

The Tunisian Constitution in light of International Law and Standards

On 3 January 2014, almost three years after the ouster of President Ben Ali, the Tunisian National Constituent Assembly (NCA) began voting article by article on a new draft Constitution. Although a simple majority was required for each article to be adopted, the NCA had to approve the entire draft in a separate vote by a two-thirds majority. This vote occurred on Sunday 26 January 2014, when 200 members of the NCA voted for the Constitution, with 12 votes against it and 4 abstentions.

The ICJ believes that the adopted Constitution is the product of a representative and inclusive process and marks a significant step toward establishing the rule of law and protecting human rights in Tunisia. The members of the NCA were elected in October 2011 through fair and transparent elections supervised by an independent body.¹ Throughout the constitution-making process, the NCA reached out to various stakeholders, including by holding national consultations with civil society organizations. Many of the recommendations formulated by these organizations were taken into account in the drafting process and contributed to improving the provisions of the adopted Constitution.

As a result of this process, the newly adopted Constitution provides better guarantees for upholding the rule of law and protecting human rights. In particular, the new Constitution expands on the rights provided for by the 1959 Constitution. It notably recognizes the right to equality between men and women and introduces many economic, social and cultural rights, including the right to health (Article 38), education (Article 39) and work (Article 40).

The Constitution also provides for strong guarantees for the establishment and enforcement of the rule of law, including by establishing a more balanced separation of powers within the executive and ending the sweeping powers that were concentrated in the hands of the President under the 1959 Constitution. The competences of the legislative branch have also been considerably enhanced, notably by recognizing the role and the rights of the parliamentary opposition and by providing for legislative oversight and inquiry mechanisms.² The new Constitution also recognizes the institutional and individual independence of the judiciary and its members and establishes an independent High Judicial Council, empowered to oversee judges' careers, thereby marking an important step towards ending the executive's interference in judicial affairs.

The new Constitution also provides for important enforcement mechanisms for human rights and the rule of law, not least the establishment of a Constitutional Court that can review the conformity of laws with the Constitution and to which individuals can have access.³

Nevertheless, in certain key respects, the Constitution falls short of international law and standards. In particular, the Constitution does not affirm that international human rights treaties ratified by Tunisia are binding and have supremacy over domestic law. The ICJ therefore recommends that the Tunisian authorities take into account the deficiencies in the Constitution highlighted in this paper when enacting legislation to implement constitutional provisions and defining public policy.

¹ The Higher Independent Authority for the Elections, established under Law-Decree No. 2011-27 of 18 April 2011

² Articles 59 and 60, 2014 Constitution

³ Article 120, 2014 Constitution

1. Human Rights Definitions, Guarantees and Limitations

- *Right to life*

The Constitution does not recognize the right to life as a non-derogable right, as provided for by Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR), to which Tunisia is a party. Article 22 provides that the right to life is sacred and “cannot be infringed upon except in grave cases provided for by law”. The ICJ is concerned that this language is too vague and, because the situations in which the right to life may be infringed upon are undefined, Article 22 runs the risk of undermining the essence of the right. The ICJ urges the Tunisian authorities to ensure that the right to life is a non-derogable right and, to this end, to take steps to abolish the death penalty, which has been the subject of a *de facto* moratorium in Tunisia since 1991. The ICJ opposes the death penalty in all cases as a violation of the right to life.

- *Right to be free from torture and other cruel, inhuman or degrading treatment or punishment*

Article 23 prohibits all forms of physical and psychological torture and provides that the crime has no statute of limitations. However, it does not prohibit acts of cruel, inhuman or degrading treatment or punishment that do not amount to torture, as required by Article 16 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), to which Tunisia is a party. Article 23 requires the “protection of the dignity of individuals and their physical integrity”, while Article 30 requires that detainees be treated with humanity and dignity. However, neither of these provisions includes a comprehensive prohibition in line with Article 16 of the CAT. The Tunisian authorities should therefore ensure, consistent with their obligations under international law, including the CAT, the prohibition of all acts of cruel, inhuman or degrading treatment or punishment that do not amount to torture. In addition, the Tunisian authorities should also ensure that a new and comprehensive definition of torture, fully in line with Article 1 of the CAT, is adopted in the Criminal Code. Article 23 of the Constitution does not define the act of torture, permitting the definition of torture contained in Article 101bis of the Tunisian Criminal Code⁴ to remain current. That definition, however, fails to provide for criminal responsibility for those who consent or acquiesce to acts of torture. In his report on Tunisia, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment emphasized “the importance of penalizing all acts of instigation, consent or acquiescence of torture by public officials or other persons acting in an official capacity, including those who order subordinates to torture or who cover up torture after the fact”.⁵ Under the CAT, State parties must ensure that not only acts of torture but also attempts and acts of complicity or participation are offences under its criminal law. In addition, no information obtained by torture may be used in any proceeding in any nature, except as evidence against a person accused of torture.

- *Equality and Non-Discrimination*

Article 21 of the Constitution provides that men and women have equal rights and obligations and that they are equal before the law without any discrimination. Article 46 further affirms

⁴ Article 101bis of the Tunisian Criminal Code defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or when such pain or suffering is inflicted for any other reason based on discrimination of any kind.”

⁵ Report of the Special Rapporteur on torture and other cruel, or degrading treatment or punishment, Juan E. Méndez, Mission to Tunisia, UN Doc. A/HRC/19/61/Add.1, para. 16.

that, "the State works towards accomplishing equality between men and women in the elected assemblies". The ICJ welcomes these provisions and urges the Tunisian authorities to complete the guarantee of gender equality contained in Article 46 by specifically defining and prohibiting discrimination against women. Consistent with its international obligations, including under the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), Tunisia should legislate to include an explicit definition of sex discrimination, as provided for in Article 1 of CEDAW, and extend responsibility to both public and private actors, in line with Article 2(e) of the Convention.⁶

The ICJ is also concerned that under Article 21 of the Constitution, equality before the law and non-discrimination are guaranteed only to citizens of Tunisia. Article 2(1) of the ICCPR provides that State parties must respect and ensure the rights contained therein "*to all individuals within its territory and subject to its jurisdiction ... 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*". In order to comply with their obligations under international law, including the ICCPR, the Tunisian authorities should introduce legal and policy reforms to respect and ensure the rights of all those subject to Tunisian jurisdiction and to specify the prohibited grounds of discrimination.

- *Arrest, detention and fair trial rights*

The Constitution's provisions on the right to liberty and the right to fair trial, in particular Articles 27, 29 and 108, do not include specific guarantees contained in the ICCPR. Specifically, Article 29 does not include the right to be brought promptly before a judge or other officer exercising judicial authority, the right to trial within a reasonable time or to release, the right to challenge the lawfulness of any detention before a court, and the right to compensation in the event of unlawful arrest or detention, as provided for in Article 9 of the ICCPR. The Tunisian authorities should ensure that these shortcomings are addressed in the criminal code and the code of criminal procedure, and are consistent with their obligations under international law, including the ICCPR, by providing for all guarantees relating to the right to liberty, to security of person, and to fair and public hearing by a competent, independent and impartial tribunal established by law.

- The principle of legality

Article 28 provides that penalties are individual and are to be imposed only by virtue of a legal provision applicable at the time the criminal offence was committed. However, it does not recognise the international law exception to the principle of non-retroactivity of criminal law enshrined in Article 15(2) of the ICCPR, whereby the principle of non-retroactivity cannot be used to prevent "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations".⁷

The ICJ is concerned that, because some of the most serious crimes under international law, including acts of torture and other ill-treatment, were not properly criminalised under national

⁶ Concluding observations of the Committee on the Elimination of Discrimination against Women on Tunisia, UN Doc. CEDAW/C/TUN/CO/6, para. 15.

⁷ According to Article 15 of the ICCPR "i) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. ii) nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

law, the prosecution of such crimes following the ouster of President Ben Ali has been widely inadequate. The ICJ recommends that Article 28 not be used to prejudice the trial and punishment of those responsible for acts or omissions which constitute crimes under international law, even if these acts or omissions were not crimes under Tunisian law at the time they were committed. The Tunisian authorities should ensure that the new provisions providing for the principles of legality and non-retroactivity of criminal law are not used to shield perpetrators of international crimes from accountability.

- *Limitations and derogations*

A general limitation clause on the rights contained in the Constitution is included in Article 49. It provides that the law will determine the limitations that may be imposed on the exercise of the rights and freedoms guaranteed in this Constitution in a way that does not undermine their essence. Under international law, certain human rights may be subject to limitations but these limitations are themselves subject to strict definitions. The laws establishing the limitations should ensure that the respective rights are not restricted beyond the limits established by international human rights law. At the same time, Article 4(2) of the ICCPR lists provisions of the treaty that are not subject to derogation and the Human Rights Committee has explained that other provisions are non-derogable by implication. Article 80 of the Constitution provides for the conditions required for the declaration of states of emergency. However, it fails to specify that certain rights and freedoms are non-derogable even in states of emergency. Even where a right is not listed in Article 4, this does not mean that it may be subject to any derogation at all. Rather, any limitation imposed by State Parties must be "*strictly required by the exigencies of the situation*" and such measures must not "*involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*" In General Comment No. 29, the Human Rights Committee stated: "*Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.*"⁸

- *Supremacy of international law over domestic law*

Article 20 provides that international treaties ratified by Tunisia are superior to domestic legislation but inferior to the Constitution. Under this provision, the Constitution could be used to narrow the protection offered by international human rights law contrary to Article 27 of the *Vienna Convention on the Law of Treaties* according to which a State Party "*may not invoke the provisions of its internal law as justification for its failure to perform a treaty*". As pointed out by the Human Rights Committee, "*Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.*"⁹

In order to comply with their international obligations, including under the ICCPR, the Tunisian authorities should ensure the supremacy of international law over domestic law and the direct applicability of human rights treaties by Tunisian judges. The supremacy of the Constitution over domestic law should also be recognised as a fundamental underpinning of the protection of human rights and the rule of law.

2. Rule of Law and the Independence of the Judiciary

⁸ General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 2.

⁹ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.4

Compared to the 1959 Constitution, the newly adopted Constitution provides better guarantees for the separation and balance of powers, including by defining and limiting the competences of the legislative, executive, and judicial branches, and providing that 30 Parliamentarians may refer draft laws to the Constitutional Court to assess their compliance with the Constitution.

The Constitution considerably reduces the competences of the President of the Republic during states of emergency and provides a system of checks and balances with regard to the possibility to declare and to terminate states of emergency. The ICJ welcomes in particular the possibility for the Speaker of the Assembly or 30 of its members to refer the matter to the Constitutional Court to determine whether the exceptional circumstances that justified the declaration of a state of emergency are still in place. However, Article 80 does not set a time limit to the state of emergency, does not require a parliamentary vote to renew or extend a state of emergency, does not provide for rights that cannot be derogated from under the state emergency, and does not provide for sufficient judicial guarantees to uphold the rule of law and protect human rights in times of public emergency.

The Tunisian authorities should initiate law and policy reforms to address these shortcomings.

They should also initiate comprehensive and meaningful review and reform of the judiciary.

Judicial independence has long been undermined in Tunisia by the executive branch's systematic and arbitrary interference in judicial affairs. The ICJ welcomes the fact that Article 102 recognises both the institutional independence of the judiciary and the individual independence of judges. However, despite improvements, provisions related to the irremovability of judges, the independence of the Office of the Public Prosecutor (OPP) and the jurisdiction of military tribunals fall short of international law and standards.

- *Security of Tenure*

Article 107 fails to enshrine fully the principle of security of tenure, as it protects judges against arbitrary transfer but does not include a guarantee of security of tenure until a stated retirement age. Security of tenure is the cornerstone for the individual independence of judges as it provides them with full protection when exercising their duties. Article 107 and regulating legislation should be brought in line with the UN Basic Principles on the Independence of the Judiciary, which state: "*Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists*".

- *The Office of the Public Prosecutor*

Article 115 provides that the OPP is part of the judiciary and benefits from the same constitutional guarantees as the rest of the judicial corps. The Constitution thus fails to comprehensively address the situation of the OPP. Under the current legal framework, the Minister of Justice has direct authority over public prosecutors. This lack of institutional independence resulted in an almost total absence of investigations and prosecutions into allegations of gross human rights violations. The ICJ is concerned that Article 115 also falls short of international standards on the separation of the OPP from the judiciary. International law and standards require the public prosecution service to be independent of the judiciary and to be objective and impartial. The UN Guidelines on the Role of Prosecutors specifically provide that the "*office of prosecutors shall be strictly separated from judicial functions.*"¹⁰

¹⁰ UN Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para. 10.

In order to ensure the proper administration of justice, the Tunisian authorities should ensure the functional independence of the OPP from the Executive, in particular by ending the direct authority and control of the Minister of Justice over the OPP and any interference of the Executive in prosecutorial decisions. They should also ensure the independence of the OPP from the judiciary.

- *Military Tribunals*

Article 110 provides that military courts shall have jurisdiction over military crimes and that the jurisdiction, structure, functioning and procedures of military courts will be determined by subsidiary legislation. The ICJ has been deeply concerned at the widespread use of military tribunals to try serious human rights violations that were committed during the January 2011 popular uprising and their exceptionally broad subject matter and *in personam* jurisdiction. Under the Code of Military Justice, the Tunisian authorities should ensure that the jurisdiction of military courts is limited to cases involving members of the military for military offenses only. The Code of Military Justice should be amended to ensure that "military crimes" refers to offences relating to military matters only and that military courts have no jurisdiction to try civilians or to try serious violations of human rights.