowed the discussion to resume.

12 NCA president Mustapha Ben Jaâfar announced his decision to suspend the NCA's activities in a televised address on Aug. 6, 2013.

13 The dialogue was organized into three tracks, only the third of which remains: (1) The formation of a new government (2) the adoption of a constitution and (3) the election of the members of the election management body and the adoption of an electoral law.

14 The Consensus Commission first identified a broad range of contentious issues, touching nearly every chapter of the constitution in addition to the preamble (the list was drawn up on July 11, 2013). This was narrowed down to key contentious issues (agreed on July 16-18, 2013, and referred to as the July 18 list), including the preamble and the transitional provisions. Some of the issues in the more expansive list were also revisited by commission members at a later date.

Despite the interruption of NCA activities for nearly three months, the commission managed to meet a total of 37 times between June 29 and Dec. 27, 2013. During that period, it reached agreement on 52 points of contention, with agreements affecting the preamble and 29 articles in total[15]. Towards the end of the process, the Commission also sought the advice of prominent constitutional experts, particularly in regards to the transitional provisions.[16]

Disagreement within the NCA centered not only on the constitution's substance, but extended to whether the agreements were binding or not. One of the most controversial issues for months leading up to the vote was how to ensure that the various blocs, parties, and independent deputies within the NCA adhered to the decisions reached by their representatives in the commission. The Consensus Commission had no formal standing in the NCA and was not mentioned in the assembly's RoP, leading some to fear that the plenary would not respect agreements reached within the Commission at the decisive moment.

After much debate, and just one day prior to the launch of the article-by-article vote, the NCA plenary amended the RoP to give the Consensus Commission formal status and to specify that "amendments emanating from the Consensus Commission shall be binding for all parliamentary groups".[17]

Timeline of the vote

The first concrete step in the long-anticipated article-by-article vote on the constitution took place on Dec. 30, 2013, when for one day only deputies submitted proposals to amend specific articles of the constitution.[18] The following day, the amendments were distributed to all deputies and published on the NCA's website. On Jan. 2, 2014, the same day the plenary met to amend the RoP once more, deputies lodged requests to speak during the plenary session in favor or against proposed amendments. The article-by-article vote itself began on Jan. 3, 2014.

The NCA's leadership hoped to complete the adoption process–meaning the article-by article vote and the vote on the entire text – by Jan. 14, 2014, the third anniversary of the Tunisian revolution. Adding further pressure on the NCA, the roadmap stemming from the national dialogue set a deadline of Jan. 12 for the constitution's adoption. The NCA could not meet this tight deadline, but, eventually adopted the constitution on Jan. 26, 2014. This was remarkably fast considering the number of articles involved, some of which were controversial and thus requiring a delicate negotiation process on the part of deputies.[19] Furthermore, the constitution was adopted by the NCA in its entirety with an overwhelming majority of 200 votes out of 216 NCA members present, when only 145 votes in

15 Document titled "Consensus Commission Meetings", NCA, December 2013.

16 Article 59 of the RoP entitles the commissions to consult "anyone whose opinion they believe they could benefit from" on a given issue, including experts and government representatives. Experts were consulted at various moments of the process. For example, the constitutional commissions conducted several hearings with Tunisian and international experts, as did the Drafting Committee prior to the release of the final draft of the constitution (on June 1, 2013).

17 Relevant articles: Articles 41 and 106 (a).

18 The RoP new Article 106 (as amended on March 15, 2013) gave deputies a total of four days per chapter of the constitution to lodge amendments. It also required that each chapter be announced ten days in advance of the vote on it. The article was amended again on Nov. 4, 2013, and the window to lodge amendments was shortened to one day only. The number of deputies needed to propose an amendment was also raised from a minimum of 5, to a minimum of 15. The requirement to announce the vote on each chapter 10 days in advance was removed.

19 There were a total of 180 items that had to be voted on: the Preamble which was divided into 8 parts, 146 articles, and 26 headings, in addition to proposed amendments. (source: press conference by Habib Kheder, the General Rapporteur of the constitution, Oct. 18, 2013).

favor were needed for its passage.[20] On Jan. 27, 2014, the constitution was signed into law by the President of the Republic, Mohamed Moncef Marzouki, the NCA President Mustapha Ben Jaâfar, and the head of government at the time, Ali Laarayedh. The constitution entered into force on Feb. 10, 2014, through its publication in a special edition of the Official Gazette of the Republic of Tunisia.[21]

The Rules of Procedure: a flexible interpretation

Though governed by the NCA's Rules of Procedure and Article 3 of the OPPP, the article-by-article vote procedures were not static throughout the process. Rather, the NCA interpreted them in a flexible manner at various moments to avoid political blockages.

While amendments from the Consensus Commission were described as "binding" in the revised RoP, this language was interpreted in various ways: some deputies felt that the NCA was bound to vote in accordance with the agreements, while others considered the term a "loose guideline." Most of the Commission's amendments were adopted and deputies generally voted in line with the agreements reached.[22] This changed, however, during the vote on Article 74[23], which defines the conditions of eligibility for the office of President of the Republic.[24] This issue was polarizing throughout the process. The language proposed by the Consensus Commission did not pass, and the heads of blocs had to mediate the issue. From this point on, the role of Consensus Commission diminished significantly, and on Jan. 14, 2014, Habib Khedher, the General Rapporteur of the constitution, announced an end to the work of the commission.

The biggest debate among observers of the process in regards to procedures centered not on the role of the Consensus Commission but on the interpretation of Article 93 of the RoP and its extensive use. The article states that the General Rapporteur of the constitution (among other, designated persons) may request that the assembly "reopen the debate on an article already passed, if new relevant elements appear before the close of deliberations on the constitution draft."

The General Rapporteur proposed the use of RoP Article 93 during the first day of voting. He suggested reopening the debate on the fourth paragraph of the preamble, and in particular on the notion of Tunisia's "Mediterranean belonging." His suggestion was not accepted. RoP Article 93 was subsequently applied to reopen review regarding Article 6 of the constitution, which deals with religious freedom and the protection of the "sacred," although this article had been approved in a previous session in its original (June 1, 2013) form.[25] After an altercation between two deputies from opposing camps, opposition deputies claimed that the conflict had resulted in "new relevant elements" and called for re-amending the article to include an obligation for the state to ban incitement to hatred

20 Mohamed Allouche, deputy from the Third Path party, did not live to see the final vote of the constitution. He died from a heart attack on Jan. 22, 2014.

21 Special edition of the Official Gazette (the JORT), Feb. 10, 2014. http://www.legislation.tn/sites/default/files/news/constitution_1.pdf

22 The Consensus Commission continued to meet as needed during the vote, mediating certain issues and proposing amendments, for example on article 46 on the rights of women.

23 Article 73 of the fourth draft.

24 Discussion centered on the question of whether to place an age limit on candidates, as well as the conditions to run for office for bi-nationals – both issues directly affecting several potential candidates.

25 Fourth draft version of Article 6: "The State protects religion, guarantees freedom of belief and conscience and religious practices, protects the sacred and ensures the impartiality of mosques and places of worship away from partisan instrumentalization".

and violence as well as *takfir* (labeling another Muslim an unbeliever, or *kafir*).[26]

The motion to reopen discussion with regard to Article 6 related to religious freedoms set a precedent. The debate could be reopened on other articles already approved, leaving the process inconclusive. Though RoP Article 93 stipulates that "new relevant elements" must appear before an article could be revisited, it does not clarify what constitutes "new" and "relevant" elements. After much debate, the General Rapporteur decided to designate the heads of blocs as the arbiters on whether Article 93 could be invoked. They permitted its invocation on multiple occasions, usually to resolve controversial issues. The NCA invoked this article to reopen debate on several points, including Article 36[27] (pertaining to the right to strike), Article 39[28] (delineating the values to be taught when implementing the right to education), and Article 74[29] (specifying candidacy conditions for the election to the office of President of the Republic).[30] Article 6, a source of controversy till almost the last moment, was voted on a total of three times, with its final format adopted on Jan. 23, 2014.

Attendance, Public Participation and Communication on the Adoption Process

Tunisia's generally deliberative constitution-making process was hampered at various moments by the absence of a realistic and detailed roadmap for the NCA's work.[31] This dynamic was compounded by a lack of a clear communication strategy, a lack of transparency, and absenteeism on the part of many deputies. Some of the lessons of the previous two years positively affected the adoption process. The NCA leadership showed a marked improvement in communication, establishing clearer procedures for civil society's access to the vote and provisions to facilitate the media's coverage of the process.

Although the problem of absenteeism of deputies had plagued the NCA for much of its existence, including during the July 2013 general debate, it was less of an issue during this vote. It was not until the vote on the entire constitution, however, that all the deputies were present at a single plenary vote.[32]

The NCA improved its communication with the media during the final voting and adoption phase. The media played an important role in broadcasting the process to the Tunisian public. Public broadcasting channel *Wataniya 2,* for example, dedicated its programming throughout the voting process to live broadcasting of the plenary sessions and related interviews with various deputies and civil society members. The NCA facilitated the media's work in this regard, dedicating central space at the assembly for use as a studio during the article-by-article vote.

The NCA also made significant efforts to facilitate civil society's access to the voting process. Several

26 A member of the Ennahdha bloc made a declaration to the media that was interpreted by some as putting into question the faith of another deputy from the Democratic Bloc. This resulted in heated debate about the need to add guaranties in the constitution against allegations of *takfir*, which could expose accused individuals to the risk of physical violence.

27 Article 35 of the fourth draft.

28 Article 38 of the fourth draft.

29 Article 73 of the fourth draft.

30 Other articles that were re-voted on using ROP Article 93 were 12, 32 (was 31 in the fourth draft), 36 (35), 63 (62), 65 (64), 81 (80), 88 (87), 91 (90), 106 (103), 110 (107) and 111 (108), 121 (118), 122 (119) and 147 (145). Articles 13 and 149 were added in the final version, and did not exist in the fourth draft.

31 Carter Center statements dated (a) May 11, 2012 (b) Sept. 26, 2012 and (c) June 12, 2013.

32 With the exception of Mohamed Allouche. See footnote 20.

weeks before the start of the article-by-article vote, the NCA invited applications by interested civil society observers on its website. According to the NCA, a total of 353 organizations registered on the site, with some organizations registering more than one representative. In general, civil society organizations had a higher visibility during the adoption phase than in previous phases of the constitution-making process, though attendance was not always consistent throughout the three weeks of voting. Nonetheless, civil society's presence at the NCA at key moments of the vote added dynamism to the proceedings and allowed for exchanges to take place at the margins of the plenary, not only between civil society members and NCA deputies, but also between civil society and the media.

In addition, the NCA facilitated the task of observers' following plenary discussions by making the final draft and amendments available to them. Proposed amendments were posted on the NCA's website ahead of the vote, in line with the NCA's Rules of Procedure.[33]

Though the NCA had made various efforts to consult citizens prior to June 2013, these efforts were not extensive. After it issued the final draft in June 2013, the NCA made few efforts to reach out to citizens. This was due in part to the increased pressures and political tensions that permeated the final months of the process. Though some deputies participated in forums organized by civil society and international organizations in various regions of the country[34], and engaged in conversations with their constituents, the NCA failed to lead public outreach efforts.

The Carter Center welcomes plans by the NCA to launch a round of public meetings in all governorates, starting in April 2014, with the aim of engaging with citizens on the content of the new constitution. The Center recommends that the NCA, government, and civil society intensify efforts to educate Tunisian citizens around the country, including youth, on the new constitution, and to solicit their views and opinions on it. The Carter Center also calls on the international community to support those efforts to the maximum extent possible.

Key Issues in the constitution

The Carter Center followed Tunisia's constitution-making process closely, from the first draft of the constitution to the final version adopted by the NCA in January 2014. Throughout the two-year process and the various drafts of the constitution[35], the Center tracked the NCA's progress and assessed the provisions of the constitution against Tunisia's international obligations to uphold fundamental political and civic freedoms, including principles of human rights, comprised within the international and regional human rights treaties ratified by Tunisia. [36]

33 Proposed amendments: http://www.anc.tn/site/main/AR/docs/constitution/propos_proj_constit.pdf (in Arabic) retrieved on 24 March 2014.

34 For example civil society organizations Al Bawsala, L'Association Tunisienne pour l'Intégrité et la Démocratie (ATIDE) and Bus Citoyen organized meetings between NCA deputies and citizens.

35 The NCA released four draft texts over the two-year period. Draft *2bis* refers to the compilation of all the chapters prepared by the constitutional commissions after having incorporated comments emanating from various sources on the second draft. This text was submitted on April 10, 2013, to the Drafting Committee for review, but was not publicly released. It formed the basis of the third draft released by the NCA on April 22, 2013.

36 These treaties include amongst others the International Covenant on Civil and Political Rights (ICCPR) ratified by Tunisia in 1969, the International Covenant on Economic, Social and Cultural Rights (ICESC) ratified by Tunisia in 1969, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ratified by Tunisia in 1985, the African Charter on Human and Peoples' Rights (AfCHPR) ratified by Tunisia in 1981, The Vienna Convention on the Law of Treaties ratified by Tunisia in 1971, the International Convention on the Elimination of all Forms of Racial Discrimination ratified by Tunisia in 1966 and the Convention on the Rights of the Child ratified by Tunisia in 1989.

The Center congratulates NCA members on their achievement and commends their willingness to incorporate the opinions and views of political representatives, civil society, and citizens into the final constitution. In large part, these efforts strengthened the structure of the text and its internal coherence, particularly in the protection of certain fundamental rights and freedoms. The NCA's various consultative mechanisms also helped to reach consensus on key issues. The Consensus Commission deserves particular mention in this regard, as its work was critical to the successful adoption of the constitution. The mechanism of the heads of bloc meetings was also important in overcoming obstacles that emerged during the final voting process.

International Law

The NCA took a conservative stance in the first two drafts of the constitution with regard to the status of international law and its hierarchy vis-à-vis Tunisian law and the constitution. These drafts made Tunisia□s respect of its international commitments conditional upon those commitments□ conformity with domestic law. This position contradicted Tunisia□s commitments under the Vienna Convention on the Law of Treaties, which states that □a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.□[37] The Drafting Committee specified in the third and fourth drafts that international treaties approved and ratified by Tunisia are above domestic law and beneath the constitution. The language in the fourth draft, however, referred to treaties approved by "the Assembly of the People's Representatives," the name of the future legislative body. This implied, perhaps unintentionally, that treaties which had been approved by former legislative bodies would not necessarily have the same legal status.

The Carter Center welcomes the final wording of this provision in the constitution, which now extends it to "the legislative body," which should encompass all legislative bodies, past, present, and future.

However, the NCA did not clarify the weight of international law and the scope of its influence in relation to Tunisia's legal framework. The constitution does not state clearly that Tunisia commits itself to respect all of its international obligations, including those based on customary law. The constitution also fails to give courts explicit incentives to make wider use of international human rights instruments. This omission could lead judges to restrictive interpretations of constitutional rights and freedoms and ordinary laws that affect human rights.

These omissions open the possibility that the constitution could conflict with Tunisia's obligations under the Vienna Convention, which clearly states that domestic laws cannot be used as a justification to disregard treaty obligations. The Carter Center encourages authorities to interpret the domestic legislation in conformity with Tunisia's international commitments, including customary law, which is recognized as part of international law. Provisions of international treaties should also always be interpreted in conformity with their universally accepted meanings.

Human rights in the constitution and their universality

The final version of the constitution includes several references to human rights and provides for the establishment of a national human rights commission to help ensure respect for human rights and to investigate human rights violations.[38] At various moments of the drafting process, the drafters discussed the universality of these rights, a discussion influenced by debates on the place of religion

37 Article 27, Vienna Convention on the Law of Treaties.

38 Human rights are cited twice in the preamble, while Article 39 requests the State to spread the culture of human rights in the context of free public education and Article 49 forbids any amendments that undermine any human rights acquisitions or freedoms guaranteed in the constitution.

in the constitution. The preamble of the first draft referred to "noble human values." In the second draft, the preamble included a reference to "principles of human rights." While the word "universal" was added in the third draft, this reference was undermined by the simultaneous addition of the phrase "insofar as they are in harmony with the cultural specificities of the Tunisian people." This wording caused significant protests by civil society and some members of the opposition. In the fourth and final draft, this limitation was removed; however remained implicit, through the qualification of universal human rights values as "supreme". *The General Report on the Constitution Project*, issued by the Drafting Committee on June 14, 2013, reads:

> "In describing the "human values and principles of human rights "as "noble/supreme", the committee wanted to emphasize the fact that we should build on only those values and principles that have attained supremacy due to their noble content, thus encompassing the meaning intended by the previous formulation [of the third draft], which required building on this second basis insofar as it was "consistent with the cultural characteristics of the Tunisian people." This is particularly the case when taking in consideration the reference following it [in the preamble], to drawing inspiration from the civilizational heritage and reform movements based on the elements of the Arab-Muslim identity and the civilizational gains of humanity."[39]

Despite advocacy by various human rights organizations, this issue never became a priority during the Consensus Commission discussions. The word "supreme" was retained in the final version of the constitution, despite the fact that it implies that there is a hierarchy of human rights in which some may be more important than others. This places a burden on the Tunisian judiciary to interpret the phrase in a way that does not compromise the rights and freedoms enshrined in the constitution and remains consistent with the Vienna Declaration, which states that "all human rights are universal, indivisible and interdependent and interrelated." The Declaration further states that, regardless of political, economic, and cultural system, states have an obligation to "treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[40] Tunisia's 1959 constitution was more precise than the current constitution in this regard, stating that "the Republic of Tunisia shall guarantee fundamental freedoms and human rights in their universality, comprehensiveness, complementarity and interdependence."[41]

Religion in the constitution

From the outset, the place of religion in the new constitution mobilized political parties and civil society. The heart of the debate was how best to find a balance between the Arab-Muslim identity of the majority of the Tunisian people and the desired secular nature of the State. The debate also extended to how best to guarantee full equality to all people regardless of their religion while recognizing Tunisia as a Muslim country.

In the first draft, the preamble contained both explicit and implicit references to religion. Even before the release of the first draft, political parties reached a consensus not to mention *Sharia* directly and to

39 The Coordination and Drafting Committee, "The General Report on the Constitution Project" (in Arabic), June 14, 2013, National Constituent Assembly.

40 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on June 25, 1993 – UN/General Assembly, Vienna 14-25 June 1993 (A/CONF.157/23).

41 Article 5 paragraph 1, added by article 2 of Constitutional Law n° 2002-5 dated June 1, 2002.

keep the emblematic first Article of the 1959 constitution, which reads: "Tunisia is a free, independent, and sovereign state. Its religion is Islam, its language is Arabic, and its form of government is a Republic." This article affirms Tunisia's Arab-Muslim identity without clearly defining Islam as the State religion.

A debate arose, however, with the introduction of a subsequent article[42] which, instead of stating that certain articles could not be amended, enumerated several inviolable concepts of the new constitution, including "Islam as the State religion." This change resulted in much controversy. Many politicians and academics said that the concept of a State religion exceeded the intentionally ambiguous wording of Article 1 - *its religion is Islam*. The Consensus Commission addressed the issue, reaching an early agreement to state clearly at the end of Article 1 that it could not be amended. The NCA honored this agreement in the plenary vote.

The adopted constitution also forbids amending Article 2, which proclaims "the civil nature of the State." Some civil society representatives have argued that defining the state as both civil and Islamist in nature is contradictory. For that reason, they argued that prohibiting amendments to both Articles 1 and 2 could create conflict.[43]

The NCA also debated vigorously the concepts of freedom of religion and conscience. Freedom of conscience, included in the fourth draft of the constitution, had been absent in previous drafts. Its inclusion was the product of long months of debate and the result of extended negotiations between political parties and other stakeholders during the spring 2013 national dialogues. The NCA eventually stipulated in Article 6 that "the state protects religion, guarantees freedom of belief and conscience and religious practices, protects the sacred and ensures the impartiality of mosques and places of worship away from partisan instrumentalization." The issue appeared settled, but the plenary vote on the constitution proved otherwise. Clashes between NCA members of different ideologies and political affiliations around the issue of the status of religion in the constitution resulted in calls to amend the article.[44]

Some NCA members considered that the State should be a protector of religion and of "the sacred." Others believed that the constitution should leave each person the freedom of religious choice, without intrusion or interference. In the end, the NCA plenary voted on three different formulations before finding a compromise between the major political blocs, though some deputies remained vehemently opposed to the article or parts of it. Article 6 in the adopted constitution tries to accommodate both concerns: "the state protects religion, guarantees freedom of belief and conscience and religious practices, protects the sacred and ensures the impartiality of mosques and places of worship away from partisan instrumentalization. The State commits itself to the dissemination of the values of moderation and tolerance and to the protection of the sacred and the prohibition of any offense thereto. It commits itself, equally, to the prohibition of, and the fight against, appeals to *takfir* and

42 Article 148 of the second draft which became Article 136 in the third draft and then 141 in the fourth.

43 Besides Article 1 and 2, the words "can not be amended" appear in two other instances in the constitution: Article 49 (no amendment of the constitution can undermine human rights and freedoms guaranteed in the constitution) and Article 75 (the number and length of presidential terms).

44 A member of the Ennahdha bloc made a declaration to the media that was interpreted by some as putting into question the faith of another deputy from the Democratic Bloc. This resulted in heated debate about the need to add guaranties in the constitution against allegations of *takfir* which could expose accused individuals to the risk of physical violence. *Takfir* is labeling another Muslim a non-believer, or *kafir*.

incitement to violence and hatred."

The Center is concerned that the obligation for the State to "protect the sacred" – a vague notion – could be used in the future to curb free speech if that speech is considered as an attack against religion.[45] According to the United Nations Human Rights Council, however, accusations of defamation of religion should not be used to limit freedom of expression.[46]

The freedoms of religion and conscience are the only rights addressed in the general principles chapter, as opposed to the later rights and freedom chapter. Their exclusion from the latter should not be interpreted to mean that they merit less protection than other fundamental rights and freedoms. Despite their omission from the later chapter, these rights are still subject to the General Limitations clause (Article 49).

The judiciary will likely play an important role in interpreting Article 6 should conflict arise. The Center encourages judges and legislators to protect freedoms of speech, conscience and religion as defined by international standards, including the freedom to adopt, change, or renounce a religion or belief.[47]

Additional religious elements included in all four drafts and in the final version of the constitution are the prescribed oaths of office sworn by elected officials, which are religious in nature, and the requirement for candidates running for President of the Republic to be Muslim. The requirement for a candidate for elected office to subscribe to a particular religious faith contravenes Articles 25 and 26 of the International Covenant on Civil and Political Rights (ICCPR), which address the principle of participation in public affairs, non-discrimination, and equality before the law.

Rights and Freedoms

The scope and interaction of fundamental rights and freedoms sparked heated discussions throughout the process. The Rights and Freedoms chapter was one of the most dynamic, evolving the most throughout the different drafts. While several rights were listed in the chapter on general principles for much of the process, all fundamental rights, with the exception of the freedoms of religion and conscience were consolidated into a chapter on rights and freedoms in the fourth draft.

The final text of the constitution upholds many key civil and political rights, such as freedom of religion, freedom of conscience, freedom of expression, gender equality, and the protection of women's rights. Several key economic, social, and cultural rights are also protected. The Rights and Freedoms chapter ends with the statement that "no amendment is allowed that undermines any human rights acquisitions or freedoms guaranteed in this constitution."[48]

45 See also Amna Guellali, Human Rights Watch Country Director for Tunisia and Algeria, "The problem with the new Constitution", Feb. 3, 2014, http://www.hrw.org/news/2014/02/03/problem-tunisia-s-new-constitution

46 United Nations Human Rights Council, A/HRC/RES/16 /18, Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief, adopted by consensus on March 24, 2011.

47 Article 18 of the ICCPR and Article 18 of the Universal Declaration of Human Rights, see also UN Special Rapporteur on Freedom of Religion or Belief, *Rapporteur's Digest on Freedom of Religion or Belief (excerpts of the Reports from 1986 to 2011), p.4:*
http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf

48 Article 49.

Restriction on fundamental rights

While the enshrinement of fundamental rights and freedoms is crucial in a constitution, it is also important to delineate when and how those rights can be restricted, keeping in mind that these restrictions must not only be limited but also necessary and appropriate.[49]

Initially, and up to the final draft, the constitution gave wide scope to the law to determine whether limits could be placed on many rights and freedoms. Furthermore, the language limited certain rights to various degrees. It was not always clear how the drafters had determined the limitations or on what basis. The fourth draft, for example, guaranteed the right of access to information "within limits that do not prejudice national security, or the rights that are guaranteed by the constitution." Freedoms of expression, media, and publication could not be restricted except by virtue of a law protecting "the rights, reputation, safety, and health of others." Academic freedom and freedom of scientific research were not limited and remain so. The right to peaceful assembly and demonstration was guaranteed, but could only be exercised as per procedural regulations provided for by the law "without prejudice to the essence of the right." The right to privacy and freedom of movement could be limited by law but required a judicial order. This variation from one right to the next risked creating confusion and opened the door to an eventual erosion of those rights.

It is therefore a positive development in the evolution of the text that the final version is free of specific restrictions on rights and freedoms in the majority of provisions, including freedom of movement; freedom of expression, information, and publication; freedom to form political parties; and the right to assembly and peaceful demonstration. The articles dealing with the right to life (Article 22), pretrial detention (Article 29), electoral rights (Article 34), the right to health coverage (Article 38), and the right to property (Article 41) still contain specific referral to the law, however, and may not fully benefit from the guarantees spelled out in the general limitation clause (Article 49).

Following the advocacy of various stakeholders, this general limitation clause, delineating how rights should be interpreted in their application, was introduced in the fourth draft. While they welcomed this inclusion, civil society and other stakeholders continued to advocate for the full protection of fundamental rights without restrictions so as to conform to Tunisia's obligations under international law.[50]

The Consensus Commission reached agreement early in its work to reformulate the general limitations clause (Article 48 of the final draft, now Article 49 of the constitution) in order to detail that any restriction of rights and freedoms "can only be put in place where necessary in a civil democratic state." The same article invokes the principle of proportionality, directing the state to respect "proportionality between these limitations and their motives." These amendments were accepted in the NCA plenary vote.

The invocation of the principles of proportionality and necessity represent an important human rights gain in the Tunisian constitution.[51] In the past, freedoms granted in the constitution were commonly

49 Lawful Restrictions on Civil and Political Rights, DRI, Briefing Paper 31, October 2012.

50 See joint statements by Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center, on July 24, 2103, and Jan. 3, 2014, both can be found at http://www.cartercenter.org/news/publications/peace/democracy_publications/tunisia-peace-reports.html

51 Zaid El Ali and Donia Ben Romdhane (International IDEA), "Tunisia's new constitution: progress and challenges to come", opendemocracy.net, 16 February 2014 http://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to-

restricted through legislation, removing all meaning from those rights. The constitution further instructs judicial authorities, which will likely have wide scope to interpret constitutional provisions around rights and freedoms, to "ensure that rights and freedoms are protected from all violations."

Despite these important gains, The Carter Center expresses some concerns about rights guarantees in the new constitution. While Tunisia has observed a moratorium on the death penalty since 1991, the constitution does not ban the death penalty outright, even if the right to life is defined as "sacred" by the constitution (Article 22) and can only be limited in extreme situations by law. It should also be noted that, in addition to the conditions delineated in Article 49 to limit rights, the constitution allows the president to take exceptional measures in times of state emergency – which often results in curtailing individual freedoms.[52] The constitution does not elaborate on the status of rights and freedoms once a state of emergency has been pronounced. The Carter Center recommends that subsequent legal reform restrict limitations to only those necessary for a specific period of time to meet the exigencies of the emergency situation. Further, rights considered non-derogable in international law should never be limited under emergency powers. [53]

The principle of non-discrimination

During the drafting process, debates around the principle of non-discrimination revolved mainly around gender issues. Other possible grounds of discrimination – including race, color, language, religion, political or other opinion, and national or social origin – received far less attention. The unofficial version (draft *2bis*) that incorporated the comments of the constitutional commissions to the Drafting Committee mentioned "all forms of discrimination." However, this specification was not incorporated into the third and fourth drafts. As a result, while language regarding gender equality improved in each successive draft, the adopted constitution does not explicitly prohibit all manner of discrimination as warranted by international law.[54]

Article 21 specifies only that "all citizens, male and female alike, shall have equal rights and duties, and shall be equal before the law with no discrimination." Not only are grounds for discrimination other than gender not mentioned, but the clause does not conform to Tunisia's obligations under the ICCPR, which specifies that equality before the law is a right of the individual and is not limited to citizens only.[55]

The Carter Center recommends that legislators revisit relevant laws, taking into account Tunisia's international obligations, and incorporate clear prohibitions of discrimination on all grounds, including race, color, language, religion, political or other opinion, national or social origin, property, birth, or other status, towards all people and not only citizens.

52 Article 80 of the Tunisian constitution allows the President to take exceptional measures in the event of an imminent danger threatening the entity, security, and independence of the country, after consultation with the head of government, president of the Assembly of People's Deputies and requires him to give notice to the head of the constitutional court. After a lapse of 30 days, the constitution court may examine continued need for the measures, on request from the head of the Assembly of the People's Deputies or 30 deputies.

53 Article 4 of the ICCPR and Human Rights Committee General Comment 29.

54 Article 2 (1) of the ICCPR states, "Each State Party (…) undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

55 Article 2 of the ICCPR stipulates that States undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant", Article 26, ICCPR "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

It is noteworthy that, while Article 21 does not refer to other grounds of discrimination, its contribution to the protection of Tunisian women's rights and equality is essential, and was a central issue during the entire constitution-making process.

Protection of women's rights and equality

The first draft of the constitution ignited a heated debate on women's rights in Tunisia, as it mentioned the "complementary roles of men and women inside the family" without reference to the equality of men and women. More generally, the rights of women in the first draft were largely considered in the context of the family.[56] Widely criticized, the notion of "complementarity" was subsequently abandoned. The second and successive drafts considered women independently from the family. The concept of the State as a guarantor for equality of opportunity between women and men in "assuming various responsibilities," as opposed to in all areas, nonetheless endured.

Furthermore, in relation to violence against women, the first and second draft noted that "the state *guarantees* the elimination of all forms of violence against women." The NCA commissions charged with drafting specific chapters later edited this clause. Unofficial draft *2bis* specified that "the state *takes adequate measures* to eliminate violence against women." The reference to "adequate measures" disappeared in the third draft, but resurfaced in the fourth and final draft. None of the drafts touched on the issue of gender parity.

Though the issue of parity did not garner much attention in the immediate months leading to the article-by-article vote on the constitution, it became a hotly debated issue during the final voting process. A pressure group of deputies, mainly women, from various blocs coalesced to push for the inclusion of stronger language on women's rights in the constitution. The Consensus Commission adopted the issue and proposed an amendment to Article 45 of the final draft (Article 46 of the adopted constitution) to stipulate that "the State commits to protect the acquired rights of women and works to support and develop them. The State guarantees equality of opportunity between men and women in assuming various responsibilities and in all fields. The State works to achieve parity between women and men in elected assemblies. The State takes adequate measures to eliminate violence against women."

The language was by no means universally acceptable in the NCA, and for several days during the plenary vote it was not clear whether the amendment would be adopted. After much negotiation, lobbying by civil society groups, and the involvement of senior political figures from various sides of the spectrum, the proposed Article 46[57] eventually passed with 116 votes in favor, 32 abstentions, and 40 against.

Human rights groups and women's rights activists welcomed the adoption of Article 46, in conjunction with Article 21's prohibition of discrimination and specification of equality in rights and duties between male and female citizens. The language is progressive in that it not only preserves the rights acquired thus far by women in Tunisia, but also requests the State to support and further extend these rights. It also entrenches the principle of parity in elected bodies by introducing an obligation for

56 In the first draft the State was entitled to "protect women's rights, preserve the unity of the family and maintain its cohesion."

57 Article 45 of the fourth draft.

the state to seek the achievement of parity in all elected councils. This language, while it does not mandate gender parity, is notable for its aspiration.

The constitution also introduced gender-sensitive wording in relation to key issues, such as the right to work and the right to decent working conditions (Article 40) and the right to stand for election (Articles 34 and 46). And while Tunisia's 1959 constitution stipulated that the President of the Republic must be a man, Article 74[58] now provides that "every male and female voter" has the right to stand for election for the position of president. The constitution can thus be seen as a further step in the advancement and protection of women's rights in Tunisia and maintains Tunisia's historical precedence within the Arab region in regard to the rights of women in society.

The Center commends the NCA for strengthening women's rights and tackling discrimination against women and applauds the progress made in strengthening women's position in the constitution. The language used in Article 34 ("the state seeks to guarantee women's representation in elected councils") is weaker, however, than the language used in Article 46. The Center encourages Tunisian authorities and political parties to do their utmost to "achieve parity in elected assemblies." The Center encourages the State to adopt positive measures in all areas in order to achieve the effective and equal empowerment of women and to fight to eliminate not only violence against women, but more widely all forms of discrimination against women. [59]

In its current elaboration of an election law, the NCA faces a first test of the principle of gender parity as enshrined in the constitution. The Center welcomes provisions in the draft electoral law that put in place measures to achieve gender parity in nomination lists, and suggests that the state tackle all barriers to women's participation in the implementation of the law.[60]

Economic, social and cultural rights

The area of economic, social, and cultural rights is one of the few that did not consistently evolve towards stronger protections over successive drafts. In some instances, the language in the adopted constitution does not fulfill the vision of the Rights and Freedoms constitutional commission, which worked on these issues.

The constitution guarantees many economic, social, and cultural rights, including the right to health (Article 38), education (Article 39), culture (Article 42), water (Article 44), and more broadly to a clean environment (Article 45). Many of these rights, however, are neither spelled out with further explanation as to how they are to be exercised and achieved, nor subject to a judicial mechanism designated for their enforcement if the state fails to meet its obligations. In addition, the constitution does not obligate the state to realize these rights to the maximum of its available resources and in a progressive manner, as stipulated in the International Covenant on Economic, Social and Cultural Rights, to which Tunisia is a party.[61]

In some cases, subsequent drafts of the constitution actually diluted the state's obligation to enforce

58 Article 73 of the fourth draft.

59 Human Rights Committee, General Comment No. 28, para. 3.

60 The draft electoral law was published on the website of the National Constituent Assembly on March 26, 2014: http://www.anc.tn/site/main/AR/docs/projets/projet_election.pdf

61 Article 2 of the ICSECR notes that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, 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."

or protect a given right. This is illustrated, for example, by a closer examination of the right to water (Article 44). In the draft submitted by the constitutional commissions to the Drafting Committee (draft *2bis*) before the release of the third draft, the right to *drinkable* water was guaranteed, with the state being obligated to protect water resources, use them efficiently, and work for their fair distribution. The third draft read merely "the right to water is guaranteed." The final draft reintroduced the obligation to protect water resources and use them efficiently, but both the "State and society" were obligated to do so in this version. The obligation to work for a *fair* distribution of water resources was eliminated. The plenary eventually adopted this language: "The right to water shall be guaranteed. The conservation and the rational use of water shall be a duty of the State and society."

The Carter Center welcomes the addition of a new provision in the last days of the article-by-article vote stipulating that "natural resources are the property of the Tunisian people, and the State exercises sovereignty over them on the people's behalf. Investment contracts related to these resources shall be submitted to the competent committee of the Assembly of the People's Representatives. Agreements ratified in relation to these resources shall be submitted to the Assembly for approval (Article 13)."

The realization of economic, social and cultural rights often has financial implications and requires the establishment of concrete enforcement mechanisms. The Center encourages Tunisian authorities to devote appropriate resources to the implementation of these rights, in order to meet the new constitution's human rights commitments.

Election Rights

Guarantees for electoral rights evolved significantly from the first draft of the constitution to its adoption. While the right to vote did not appear in the first draft – an unfortunate omission addressed in the second draft – the characteristics of genuine elections in the adopted constitution align closely with those elaborated in international law.[62]

The Carter Center commends the NCA for its efforts to protect the electoral process and voting rights, which form the foundation of the modern democratic state. The constitution requires that legislative, presidential, and local elections be universal, free, direct, secret, fair, and transparent.[63] The words "fair and transparent" were added in the fourth draft, a positive step that reinforces the democratic nature of elections.

Unfortunately however, some concerns remain. Article 34 on election rights is one of the few articles that retained a specific limitation, and thus may escape the stringent conditions set in the General Limitation clause for restricting rights (Article 49). Given that the article gives wide scope to the law to determine the limits that could be placed on electoral rights, The Carter Center also recommends that, should any measures be placed to restrict these rights, the restrictions should be reasonable, proportional, and necessary in a democratic society, as per the conditions spelled out in the General Limitation clause.

The adopted constitution further omits the principle of equality in the articles related to voting rights. This omission is significant, and lawmakers should make every effort to incorporate the principle into Tunisia's organic laws relating to elections.

62 Article 25 of the ICCPR states that "every citizen shall have the right and opportunity…(a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors…"

63 Articles 55 (legislative elections), 75 (presidential elections), and 133 (local elections).

Equality is a fundamental element of the right to vote and is directly mentioned in the Universal Declaration of Human Rights as well as the ICCPR. The equality of the vote refers to the principle of "one person, one vote" so that no citizen's right to vote is greater or less than that of another citizen. It is one of the bases of measures to combat election fraud, since such fraud is a violation of equality. Equality of the vote also means that every citizen's vote should have the same value; for example, the number of citizens or voters per elected representative should be generally equal when representatives are elected from different constituencies.

Furthermore, the criteria for candidacy for election to the office of President of the Republic, which were hotly debated during the entire constitution-making process. Discussion centered on the question of whether to place an upper age limit on candidates, as well as on the restrictions on dual nationals. Both measures directly affected several potential candidates.

The second and subsequent drafts of the constitution stipulated that candidates for the office of the President of the Republic have a minimum age of 40 and a maximum age of 75. All drafts made reference to the candidate being Muslim.[64] Key stakeholders and members of the Consensus Commission managed to reach an agreement to remove the age restrictions on presidential nominees, as well as to soften the interdiction of candidacy for persons holding dual citizenship by providing that the nominee sign a commitment to revoke the second citizenship should she or he be elected. During the vote both issues remained controversial and generated much debate. The assembly was forced to vote twice on the article (Article 74).[65]

The Carter Center notes that U.N. General Comment 25, the interpretive document for Article 25 of the ICCPR indicates that any restrictions on the right to be elected and on the right of people to freely choose their representatives "must be justifiable on objective and reasonable criteria."[66] Comment 25 identifies minimum age as a potentially reasonable restriction for holding office, as is lack of mental capacity. While the provisions for maximum age may endeavor to address mental and physical capacity to hold public office, they do not inherently reflect these qualities and may therefore discriminate against otherwise fit candidates. The NCA's decision to remove the age ceiling in the constitution is positive, as it brings the criteria for candidacy in closer alignment with international norms. The lowering of the minimum age to 35, as opposed to the 40 in previous drafts, is also a positive development, which may encourage wider participation by younger candidates in the political affairs of their country.

The nationality of the president also generated heated discussion. Until the fourth draft, persons possessing only the Tunisian nationality and none other in addition could run for the presidency. This condition was refined in the fourth draft, which specified that, on the date of the submission of the application, the candidate is not allowed to hold another nationality – obliging dual nationals to give up any other nationalities before presenting their candidacy to run for president. After advocacy efforts by dual nationals serving within the NCA, the Assembly eventually opted to ease the conditions for candidacy. Candidates must now abandon any other nationality only if elected President of the Republic (Article 74).

Structure of the political system

64 When submitting their chapters for the first draft in August 2012, several commissions proposed multiple versions of articles. Regarding the candidacy conditions for the election to the office of President of the Republic, five different options were presented and two did not include the requirement for the candidates to be Muslim.

65 Article 73 of the fourth draft.

66 U.N. General Comment 25, para 15.

International law obligations do not dictate a specific political system, as "every State possesses a fundamental right to choose and implement its own political, economic and social systems."[67] The content of the constitution should, however, ensure that all elements of a democratic system that guarantee the implementation of rights are respected. The separation and balance of powers are fundamental principles of democratic systems, and the idea of balance of powers implies collaboration between the different powers of the state and the creation of mechanisms of mutual control and of countervailing powers.

The choice of the political system was particularly contentious during the drafting process. Although the first draft of the constitution established the principle of separation of powers, the debate revolved around the balance of powers between the executive and the legislative, and between the President of the Republic and the head of government (prime minister), in a mixed system with an executive power with two leaders.

In both the first and second drafts, several aspects of the political system remained unresolved. In the absence of consensus within the Commission on Executive and Legislative Powers (Powers Commission), its members put forth two or three options of several articles for consideration. In the third draft, the Drafting Committee incorporated one of the options presented by the Powers Commission. The selected political system granted considerable power to the parliament and the government, while providing for the direct election of the President, whose prerogatives would be strictly limited.

The fourth draft of the constitution did not substantially change the prerogatives of the two heads of the executive, but introduced details to clarify their respective roles and attempted to create a more even balance between them. A new provision (Article 70 in the fourth draft and 71 in the constitution) clearly stated that both the President of the Republic and the government, led by a head of government, "hold the executive power." These changes, emanating to some extent from the national dialogues, were considered insufficient by many opposition members and others, however.

In the end, the plenary adopted measures that clarified the competence of the head of government and the President of the Republic, but some grey areas remain. In several instances, the constitution foresees that the President of the Republic shall take decisions after consultation with the head of government.[68] These provisions may prove complicated to implement, should the executive powers fail to reach agreement. The constitution stipulates in Article 101 that in the case of a dispute arising between the heads of the executive, the "most concerned" of the two parties may refer the matter to the Constitutional Court for a ruling, which must be issued within a week. While the court could in principle act as arbitrator, there is a danger of the court becoming politicized if it is called upon to arbitrate between the actors frequently, and the constitution does not offer specific guidelines for making judgments. In addition, the Constitutional Court may not be established for up to a year following the upcoming legislative elections, leaving a potential vacuum should conflicts arise in the

67 International Court of Justice (ICJ), Case concerning military and paramilitary activities in and against Nicaragua, (Nicaragua v. The United States of America), 27 June 1986, p. 131: "A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems" and ICJ, Advisory opinion, Sahara Occidental, 16 October 1975, pp. 43-44: "No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today."

68 Articles 77, 78, 80, 106.

immediate term.[69]

Another issue that may generate future difficulties concerns the ratification of international treaties. Article 77 stipulates that the President of the Republic is responsible for ratifying treaties and authorizing their publication, while the head of government is "exclusively competent to present draft laws relating to the approval of ratification of treaties" (Article 62). The constitution is silent, however, on how to deal with a scenario in which the head of government chooses not to present a draft law or fails to do so in a timely manner, thereby blocking the ratification process. Such a situation could lead to a political crisis affecting the balance of powers.

Finally, some provisions regarding the political system are very complex and may prove difficult to implement. The President of the Republic is allowed to ask the assembly to renew or withdraw confidence from the government up to two times during his or her term (Article 99). Should the assembly choose to do withdraw confidence, the president is tasked with designating someone to form the new government in a period not exceeding 30 days. Should this person fail to do that, or should the assembly fail to give confidence to the new government, the president is authorized to dissolve the Assembly and to call for elections. On the other hand, should the assembly give the government its confidence twice, the president must submit his or her resignation. The system does not give either party strong incentives to practice checks and balances, since the cost of failure is extremely high for both the president and the assembly.

In order to avoid stalemates, the Carter Center calls on Tunisian political actors to continue seeking consensus in the current phase of the transition and beyond, as they did in the months leading to the constitution's adoption. Maintaining this spirit will help to integrate this positive aspect of the Tunisian constitution-making process into the wider political culture of the country, and could help to reduce the potential for conflict, particularly while permanent institutions, including the constitutional court, are not yet in place.

Role and rights of the political opposition

The role and rights of the political opposition, which were not specified in the first and the second drafts, is one of the main positive outcomes of the national consultations held in December 2012 and January 2013.[70] The third draft includes a reference to the role and the rights of the opposition as an integral element of the Assembly of the People's Representatives (Article 57), and in the fourth draft (Article 59) similar language is used to grant "the opposition the right to create and preside an inquiry commission every year," but without giving any further information on the status and prerogatives of such a commission.

The final text of the constitution not only retains the explicit recognition that the parliamentary opposition is an "essential component" of the legislature, but also provides for a member of the opposition to head the parliament's finance committee. This committee plays a key role in controlling the State's funds. It is charged with reviewing the state's annual budget before it is voted on in parliament as well as with assessing whether the state's monies are being used wisely.[71] The constitution also

69 The constitution foresees the establishment of a temporary commission that is tasked with reviewing the constitutionality of draft laws. Its mandate will not extend to arbitration between political powers.

70 The UNDP report on the national consultation process highlights that the inclusion of the rights of the opposition in the Constitution was insisted upon in the governorates of Monastir, Bizerte and Sidi Bouzid. See PNUD, "Dialogue National Sur Le Project de La Constituation: Rapport General", Tunis March 2013, p. 35.

71 For a more detailed analysis of the importance of this explicit recognition see Zaid El Ali and Donia Ben Romdhane (International IDEA), "Tunisia's new constitution: progress and challenges to come", opendemocracy.net, 16

extends the right to refer a draft law to the Constitutional Court to the President of the Republic and the head of government, as well as any 30 members of the assembly.[72] This provision should further boost the rights of the opposition and, by extension, the democratic nature of the state.[73]

Role of the Judiciary

The Tunisian constitution lays a strong foundation for the independence of the judiciary. The chapter on judicial authority contains important guarantees in this regard, including Article 102, which affirms that "the judiciary is an independent authority that ensures the administration of justice, the supremacy of the constitution, the sovereignty of the law, and the protection of rights and freedoms." Article 109 prohibits outside interference with the judiciary.

The language concerning the appointment of judges was significantly improved in the adopted text of the constitution (Article 106).[74] Initially, this provision noted that judges would be appointed by presidential decree based on decisions by the High Judicial Council (the independent supervisory body for the judiciary). There were no provisions made for the appointment of senior judges, which meant that all power for the appointment of senior civil servants would rest with the head of government, as per Article 92. In the final text, the NCA put in place stronger guarantees to ensure that the judiciary does not fall hostage to the government. The final draft gives the President the responsibility of appointing senior judges, but only in consultation with the head of government and based on a proposal by the High Judicial Council (Article 106).

Furthermore, later drafts strengthened the immunity of judges. Until the fourth draft, it was possible to lift the immunity of a judge in the event that he or she is caught red-handed (*in flagrante delicto)*. In the final text, the judge must be caught red-handed *committing a crime.* Only then could his or her immunity be removed. It should be noted that there were no provisions in the 1959 constitution to protect judicial independence. The guarantees of judicial independence in the new constitution can be seen as a key turning point in Tunisian history, in light of past practices of authorities - both prior to the revolution and to a lesser extent since - that made the judiciary vulnerable to the executive power.

The NCA also improved the final text establishing the membership of the High Judicial Council. According to the adopted constitution, the Council must be established within six months of the upcoming legislative elections, and will play an important role, among other duties, in selecting the members of the Constitutional Court. A key aspect of the Council's work will be to deal with all matters relating to the appointment, promotion, dismissal, and career progression of judges. Initially, and until the fourth draft, it was foreseen that half the members of the Council would be judges, while the other half non-judges. This measure was amended to increase the percentage of judges to two thirds. The adopted constitution also strengthened measures for the election of most judges and non-judges. Article 112 stipulates, moreover, that "the remaining third (non-judges) shall be composed of specialized independent individuals," and that "elected members shall undertake their functions for a single six-year term," which are further guarantees of independence.

Though this issue was apparently not discussed prior to the adoption phase of the constitution-making

February 2014, http://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to-

72 Article 120.

73 The Human Rights Council adopted a resolution that emphasizes the crucial role played by the political opposition and civil society in the proper functioning of a democracy. (A/HRC/RES/19/36). See also "The constitutional rights of the opposition", DRI Briefing Paper 34, February 2013

74 Article 103 of the fourth draft.

process, a group of deputies proposed an amendment to enshrine the profession of lawyers in the constitution for the first time in Tunisian history. The resulting article (Article 105) states that: "The profession of lawyer is a free independent profession that contributes to the establishment of justice and to the defense of rights and freedoms. Lawyers are entitled to the legal guarantees that ensure their protection and the fulfillment of their task". This article should be read in the context of Tunisia's authoritarian past, in which lawyers were frequently subjected to harassment by state security. In this sense, the adopted language could play a role in strengthening a lawyer's right to provide defense and right to a fair trial. The right to appeal - another ingredient of the right to a fair trial - first appeared in the second draft (Article 104) but was removed in the fourth, then eventually reintroduced in the final version of the constitution (Article 108).

Despite these strong guarantees, security of tenure requires further elaboration in the law. Article 107 states that no judge may be transferred, dismissed, expelled, or subjected to disciplinary punishment "except in accordance with the guarantees provided for by law." Though the article requires a decision by the High Judicial Council before any of the above actions can be taken, it leaves wide scope to the law to determine the criteria for dismissal. These measures could be used in future to undermine the judiciary.

The Center recommends that the government, the NCA, and the future Assembly of the People's Representatives incorporate stronger provisions on the independence of the judiciary into the legal framework, consistent with international standards, including the unambiguous affirmation of security of tenure in regards to appointment, promotion, and discipline, with removal of judges possible only for serious misconduct and only following a fair trial.[75]

The Tunisian constitution accords the judiciary wide powers to interpret the constitution and, by extension, to enforce the freedoms and rights guaranteed therein. Furthermore, authorities have up to a year following the upcoming legislative elections to establish the Constitutional Court. This leaves a potential void in constitutional oversight that may not be met entirely by the provisional commission foreseen by the constitution's transitional provisions, which has only *a priori* oversight of laws (Article 148, paragraph 7).

The Carter Center recommends that judges be required to interpret the law, including the constitution, to favor the enforcement of a right or fundamental freedom. In addition, the interpretation of human rights treaties from any official treaty body, including courts and commissions, should be taken into account as a minimum standard.

A further concern is the question of the supremacy of the constitution. Until the fourth draft of the constitution, Article 102[76] stipulated that "judges are independent. No power shall be exercised over their rulings other than the power *of the constitution* and the law" (emphasis added). In the final text, the word "constitution" was removed, a move that put in question the provisions of the first paragraph, which instructs judges to enforce the supremacy of the constitution yet in the second paragraph essentially asks them to refer to the law only. This may lead to the prevalence of the law over the constitution where contradictions exist between the two, and a systematic referral of cases to the Constitutional Court, even where the constitutionality of the issue in question is clear. This could result, on a practical level, in an overburdening of the Constitutional Court and delays in judgment.

However, given that Article 102 instructs the judiciary to ensure the constitution's supremacy, the

75 The UN Basic Principles on the Independence of the Judiciary and the Principles and Guidelines on the Right to Fair Trial in Africa.

76 Article 100 in the fourth draft.

article assumes paramount importance during the remainder of the transitional phase, particularly in the absence of the Constitutional Court. It should be read in the context of the larger constitution, which sets limits on the scope of permissible restrictions to rights and freedoms (Article 49).

Composition and competence of the Constitutional Court

Until the fourth draft, the Assembly was mandated to elect twelve Constitutional Court members from among candidates proposed by the President of the Republic, the head of government, the President of the Assembly, and the President of the High Judicial Council. In the final version, the NCA designated the same four authorities to appoint the court's members, without the assembly playing a role in their selection. This measure was a positive step that strengthens the balance of powers and ensures that no one entity controls the court.

The first and second drafts mandated that the Constitutional Court be composed entirely of legal specialists with a minimum of 20 years of professional experience. The Drafting Committee lowered these prerequisites in the third draft, requiring a majority of legal specialists with a minimum of 10 years' experience.[77] Opposition members, civil society representatives and some members of the constituent commission dealing with judicial powers that had initially drafted the article protested these changes. The fourth draft proposed a compromise of a two-thirds composition of legal specialists with a minimum of 15 years of experience (Article 115). NCA members eventually opted for an intermediate solution, namely an increase of the number of legal specialists to three-quarters and a return to the initial 20 years of professional experience requirement initially foreseen by the Judicial Powers Commission (Article 118).

The second draft of the constitution articulated the Constitutional Court's competencies, including the mandatory referral to the Constitutional Court of any proposed amendments to the constitution, draft organic laws, and ratification of treaty laws, as well as an optional referral under certain conditions for draft legislation (Article 117). Any five assembly members, in addition to the President of the Republic, the President of the Assembly, and the head of government, could refer legislative matters to the court. Although the judicial constitutional commission increased the number of deputies to 10, the Drafting Committee kept only the mandatory referrals and removed the mechanism of optional referral in the third draft. National and international organizations criticized this decision.[78] A Consensus Commission proposal allowing a minimum of 30 assembly members to seize the court was adopted in the plenary votes. This measure will allow deputies, particularly the opposition, the power to challenge draft laws before the Constitutional Court while at the same time reducing the risk of blockage by a small number of deputies.

Transitional Provisions

A new chapter was added to the final draft of the constitution, which dealt with the transitional

77 The provisions on the composition of the Constitutional Court were said to have been changed as a compromise between advocates for the establishment of a High Islamic Council and its opponents. The Court's composition was widened by the Drafting Committee so as to allow for the inclusion of non-legal specialists thus opening the door for the inclusion of religious law scholars.

78 « Observation sur le projet final de la constitution de la République tunisienne », Strasbourg, le 17 July 2013, Avis 733/2013 (French only), Council of Europe, Venice Commission; para. 176 http://www.venice.coe.int/webforms/documents/?pdf=CDL(2013)034-f and "Strengthen New Constitution's Human Rights Protection, Guarantee Equality for All, Affirm International Law Obligations", joint statement by Al Bawsala, Amnesty International, Human Rights Watch, and The Carter Center, Jan. 3, 2014, http://www.cartercenter.org/news/pr/tunisia-010314.html

provisions intended to ensure a smooth transition between the former and new constitutional orders. The drafting process with regard to the transitional provisions was unique. The constitutional commissions did not discuss their content, nor did any of the commissions have a mandate to address these provisions. Instead, the Drafting Committee adopted the transitional provisions at the very last stage of the process, leaving little time for members to discuss and reflect on their implications. Stakeholders widely criticized both the process and the content of the chapter. It was the only chapter that was revaluated in full by the Consensus Commission, which debated, among other issues, the timeline of the establishment of the Constitutional Court, the prerogatives of the NCA, and the deadlines for the entry into force of the various provisions of the constitution, including the upcoming election date.

The Carter Center welcomes the fact that transitional provisions adopted set clearer timelines and deadlines for the entry to force of the various provisions of the constitution. The Center also applauds the NCA's decision to grant the Constitutional Court full jurisdiction to examine the constitutionality of laws immediately upon its creation, rather than three years later, as previously specified. The establishment of the Constitutional Court, however, is dependent on the timing of the upcoming legislative elections and could take up to one year from that date, leaving a void in judicial review that will not necessarily be covered by the court system at large, given that Article 148 para. 7 of the constitution explicitly states that the court system is not allowed to review the constitutionality of laws. The constitution calls for the establishment of an interim commission charged with considering the constitutionality of draft laws until the permanent body is in place. As this body does not have a mandate to consider the constitutionality of current laws, including those inherited from the former regime, a void exists to ensure that Tunisia's legal framework is in conformity with the new constitution. In addition, prior to the establishment of the Constitutional Court, there is no mechanism to arbitrate potential conflicts between the two heads of the executive, leaving a potential vacuum should conflicts arise in the short term.

Furthermore, Article 120 mandates the future Constitutional Court to review the legislative body's Rules of Procedure as presented to it by the President of the Assembly. This review is critical in guaranteeing that the exercise of legislative power is in conformity with the perquisites of the constitution. There is no mechanism foreseen in the transitional provisions to review the future Assembly of the People's Representatives' Rules of Procedure, which are likely to be adopted well before the establishment of a permanent Constitutional Court.

Currently the transition between temporary and permanent governments is regulated by the transitional provisions as well as the OPPP. It would have been preferable to integrate the still-applicable provisions of the OPPP in the transitional provisions so as to ensure greater coherence and to fully reflect the force of the new constitution.

The Center calls on the NCA and the new government to put in place the legal framework necessary to implement the provisions of the constitution, in particular the timely establishment of a provisional commission to review the constitutionality of draft laws.[79]

The Center strongly encourages the NCA to establish the commission in time to review the draft elections law, currently under discussion. The Center further recommends that the NCA mandate the commission to review the future Assembly of the People's Representatives' Rules of Procedure, which are likely to be adopted before the establishment of a permanent Constitutional Court. This step would respect the spirit of Article 120, which mandates the future Constitutional Court to review the legislative body's Rules of Procedure as presented to it by the President of the Assembly. This

79 As stipulated in article 148, paragraph 7 of the constitution.

review is critical in guaranteeing that the exercise of legislative power is in conformity with the perquisites of the constitution.

Recommendations

The Carter Center encourages the NCA, the government, participants in the national dialogue, civil society organizations, and the future members of the Assembly of the People's Representatives to consider the following recommendations:

RIGHTS

- Review and reform Tunisia's existing legal framework to ensure that domestic law and regulations reflect and respect the country's international commitments on human rights and the rights enshrined in the new constitution.
- Incorporate into organic laws guarantees of the principle of the equality of the vote.
- Prohibit discrimination on the grounds of race, color, language, religion, political or other opinion, national or social origin, property, birth, and other status. Ensure that these rights apply to all people in Tunisia, citizens and foreigners alike, in accordance with international law.
- Encourage the State to fight not only violence against women but all kinds of discrimination against women. Adopt concrete measures to protect women's rights, such as mechanisms to advance gender parity in nomination lists, including in the draft legislation currently under debate in the National Constituent Assembly.
- Specify in relevant legislation Tunisia's obligation to adopt specific mechanisms to guarantee the progressive realization of economic, social, and cultural rights to the maximum of the country's available resources.

ENFORCEMENT

- Judges should interpret the law, including the Constitution, to favor the enforcement of a right or fundamental freedom, and to take into account the interpretation of human rights treaties, including from courts and commissions, as a minimum standard.
- Encourage judges and legislators to protect freedom of religion or belief, including the freedom to adopt, change, or renounce a religion or belief, and to ensure that any limitations are consistent with the general limitation clause in the constitution.
- In the event that a state of emergency is declared, ensure that any restrictions to rights and freedoms are specific, necessary, proportionate, and subject to judicial review, and that they will expire after a defined period of time. Furthermore, specify that rights considered absolute in international law remain protected and ban their restriction under emergency powers.

INSTITUTIONS

- Incorporate provisions into the legal framework to ensure the independence of the judiciary in regard to appointment, promotion, and discipline, including the security of tenure. The removal of judges should be restricted to cases of serious misconduct, following a fair trial, and, in accordance with the constitution, by reasoned decision of the High Judicial Council

following its establishment.

- Establish a provisional commission promptly to review the constitutionality of draft laws, so as to include the draft electoral legislation currently under debate. The commission should have the authority and resources necessary to carry out its duties independently and effectively.
- Consider granting the provisional commission the right to review the Rules of Procedure of the future Assembly of the People's Representatives.
- As was done in the constitution adoption process, facilitate civil society and media access to commission and plenary discussions of the elections law, as well as all future laws debated by the NCA.
- Intensify outreach campaigns to educate the public about the constitution.

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