

Flawed and Inadequate Algeria's Constitutional Amendment Process

A Briefing Paper

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® Flawed and Inadequate: Algeria's Constitutional Amendment Process - A Briefing Paper

© Copyright International Commission of Jurists
Published in October 2020

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to their headquarters at the following address:

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

Flawed and Inadequate

Algeria's Constitutional Amendment Process

A Briefing Paper

Table of contents

1. Introduction	3
2. The constitutional drafting process.....	4
2.1. Timeframe and transparency.....	5
2.2. Inclusiveness and participation.....	5
3. The content of the draft Constitution	8
3.1. Civilian oversight of the military	8
3.2. The rule of law and the separation of powers.....	10
3.3. The independence of the judiciary.....	12
3.3.1. The Constitutional Court	14
3.3.1.1. Independence of the Constitutional Court.....	14
3.3.1.2. Access to Constitutional Court	16
3.4. Human rights in the draft Constitution.....	16
3.4.1. Scope of Human Rights Provisions	17
3.4.2. Limitations and derogations on human rights.....	24
3.4.3. Enforcement of human rights	26
4. Recommendations	28

1. Introduction

In February 2019, a mass protest movement, also known as *Hirak*, erupted across Algeria after former President Abdelaziz Bouteflika announced his intention to run for a fifth presidential term. Despite attempts by military and political leaders to contain the *Hirak* movement, including by forcing President Bouteflika to resign in April 2019 and by prosecuting dozens of key figures associated with his regime, the protests continued for an entire year. The *Hirak* movement demanded, *inter alia*, structural reform of the political system, which has long been dominated by the People's National Army (L'Armée Nationale Populaire, ANP) and related ruling political and economic elites. Strongly opposed to such demands, including the establishment of a constituent assembly, Ahmed Gaid Salah, former Chief of Staff of the ANP,¹ oversaw the design and enforcement of a transition roadmap that resulted in the December 2019 election of Abdelmadjid Tebboune as the new President of Algeria. The presidential elections and the related transition process were widely viewed by protesters, opposition parties and civil society actors as a sham process aimed at maintaining the status quo and preserving the privileges of the army and ruling elites.²

On 11 January 2020, President Tebboune decreed the establishment of – and subsequently created – a Committee of experts mandated to develop proposals for amending the Constitution and the provisions required to implement them.³ On 7 May 2020, the Committee released a number of draft amendments to the Constitution, which cover, *inter alia*, provisions on fundamental rights and freedoms; separation of powers; independence of the judiciary; the Constitutional Court; transparency and the fight against corruption; and an independent electoral authority.⁴ The draft was reportedly shared with political parties, academics, members of civil society, unions and media outlets for consultation, for their input by 20 June 2020.⁵ The Committee was supposed to take the outcome of the consultations into consideration, and prepare a consensual draft by 30 June 2020.⁶ The final draft was approved by the Algerian Parliament on 10 September 2020, published in the official Gazette on 16 September 2020, and will be submitted to a referendum on 1 November 2020.⁷

Simultaneously and since the start of the movement, dozens of *Hirak* leaders and activists, as well as journalists,⁸ have been arbitrarily arrested and remain in prison.⁹ Such crackdowns have prompted many to question whether genuine political will exists to end the decades-

¹ The Independent Arabia, "Algeria, Supporters of the National Constituent Assembly under Accusations," 9 June 2019, available in Arabic at: <https://www.independentarabia.com/node/31546/-...-أنصار-المجلس-التأسيسي-في-جرمي-الانتهاكات>.

² El Watan, « Le RCD s'offusque du comportement du pouvoir: 'Le taux de participation réel à la présidentielle n'a pas dépassé les 8%,' » 15 December 2019.

³ Presidential decree number (20-03), 11 January 2020, regarding the establishment of a panel of experts mandated to draft proposals to amend the constitution, the Gazette 02, 15 January 2020, available at: <https://www.joradp.dz/FTP/JO/2020/A2020002.pdf>.

⁴ The preliminary project to amend the Algerian Constitution (the draft Constitution), May 2020.

⁵ Elbilad, "Toward extending the parliamentary term to discuss the constitution," 3 June 2010, available in Arabic at: <http://www.elbilad.net/article/detail?id=107724>.

⁶ *Ibid.*

⁷ Aljazeera, "Algerian Parliament adopts draft constitutional reforms," 10 September 2020, available at: <https://www.aljazeera.com/news/2020/9/10/algerian-parliament-adopts-draft-constitutional-reforms>.

⁸ Amnesty International, "Algeria: Appeal court issues outrageous two-year prison sentence against journalist Khaled Drareni," 15 September 2020.

⁹ Human Rights Watch, "Rights Language in Algeria's Draft Constitution No Comfort to Jailed Journalist. President Pledges Wide Consultation on Draft While Reporters, Protest Leaders Locked Up," 30 May 2020, available at: <https://www.hrw.org/news/2020/05/30/rights-language-algerias-draft-constitution-no-comfort-jailed-journalist>.

long legacy of authoritarian rule in the country and bring about real, structural change in Algeria by amending the Constitution.¹⁰

In light of the above context, the International Commission of Jurists (ICJ) is concerned that the process of amending the Constitution falls short of international standards on inclusiveness, participation and transparency. The process undermines the right of all Algerians to take part in the conduct of public affairs, particularly in respect of the form of their Constitution and government, undermining the transitional process in Algeria. Beside the deficient process, the draft amendments to the Constitution provide few guarantees for establishing the rule of law and upholding human rights.

The provisions relating to the military are also inadequate to set up comprehensive civilian oversight over the armed forces, which would serve to reinforce their existing lack of accountability. Additionally, while most of the articles relating to human rights and fundamental freedoms expand the protections accorded under the previous Constitution, they do not fully comply with Algeria's obligations under international law, including in relation to torture and other cruel, inhuman or degrading treatment or punishment, equality before the law, and freedom of thought, conscience and religion. The rights set out in the draft amendments continue to be subjected to unclear limitations, which do not respect the requirement under applicable human rights treaties and standards to be precise, free of ambiguity and necessary in a democratic society. Finally, the draft amendments do not provide sufficient guarantees regarding the independence, impartiality and accountability of the judiciary, the Office of the Public Prosecutor and the Constitutional Court.

This briefing paper analyses the drafting and content of the proposed amendments to the Constitution (draft Constitution) in light of Algeria's obligations under international law and relevant international standards. It further provides a set of detailed recommendations to the Algerian authorities aimed at ensuring the draft Constitution comports with international rule of law and human rights standards, and with a view to establishing a clear break with the practices and policies of the former regime.

Algeria is a party to most of the principal human rights treaties. These include the International Covenant on Civil and Political Rights (ICCPR) and its first Optional Protocol on a communication mechanism; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child its Optional Protocol on the involvement of children in armed conflict and its Optional Protocol on the sale of children, child prostitution and child pornography; the International Convention on the Protection of All Migrant Workers and Members of their Families; and the Convention on the Rights of Persons with Disabilities.

Algeria is also party to regional human rights treaty, including the African Charter on Human and Peoples' Rights (ACHRP) established under the African Union, and the (revised) Arab Charter on Human Rights (ACHR), established under the League of Arab States.

2. The constitutional drafting process

¹⁰ Alaraby Aljadid, "The president of the judges' syndicate: this is a draft constitution for the president not for Algeria," 07 June 2020, available in Arabic at: <https://www.alaraby.co.uk/رئيس نقابة القضاة في الجزائر ينتقد مسودة الدستور>

The ICJ considers that the legitimacy and acceptance of the Constitution necessitates a number of procedural requirements in order to ensure its legitimacy as the foundational governance instrument of the State that guarantees the rule of law and human rights. These procedures must be inclusive and transparent, as provided under international standards.

2.1. Timeframe and transparency

In order to guarantee adequate participation and a consensus-based Constitution, sufficient time, opportunity and transparent procedures for consultations must be provided for by the Algerian authorities.¹¹ Guidance provided by the UN Secretary General on Constitution-drafting suggests that it is necessary to provide sufficient time, opportunity, and transparent procedures to allow for a comprehensive public dialogue that can include all stakeholders without exclusion, and which may lead, consequently, to a consensus-based Constitution.¹²

The Presidential Decree gave the Committee of Experts only two months from the date of its establishment to produce its proposed amendments.¹³ Moreover, the period during which political parties, academics, members of civil society, unions and media outlets could submit their views (the consultation period) ran from 7 May to 20 June 2020. Six weeks is a very short period of time for all concerned and interested stakeholders from various sectors to review the draft, analyze it and provide feedback, especially in light of the fact that the draft was published during the Coronavirus pandemic and accompanying lockdown.

The draft Constitution was purportedly shared with various stakeholders for consultation.¹⁴ However, no information is available about the political parties, members of the civil society and other stakeholders with whom the draft was shared, and how the consultation process was carried out. For instance, no online or other platform were provided for stakeholders and the general public to provide input or feedback on the draft constitution, thus making it difficult to assess the extent to which such feedback has genuinely been taken into consideration. The final draft was not published in the official Gazette until 16 September 2020, six weeks before the referendum.

2.2. Inclusiveness and participation

The Presidential decree of 11 January 2020 establishing a Committee of Experts refers to articles 91-96 and 134 of the current Constitution, which gives the President the authority to sign "presidential decrees" and the "regulatory" authority for matters that do not fall under legislation.¹⁵ The Committee of Experts was composed of 18 members appointed by the President, including six women, whose names were listed in the decree without further information about the criteria and procedure for their selection.

The Right to political participation is protected in the ICCPR, the ACHRP and the ACHR.

Article 25 of the ICCPR, to which Algeria is a State party,¹⁶ guarantees the right of every citizen:

¹¹ Human Rights and Constitution Making (2018).

¹² See, for example, Guidance Note of the Secretary General, United Nations Assistance to Constitution-making Processes, Principle 4.

¹³ Presidential decree (20-03).

¹⁴ Presidency of the Republic: Distribution of the Constitution Amendments Draft, Algeria Press Service, 07 May 2020, available in Arabic at: <http://www.aps.dz/ar/algerie/86924-2020-05-07-14-38-47>.

¹⁵ Presidential Decree (20-03).

¹⁶ Algeria ratified on 12 September 1989.

(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.

In its General Comment No. 25, the United Nations (UN) Human Rights Committee (HRC), which provides the authoritative interpretation of the ICCPR, affirmed:

the conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.¹⁷

The HRC has also recognized that article 25 guarantees that “people have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government;” and that “[c]itizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process.”¹⁸

The HRC has expressed concern when constitutional review processes seem not to have been “conducted with full inclusiveness or under conditions allowing full freedom of debate,” and recommended that “the State party take all the necessary measures to ensure transparency in all stages of the constitutional review process and to guarantee the effective and meaningful participation of all relevant actors, including representatives of opposition parties and the full range of civil society.”¹⁹ It further affirmed that “the State party should ensure that the text of the new Constitution is fully consistent with the Covenant.”²⁰

Article 13 of the ACHPR provides that “[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.” In article 24, the ACHR provides that every citizen has the right to: “(1) freely pursue a political activity; (2) take part in the conduct of public affairs, directly or through freely chosen representatives...”

The UN Human Rights Defenders Declaration highlights that “[e]veryone has the right, individually and in association with others, to have effective access, on a nondiscriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.”²¹

The UN Office of the High Commissioner for Human Rights (OHCHR) has recommended that Constitution processes:

¹⁷ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) CCPR/C/21/Rev.1/Add.7, Para. 5

¹⁸ *Ibid.* Para. 6

¹⁹ Human Rights Committee, Concluding Observations on Sudan, UN Doc CCPR/C/SDN/CO/4, 19 August 2014, para. 6.

²⁰ *Ibid.*

²¹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, United Nations, UN doc A/RES/53/144, 8 March 1999, Article 8.

[b]e structured in such a way that input from different parts of society can be provided without impediments and can be duly taken into consideration. This requires the establishment not only of communication channels but also of other organizational capacities. Moreover, it is vital that the drafting process allow for a free and exhaustive debate on various options for constitutional solutions originating from different segments of society. Finally, it is important that different segments within the constituency have the right to participate in the debate and put forward proposals, and that they be encouraged and enabled to do so.²²

In addition, particular measures may be required to ensure that all stakeholders, including sections of the population who have been marginalized, such as women and minorities, are guaranteed an adequate opportunity to participate in public affairs. Article 7 of the CEDAW, to which Algeria is a State party,²³ requires States to “take all appropriate measures to eliminate discrimination against women in the political and public life of the country.”²⁴

The rights of persons from minority groups, including Amazigh populations, who have been historically marginalized and discriminated against, are protected under article 27 of the ICCPR. As noted by the HRC, article 27 may require “positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”²⁵ As pointed out by the UN Secretary-General:

[c]onstitution-making processes by definition provide opportunities to shape a common vision on the future of a country and entry points for introducing strong anti-discrimination guarantees and normative protection of minorities ... Broad inclusion, including of persons belonging to minorities, can generate space for a genuine national dialogue and confer democratic legitimacy to the resulting constitutional arrangements.²⁶

The ICJ is concerned that the lack of transparency during the consultation process, including whether there was direct communication or discussions with the relevant stakeholders, makes it difficult to assess the extent to which these consultations were meaningful. Furthermore, as mentioned earlier, the consultation process took place in the middle of the Coronavirus pandemic and related restrictions on the right to freedom of assembly, for a short period of time not exceeding six weeks. For these reasons, the ICJ is concerned that the government’s attempts to ensure the effective participation of all relevant stakeholders in the process have been significantly inadequate and limited in both reach and substance. One member of the Committee resigned before the draft was released because it failed to provide

²² Human Rights and Constitution Making, OHCHR, UN doc HR/PUB/17/5, 2018, p.14, available at: https://www.ohchr.org/Documents/Publications/ConstitutionMaking_EN.pdf

²³ Algeria acceded on 22 May 1996.

²⁴ This includes the requirement to ensure that women have the right, on equal terms with men, to, among others, “vote in all elections and public referenda and to be eligible for election to all publicly elected bodies” and to “hold public office;” see also UN Committee on the Elimination of Discrimination against Women, General Recommendation 23, UN Doc A/52/38, 1997, para. 43, which recommends States to “identify and implement temporary special measures to ensure the equal representation of women in all fields.”

²⁵ ICCPR, Article 27: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”. See Human Rights Committee, General Comment No. 23, UN CCPR/C/21/Rev.1/Add.5, 8 April 1994, paras. 6.2 and 7. See also International Convention on the Elimination of Racial Discrimination, Article 5.

²⁶ Guidance Note of the Secretary General on Racial Discrimination and Protection of Minorities, United Nations, November 2014.

comprehensive revisions of the current Constitution, defeating the explicit purpose of the constitutional amendment project.²⁷

The Algerian authorities should take effective steps to ensure that all stakeholders, including, *inter alia*: opposition parties; Civil Society Organizations (CSOs); the Algerian Bar Association; judges; victims of human rights violations and their representatives; representatives of minority groups, including the Amazigh populations; and representatives of other groups that have historically been discriminated against or marginalized, including women, are given the opportunity to participate meaningfully at all stages of the constitutional drafting process, and that their contributions are fully taken into account.

Only a constitutional reform process that allows for requisite public participation and debate to take place can lead to a consensus-based Constitution reflective of the views of large categories of the society. Sufficient time, transparency and consultation mechanisms must therefore be built into the process.

3. The content of the draft Constitution

The drafting of a Constitution following a period marred by the abuse of executive power and widespread human rights violations, including the military, provides a crucial opportunity to mark a departure from the past by creating new governance structures and rules that adhere to the principle of the rule of law and conforms to international human rights law and standards. Providing for civilian oversight over the military, the separation of powers, the independence of the judiciary and the protection of human rights in the new Constitution is essential to ensuring and upholding human rights and the rule of law.

3.1. Civilian oversight of the military

The Algerian Constitution goes some way towards establishing formal, limited civilian oversight over the armed forces. Like the provisions of the current Constitution, article 91 of the draft Constitution provides that the President is the Supreme Commander of the Armed Forces and is in charge of national defence. Articles 92 and 100 vest the President with the power to appoint civil and military officials and to declare war, respectively.

Article 30 limits the role of the ANP to “the consolidating and developing of the Nation’s defensive capabilities; preserving national independence and defending national sovereignty; and protecting the unity of the country and the integrity of its territory.” While article 30 does not explicitly give the armed forces any political powers, it does not prohibit them from exercising such powers. Article 30 is similar to previous constitutional provisions which narrowly defined the role of the army; however this did not prevent the military in practice from playing a pivotal role in the political and economic systems and political life in Algeria.²⁸

For example, according to article 102 of the current Constitution, when the President of the Republic is wholly unable to perform his/her functions due to serious and lasting illness, the Constitutional Council shall suggest that the Parliament declares a state of impediment of the

²⁷ Letter of resignation was published in *Liberte Algeria*, “Révision de la Constitution: démission au comité d’experts (DOCUMENT),” 14 April 2020, available at: <https://www.liberte-algerie.com/actualite/revision-de-la-constitution-demission-au-comite-dexperts-document-337457>; see also, Maghreb Emergent, “Exclusif: L’Assemblée constituante est la seule alternative désormais possible (Fatsah Ouguergouz),” 19 July 2020, available at: <https://maghrebemergent.info/exclusif-lassemblee-constituante-est-la-seule-alternative-desormais-possible-fatsah-ouguergouz/>

²⁸ Carnegie Middle East, “Dalia Ghanem, What will Algeria’s Military Do Next?,” 09 July 2019, available at <https://carnegie-mec.org/2019/07/09/what-will-algeria-s-military-do-next-pub-79470>

President. Parliament may subsequently declare it officially with a majority of two-thirds of its members. However, on 26 March 2019, and in response to the *Hirak* movement's demands for Bouteflika to step down, Ahmed Gaid Salah, the Chief of Staff of the Army at the time, applied article 102 by announcing the state of impediment of President Bouteflika.²⁹ Gaid Salah also announced the process and timeline of the presidential elections after the removal of Bouteflika, emphasizing that anyone opposing elections is "conspiring against the people and the nation which the army will not allow."³⁰

In 1992, after the Islamic Salvation Front (FIS) won a majority of votes in the first round of legislative elections, the army cancelled the electoral process altogether, declared a state of emergency and outlawed the FIS, paving the way for a decade-long civil war³¹ that involved serious human rights violations and crimes under international law, including unlawful killings, torture and other ill-treatment, and the enforced disappearance of more than 7,000 people.³² Algerian security and armed forces bear the responsibility of a significant number of these violations.³³ Officials and members of the Algerian armed forces have been involved in, and are allegedly responsible for, many of these serious human rights violations.³⁴

Since Algeria's independence, the armed forces' influence over the political affairs of the country has gone hand in hand with its control over the country's economy, with the military strongly influencing the policy-making and administration of Algeria's natural resources. In this regard, the ICJ is concerned that the role of the armed forces under amended article 30 in protecting the national sovereignty and independence can be construed to include the protection of the army's influence and control over the country's natural resources, the protection and administration of which should be exclusively civilian.

The outsize influence of the military can also be evidenced by the privileged protections it has been accorded in legal processes. Recently, Algerian activists have been subjected to arbitrary detention and prolonged periods of solitary confinement for publicly criticizing the head of the Algerian army.³⁵ The head of the Workers' Party was sentenced to 15 years in prison in September 2019 for "conspiring" against the army, following a meeting with former intelligence chiefs and the brother of former President Bouteflika to discuss the political situation in Algeria.³⁶

The role of the military has been bolstered by the draft Constitution, which provides that the ANP "defends the vital and strategic interests of the country in accordance with the provisions

²⁹ BBC, "How Algeria's army sacrificed a president to keep power," 6 April 2019, available at <https://www.bbc.com/news/world-africa-47821980>

³⁰ Aljazeera, "Algeria army chief demands presidential election by December," 3 September 2019, available at <https://www.aljazeera.com/news/2019/09/algeria-army-chief-demands-presidential-election-december-190903065124888.html>

³¹ Human Rights Watch, "Time for Reckoning: Enforced Disappearances in Algeria," 26 February 2003, available at <https://www.hrw.org/report/2003/02/26/time-reckoning/enforced-disappearances-algeria>

³² *Ibid.*

³³ A number of cases of enforced disappearance were considered by the Human Rights Committee, which found that Algeria had violated its obligations under the ICCPR, and called for in-depth, thorough and impartial investigations into the violations and the prosecution of the perpetrators, see for example: Human Rights Committee, *Abdelkader Boudjema v. Algeria*, UN Doc CCPR/C/121/D/2283/2013, 1 December 2017. See also, Human Rights Committee, *Malika El Boathi v. Algeria*, UN Doc CCPR/C/119/D/2259/2013, 16 May 2017.

³⁴ Human Rights Committee, "Human Rights Committee considers the report of Algeria, Meeting summary," 05 July 2018, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23336&LangID=E>

³⁵ Amnesty International, "Algeria 2019," , available at: <https://www.amnesty.org/en/countries/middle-east-and-north-africa/algeria/report-algeria/>.

³⁶ *Ibid.*

of the constitution.” Such broad provisions have the potential to encourage and facilitate the military’s intervention in civil and political matters. Initially, this provision was not included in the draft Constitution prepared by the Committee of Experts, but, rather, was added at a later stage in the final draft approved by Parliament.

Against this backdrop, the draft Constitution should provide for explicit provisions prohibiting the military from any form of intervention in, influence or control over political life or the country’s economic affairs or interests. To conform to Algeria’s obligations under international law and standards, the draft Constitution should provide for civilian oversight principles and mechanisms to ensure the effective functioning of the armed forces, including by ensuring that they abide by the law and are held to account.

In Resolution 19/36 on human rights, democracy and the rule of law, the UN Human Rights Council highlighted the need to ensure “the military remains accountable to relevant national civilian authorities.”³⁷ The UN HRC has also persistently pointed to the need to subject the armed forces to effective control by civilian authorities. The HRC previously expressed concerns about “the lack of full and effective control by civilian authorities over the military and the security forces,”³⁸ as well as “the lack of a clear legal framework, defining and limiting the role of the security forces and providing for effective civilian control over them.”³⁹

A recent example of good practice in this regard comes from Tunisia, where the Tunisian House of Representatives allocated the responsibility to ensure civilian oversight over armed forces to a specific parliamentary commission.⁴⁰ It can also be found in article 4 of The Inter-American Democratic Charter, which states that the “constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the Rule of Law on the part of all institutions and sectors of society are equally essential to democracy.”⁴¹

The drafting of the new Constitution offers a unique opportunity to fully confront the issue of civilian control over, and the accountability of, the armed forces in Algeria. It also provides an opportunity to ensure appropriate scrutiny and transparency over the economic interests of the armed forces, and to guarantee that its role is limited to national defence.

3.2. The rule of law and the separation of powers

The principle of the separation of powers is a bedrock rule of law principle. As observed by the HRC, implementing the rule of law effectively and ensuring the clear separation of the legislative, executive and judicial branches of government is vital for the protection of human rights and the consolidation of democracy.⁴² The UN Special Rapporteur on the independence of judges and lawyers has also affirmed that the “[s]eparation of powers, the rule of law and the principle of legality are inextricably linked in a democratic society.”⁴³ As a basic tenet of

³⁷ Human Rights Council, UN Doc A/HRC/Res/19/36, 19 April 2012, para. 16(j)(vi). See also UN Commission on Human Rights, Resolution 2000/47, UN Doc E/CN.4/RES/2000/47, 25 April 2000, para.1(c)(ix).

³⁸ Human Rights Committee, Concluding Observations: El Salvador, UN Doc CCPR/C/79/Add.34, 18 April 1994, part 4.

³⁹ Human Rights Committee, Concluding Observations: Romania, UN Doc CCPR/C/79/Add.11, 29 July 1999, para. 9.

⁴⁰ See Tunisian House of Representatives’ website, Commission of Security and Defense, available at: http://www.arp.tn/site/dep/AR/liste_dep_commissions.jsp?cc=621

⁴¹ The Inter-American Democratic Charter, 11 September 2001, article 4.

⁴² Human Rights Committee, Concluding Observations: Slovakia, UN Doc CCPR/C/79/Add.79, 4 August 1997, para. 3.

⁴³ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/HRC/14/26, 9 April 2010, para.17. See also Commission on Human Rights, Resolution 2002/46, UN Doc E/CN.4/RES/2002/46, 23 April 2002, para. 1.

the rule of law, the functioning separation of powers principle is particularly critical in times of transition. As noted by the Special Rapporteur on the independence of judges and lawyers, “[u]nderstanding of, and respect for, the principle of the separation of powers is a sine qua non ingredient for democratic States and which is, therefore, of cardinal importance for countries in transition to democracy- which heretofore have been typically characterized by precisely the absence of a separation of powers.”⁴⁴

Part 3 of the draft Constitution addresses the three branches of government, providing chapters on the President and the cabinet, the Parliament and the judiciary. Despite this formal recognition, the separation of powers principles have continuously been undermined in Algeria by the disproportionate concentration of powers in the hands of the President of the Republic, the marginalization of the legislature and the interference of the executive in judicial affairs.

In Algeria, the executive has systematically exercised comprehensive control over the legislature and the judiciary. Within the executive, most powers are concentrated in the hands of the President. The draft Constitution vests even more powers in the President. Pursuant to article 84 of the draft Constitution, as the head of State, the President of the Republic shall “embody the unity of the Nation,” shall be the guardian of the Constitution and, as discussed in section 4, is the Supreme Commander of the Armed Forces and in charge of the national defence. Moreover, the President appoints and dismisses the Prime Minister or Chief of Government at will⁴⁵ and, under article 121, has the authority to appoint one-third of the members of the Council of the Nation (upper chamber of the Parliament). The President appoints: members of the government (ministers) following “suggestions” by the Prime Minister;⁴⁶ the head of the Supreme Court (the higher ordinary court);⁴⁷ the head of the State Council (the higher administrative court);⁴⁸ the head of the Court of Accounts (a body assigned to monitor public property and money);⁴⁹ judges;⁵⁰ and the head of the Constitutional Court.⁵¹ The President is still the head of the High Judicial Council (HJC).⁵² The President “has the right” to initiate constitutional amendments under article 219, and to then refer the amendment to the Parliament for voting, whereas the Parliament can only “suggest” constitutional amendments to the President who “can” submit it to a referendum under article 222.

The President has full authority to make unilaterally enforceable regulations according to article 91 of the draft constitution, whereas the Prime minister or head of Government are limited to implementing laws and regulations. Furthermore, article 142 of the draft Constitution provides that the President has the authority to effectively legislate via ordinances on urgent matters in the event of a parliamentary vacancy or holiday. No definition or description is provided as to what might constitute an “urgent matter,” carrying a significant risk of having the President undertaking wide, discretionary and unchecked legislative actions. Article 160 of the draft Constitution grants the Parliament the power to interrogate the government on any issue of “national significance,” as well as the status of the implementation of a certain law. However, article 151 vests the President with the

⁴⁴ Report of the special Rapporteur on the independence of judges and lawyers, submitted in accordance with Commission on Human Rights resolution 1994/41, UN Doc E/CN.4/1995/39, 6 February 1995, para. 55.

⁴⁵ Draft Constitution, article 91(5).

⁴⁶ Draft Constitution, article 92.

⁴⁷ Draft Constitution, article 92.

⁴⁸ Draft Constitution, article 92.

⁴⁹ Draft Constitution, article 199.

⁵⁰ Draft Constitution, article 92.

⁵¹ Draft Constitution, article 186.

⁵² Draft Constitution, article 180.

unchecked, unlimited power to dissolve the People's National Assembly (the lower chamber of the Parliament) or call for early parliamentary elections, without limiting this power to specific circumstances. Unlike the government, the President is not accountable to any other power. Moreover, neither the Parliament nor the Constitutional Court are competent to initiate any impeachment procedure against the President.

For the Constitution to adequately entrench the rule of law and present a clean break from decades of authoritarianism, it should provide for specific provisions that clearly delimit the competencies of each branch of the State in accordance with the principles of the rule of law and the separation of powers. By virtue of this separation, each branch may not interfere with the authority and responsibilities of other branches. Each branch should act as a check on any abuse of power by the other branches.

One of the main goals of the establishment of the Committee of Experts by President Tebboune was to make proposals responding to popular demands to build a rule of law State based on a balance of powers and human rights.⁵³ According to the explanatory note of the draft Constitution, restricting the President's powers would result in changing the nature of the political system, which falls outside the mandate of the Committee.⁵⁴ The ICJ believes the Committee did not effectively use its mandate to consolidate the rule of law and the separation of powers in Algeria, and that the resulting draft Constitution which consolidates decades of unbridled presidential powers, runs counter to the very purpose of "deepening the rule of law."⁵⁵ Given Algeria's history of abuse of such powers, the draft Constitution should be amended to include adequate safeguards and mechanisms against any abuse of power by the President and other members of the executive, as well as the legislative and judicial branches of government.

3.3. The independence of the judiciary

The independence of the judiciary is another fundamental component of the rule of law, linked to separation of powers. The right to a fair hearing by an independent, impartial and competent tribunal established by law is a core element of the administration of justice based on the rule of law.

In its concluding observations on the fourth periodic report of Algeria in 2018,⁵⁶ the UN HRC noted with concern that the independence of the judiciary was not sufficiently guaranteed because the executive played a significant role in the organization of the judicial branch. The HRC highlighted five main concerns over Organic Law No. 04-11 of 2004 on the organization of the judiciary, including the fact that: (1) senior judges can only be appointed by presidential decree; (2) judges are appointed by residential decree based on recommendations by the Minister of Justice after deliberation with the HJC; (3) judges become tenured only after serving for 10 years; (4) judges who are serving in the prosecution office are under the complete authority of the Minister of Justice, who may reassign them; and (5) dismissals and compulsory retirement take effect by presidential decree and that the other disciplinary measures are ordered by the Minister of Justice.⁵⁷

Against this background, in November 2019, the ICJ called on the Algerian authorities to reverse the decision of the Minister of Justice to transfer 2,998 judges allegedly relating to

⁵³ Explanatory note of the draft Constitution released in May 2020, p2.

⁵⁴ *Ibid*, P. 6.

⁵⁵ *Ibid*, p. 2.

⁵⁶ Human Rights Committee, Concluding observations: Algeria, UN Doc CCPR/C/DZA/4 , 17 August 2018.

⁵⁷ *Ibid.*, p. 8-9.

their demands for the establishment of the rule of law and the end of the executive's control over the judiciary.⁵⁸

The draft Constitution does little to end such control and uphold judicial independence. By virtue of article 172, the draft would, to some extent, provide for the irremovability of judges, stating "[a] judge may not be transferred or removed or dismissed or disciplined except in the cases and with the guarantees provided for by the law, based on a reasoned decision from the High Judicial Council." This provision, however, still falls short of the universal standard contained in the UN Principles on the independence of the judiciary, which stipulates that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties.⁵⁹ Security of tenure is the cornerstone of the independence of judges at the individual level as it provides them with full protection when exercising their duties. The draft Constitution should therefore unequivocally recognize the irremovability of judges as set forth in international standards.⁶⁰

In addition, article 180 provides that it is the High Judicial Council that guarantees the independence of the judiciary. While this is a positive development in principle, it is undermined by the nature and composition of the HJC itself. Article 180 also provides that the President of the Republic is the president of the HJC. Under the draft Constitution, the HJC is composed of:

- The head of the Supreme Court as a vice president;
- The head of the State Council;
- Two judges from the Judges' Syndicate;
- The head of the National Council for Human Rights;
- 15 judges elected by their peers, including from the Supreme Court, the State Council Courts of Appeal and tribunals of first instance;
- Six non judicial members, selected based on their qualifications, two by the President and four by the Parliament (two by the head of each chamber).

The ICJ welcomes the fact that the HJC's composition provided for by the draft Constitution is pluralistic and that the majority of its members are judges elected by their peers, in accordance with international standards.⁶¹ With a view to enhancing the institutional independence of the HJC, however, the President of the Republic should be removed from the membership of the HJC, and divested of any role in appointing judicial and non-judicial members of the HJC, as such a role and membership increases the possibility, and indeed likelihood, of political influence over this body. The (former) UN Special Rapporteur on the independence of judges and lawyers has advised that bodies in charge of protecting judicial independence and promoting judicial accountability should "preferably be composed entirely

⁵⁸ ICJ, "Algeria: reverse mass, arbitrary transfer of judges," November 2019, available at <https://www.icj.org/algeria-reverse-mass-arbitrary-transfer-of-judges/>.

⁵⁹ UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 18.

⁶⁰ UN Basic Principles, *supra*, Principle 13.

⁶¹ See for example, article 9 of the Universal Charter of the Judge (Appointment of judges "should be carried out by an independent body, that includes substantial judicial representation"), approved by the International Association of Judges on 17 November 2009. See, similarly, the European Charter on the Statute for Judges, principle 1.3 ("In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute 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") and the Council of Europe Committee of Ministers Recommendation (2010) 12, adopted 17 November 2010, para. 46.

of judges, retired or sitting;" and while "some representation of the legal profession or academia" is an option, "no political representation should be permitted."⁶²

The independence of the judiciary must be guaranteed pursuant to Algeria's international legal obligations, including under article 14 of the ICCPR; articles 26 of the ACHPR (States parties to the present Charter shall have the duty to guarantee the independence of the Courts); and articles 12 and 13 of the ACHR. Article 12 of the latter provides, "[t]he States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats."

An independent judiciary is crucial in order to uphold the rule of law and ensure the effective enforcement of human rights and fundamental freedoms. The HRC has repeatedly stressed that States adopt legislation and measures to ensure a clear demarcation between the competences of the executive and judicial branches of government, including as a safeguard against undue executive interference in areas that are inherent judicial functions.⁶³

While States have wide latitude over the arrangement of the justice sector and enforcing independence, there must be effective procedures and mechanisms that serve to ensure the independence of the judiciary as a system, as well as the independence and impartiality of individual judges. The UN Principles on the Independence of the Judiciary affirm, "[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."⁶⁴

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Union, specifically provide, "[t]he process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary."⁶⁵

The draft Constitution should therefore provide for an independent HJC charged with the administration of, or oversight over the functions relating to the recruitment, promotion, transfer and discipline of judges, and with full guarantees of institutional, administrative and financial independence from the executive. The draft Constitution should also ensure that the HJC be: (i) independent from the executive, including by amending its composition to exclude the President from its membership and ensuring that the majority of members are from the legal profession and are elected by judges; (ii) pluralistic and gender representative; (iii) competent to decide on all issues relating to the career of judges; and (iv) empowered to uphold the independence of the judiciary.

3.3.1. The Constitutional Court

3.3.1.1. Independence of the Constitutional Court

⁶² UN Special Rapporteur on the Independence of Judges and Lawyers, *Report on Accountability*, UN Doc A/HRC/26/32, 28 April 2014, para. 126. See also Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/11/41, 24 March 2009, para. 28.

⁶³ Human Rights Committee, Concluding Observations: Romania, UN Doc CCPR/C/79/Add.111, 28 July 2010, para. 10. See also Concluding Observations: Peru, UN Doc CCPR/CO/70/PER, 15 November 2000, para.10; Concluding Observations: El Salvador, UN Doc CCPR/C/79/Add.34, 18 April 1994, para. 15; Concluding Observations: Tunisia, UN Doc CCPR/C/79/Add.43, 23 November 1994, para. 14; and Concluding Observations: Nepal, UN Doc CCPR/C/79/Add.42, 10 November 1994, para. 18.

⁶⁴ UN Basic Principles, Principle 2.

⁶⁵ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and Peoples' Rights, 2003. A(1)(h).

The Constitution serves to safeguard the rule of law and separation of powers. It is essential that the judicial body tasked with ensuring the implementation and respect for the Constitution and constitutional principles is fully independent, has a comprehensive mandate, is accessible to all individuals and has the legal and practical resources needed to conduct an effective review of the constitutionality of legislation and executive action. Further, a strong independent Constitutional Court is vital for the protection of human rights and fundamental freedoms that are guaranteed as constitutional rights.

The preamble of the draft Constitution recognizes the primacy of the constitution over “all,” and contains basic laws that guarantee individuals and groups rights and freedoms. In one of the key positive developments, the draft Constitution establishes a Constitutional Court to ensure compliance with provisions of the Constitution.⁶⁶ The Constitutional Court would be composed of 12 members, including: four members appointed by the President (including the head of the court); one by the Supreme Court; one by the State Council; and six members with expertise in constitutional law elected through universal suffrage. The President of the Republic is to define the conditions and process of their election. According to article 187, members of the Constitutional Court must be 50 years of age by the time of their appointment or election; enjoy civil and political rights and not have been convicted of a crime punished by deprivation of liberty; have at least 20 years of legal experience; and not be members of a political party. They would not be entitled to hold any other job or be members of any body or organization upon their election or appointment.

The ICJ is concerned that the criteria and the process for selecting and appointing the members of the Constitutional Court fall short of international standards on the independence of the judiciary. International law requires that judges be selected on the basis of objective criteria and transparent procedures guaranteeing the Court’s and judges’ independence and impartiality,⁶⁷ to which the draft Constitution makes no explicit reference. Constitutional Courts are judicial bodies governed by the same standards of independence applicable to any other body of the judiciary, and there is no reason to exempt them from the standards governing other members of the judiciary.⁶⁸ The UN Special Rapporteur on the Independence of Judges and Lawyers has repeatedly expressed concerns about the risk of politicization when legislative or executive authorities select and appoint members of the judiciary.⁶⁹

In this regard, the ICJ is concerned that the draft Constitution does not provide sufficient guarantees to protect against such politicization. Not only does it allow the President to appoint one-third of the Court’s members, including its President, without any form of legislative consideration or consent, but also allows the President to decide on the criteria and procedures for electing six other members of the Court. Such criteria and procedures must be clarified, detailed and provided for by the Constitution or the law. They should not be left to the sole discretion of the President. While many of the precise criteria and modalities of

⁶⁶ Draft Constitution, article 185.

⁶⁷ ICJ, Practitioners Guide No. 1 on “International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors,” 2007, (ICJ Practitioner’s Guide No. 1).

⁶⁸ For example, the Council of Europe, in its recommendation on judicial independence, efficiency and responsibilities, states that “[t]his recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional matters,” see recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, 17 November 2010, Chapter 1, para. 1. Similarly, the Inter-American Court of Human Rights upheld the importance of guaranteeing the independence of Constitutional Court judges, see Inter-American Court of Human Rights, Case of the Constitutional Court v. Peru, Judgment of 31 January 2001, para. 64(a)-(b).

⁶⁹ Report of the Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/HRC/11/41 (24 March 2009), paras. 23-34, 97.

judicial appointments may be left to rules defined in legislative statute, they should not be reserved to the sole competency of the President.

3.3.1.2. Access to the Constitutional Court

The draft Constitution grants individuals indirect access to the Constitutional Court through referrals by the Supreme Court or the State Council, where parties to a case claim that an applicable law or regulation violates their rights and freedoms as protected by the Constitution.⁷⁰ The provision of such access could help enforce and bring into effect the rights and liberties protected by the Constitution. Nonetheless, the ICJ encourages the inclusion of a procedure through which anyone can directly challenge the constitutionality of a law or action that infringes on their constitutionally protected rights in the Constitution.

Direct access to courts, including Supreme and Constitutional courts, for the protection of fundamental rights and freedoms from unconstitutional acts or actions through "*jucio de amparo*" or "*writ of amparo*" is a common feature of the Latin American constitutional tradition.⁷¹ In Europe and Africa, several countries have adopted a system of individual constitutional complaints, including Germany,⁷² Spain,⁷³ Poland,⁷⁴ and South Africa.⁷⁵

If direct access is not provided for, the ICJ urges the authorities to ensure that the two-layered admissibility assessment prior to referral to the Constitutional Court is reformed, as it places an undue burden on the litigants and may undermine their right to an effective and accessible judicial remedy to address violations of their constitutional rights. The ICJ has researched and documented situations in which lower courts serve as gatekeepers, which has resulted in litigants being blocked from challenging the constitutionality of laws before Constitutional Courts.⁷⁶

Accordingly, the ICJ calls on the Algerian authorities to ensure that the criteria for admissibility of constitutional challenges are clearly defined in the law, and procedures for accessing the Constitutional Court are not unduly restrictive. Inspiration can be drawn from the positive example of Tunisia, where, by virtue of article 56 of the Law on the Constitutional Court, "the ordinary judge must refer the matter immediately to the Constitutional Court" without it being subject to any form of review by higher courts, such as the Court of Appeal and the Court of Cassation.⁷⁷

3.4. Human rights in the draft Constitution

⁷⁰ Draft constitution, article 195.

⁷¹ Mexico's Constitution, articles 103 and 107; Political Constitution of Chile, article 20 ("*recurso de protección*"); Colombian Constitution of 1991 ("*acción de tutela*"), article 86; Costa Rica's Political Constitution, article 48, and Law on Constitutional Jurisdiction, Article 18; Argentina's Code of Constitutional Procedure, article 35.

⁷² German Basic Law, article 93 Sec. 1 No. 4a (Verfassungsbeschwerde).

⁷³ Constitution of Spain, articles 42 and 43.

⁷⁴ Constitution of Poland, article 79.

⁷⁵ Constitution of South Africa, article 167.

⁷⁶ ICJ, "*Egypt's Judiciary: Tool of Repression, lack of effective guarantees of independence and accountability*," September 2016, p. 113, available at <https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf>

⁷⁷ Law No. 50 of 2015 of 3 December 2015 related to the Constitutional Court; see also ICJ, "*Tunisia Draft Law on the Constitutional Court in light of international law and standards*," November 2015, p. 16, available at: <https://www.icj.org/wp-content/uploads/2015/11/Tunisia-Draft-Law-Const-Court-Advocacy-Analysis-Brief-2015-ENG.pdf>

3.4.1. Scope of human rights provisions

The current Constitution guarantees a number of human rights, most of which are protected in the core universal and regional human rights treaties to which Algeria is a State party. Despite these constitutional guarantees and international legal obligations, there have been widespread, and often systematic, human rights violations committed in the country since its independence in 1962. Such violations include, *inter alia*, torture and other ill-treatment, unlawful killings, arbitrary arrests and detention, and unfair trials.⁷⁸

Against this backdrop, and the calls of activists and human rights defenders in Algeria for more effective human rights protections, the draft Constitution incorporates a broader range of human rights and fundamental freedoms, including: the right to life;⁷⁹ freedom of the press, freedom of assembly and association; the right to privacy and to access information; and the rights of the elderly and persons with disabilities. It further enshrines protections for women against all forms of violence, and the right to a remedy for preventive detention. Finally, it is worth underscoring that freedom of conscience provided for in article 42 of the current Constitution was not included in article 51 of the draft Constitution.

The enumeration of rights contained in the draft Constitution, however, is still not comprehensive. In their present form, these rights are not always consistent with international human rights law and standards in terms of both definition and scope. The analysis provided in the forthcoming sections is not exhaustive and addresses only a few of rights recognized by the draft Constitution.

3.4.1.1. The right to life

The right to life is protected under a number of treaties to which Algeria is a State party, including the ICCPR (article 6), the Convention on the Rights of the Child (article 6), the ACHPR (article 4) and ACHR (article 5). The nature and scope of the right to life as protected under the ICCPR is set out in detail by the UN HRC's General Comment No. 36.⁸⁰ No derogation from the right to life is permitted, even in times of emergency.⁸¹ Article 38 of the draft Constitution provides that the right to life is an inherent human right, protected by the law, and that no one may be arbitrarily deprived of it. The language of this article is consistent with Article 6 of the ICCPR and Article 5 of the Arab Charter providing, "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his/her life." This right does not exist in the current Constitution and was added to the draft Constitution by the Committee of Experts.

However, the ICJ regrets that the draft Constitution does not prohibit the death penalty as a violation of the right to life. While the death penalty is not prohibited in law, the country has maintained an official moratorium on executions since 1993. Algeria has also supported and voted in favour of repeated resolutions issued by the UN General Assembly calling for a universal moratorium on the death penalty with a view to realizing its abolition, most recently

⁷⁸ See for example: Amnesty International, "Algeria: an Open Human Rights Letter to the United Nations on the Crackdown on Journalists and Activists in Algeria," 24 September 2020, available at:

<https://www.amnesty.org/en/documents/mde28/3115/2020/en/>; Amnesty International, "Algeria: End Relentless Targeting of Government Critics," 04 December 2015, available at:

<https://www.amnesty.org/en/documents/mde28/2951/2015/en/>

⁷⁹ Draft Constitution, article 38.

⁸⁰ Human Rights Committee, General comment No. 36 on Article 6: right to life, 3 September 2019, UN Doc. CCPR/C/G/36.

⁸¹ ICCPR, Article 4(2); Arab Charter on Human Rights, 22 May 2004 Article 4(2).

on 17 December 2018.⁸² The ICJ considers that the adoption of a revised Constitution presents a prime opportunity for Algeria to put its expressed aim of abolition into effect by enshrining it in the Constitution. The ICJ opposes the death penalty unconditionally and in all circumstances, and considers that its imposition in all cases is a violation of the right to life and the prohibition of cruel, inhuman or degrading punishment.

The ICJ strongly recommends the inclusion of a clear prohibition on the use of the death penalty in the draft Constitution.

3.4.1.2. The prohibition of torture and other ill-treatment

The right to be free from torture and other cruel, inhuman or degrading treatment or punishment is guaranteed under the Convention against Torture (CAT), the ICCPR (article 7), the ACHPR (article 5) and the ACHR (article 8). Pursuant to article 39 of the draft Constitution, "the inviolability of the human being shall not be infringed. Any form of physical or moral violence or violation of dignity shall be prohibited and punishable by law. Torture or cruel, inhuman, or degrading treatment, including human trafficking, shall be punishable by law." Even though article 39 is a positive step towards prohibiting, criminalizing and punishing torture and other ill-treatment, the draft Constitution should be amended to include the prohibition of cruel, inhuman or degrading punishment. In addition, it should be amended to include a definition of torture that meets the requirements of article 1 of the CAT, to which Algeria is a State party."⁸³

3.4.1.3. The right to liberty and security of person

The right to liberty and security of the person is protected under the ICCPR (article 9), the ACHPR (article 6) and the ACHR (article 14).

Article 44 of the draft Constitution provides that no person shall be arrested, detained and prosecuted other than as provided for by the law. It also makes it mandatory to inform persons of the reason(s) for their arrest, providing that the law shall punish acts of arbitrary detention, and renders pre-trial detention an "exceptional measure." Under article 9(1) of the ICCPR, to which Algeria is a State party, "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."⁸⁴ Similar provisions are included in the ACHR,⁸⁵ which expressly designate the right to challenge lawfulness of detention before a court as non-derogable, even in situations of extreme emergency.⁸⁶

⁸² Moratorium on the use of the death penalty, resolution adopted by the General Assembly on 17 December 2018, UN doc A/RES/73/175, 23 January 2019.

⁸³ CAT, article 1 stipulates: "[t]he term 'torture' means 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 for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Algeria acceded to the CAT on 12 September 1989.

⁸⁴ See also Article 6 of the African Charter of Human and Peoples' Rights; Article 17(2) of the Convention on Enforced Disappearance, Article 37(b) of the Convention on the rights of the Child, Article 16(4) of the Migrant workers convention, and section M(1)(b) of the Principles on Fair Trial in Africa. See also Human Rights Committee, General Comment No. 35, CCPR/C/GC/35, 16 December 2014, (HRC GC No. 35).

⁸⁵ Arab Charter, article 14.

⁸⁶ Arab Charter, articles 4(2).

Given its fundamental nature, the right to liberty and security of person should be expressly recognized in the draft Constitution, including the prohibition of any deprivation of liberty that is not in accordance with the grounds and procedures specified by law and the right to challenge the lawfulness of detention (*habeas corpus*).

In light of the above, article 44 of the draft constitution should be amended to include all the elements provided for in the article 14 of the ACHR, including:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.
2. No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.
3. Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.
4. Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.
5. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule.
6. Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.
7. Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.⁸⁷

3.4.1.4. The right to equality and non-discrimination

The principle of non-discrimination is protected under all human rights treaties, including those to which Algeria is a State party. In addition to these specific protections, article 26 of the ICCPR provides that:

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 37 of the draft Constitution provides, "all citizens shall be equal before the law and shall be guaranteed the right to equal protection. There shall be no pretext for discrimination on the basis of birth, race, gender, opinion, or any other personal or social condition or situation." In its current form, the draft Constitution provides not only for "equality before the law," but also for the "equal protection of the law". While this is a positive step, article 37 is non-compliant with Algeria's obligations concerning the grounds of prohibited discrimination.

⁸⁷ Arab Charter, article 14.

While various instruments and subsequent jurisprudence provide for a different enumeration of express grounds, all of these are non-exhaustive, and include “other status” to signify that discrimination on any status grounds is prohibited. Contemporary human rights recognizes at least race, colour, sexual orientation or gender identity, age, gender, religion, language political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or other status.⁸⁸ Optimally, these should be expressly protected. but even if the Constitution does not expressly mention all of these grounds, it must include “other status.”

Article 50 of the draft Constitution grants every “foreigner” the protection of the law to his/her person and property, and prohibits the expulsion of a foreigner except as provided for by the law or an international convention. It further prohibits the expulsion of a person who has legally been granted protection under the asylum law. While these protections are important and should be maintained, the ICJ is concerned that numerous articles exclude non-citizens from the protection of the law. Article 37 provides, “[a]ll citizens are equal before the law,” and a significant number of articles only refer to “citizens,” excluding non-citizens from their scope of protection. Such exclusions are inconsistent with Algeria’s obligations under all of the human rights treaties to which it is a State party, which, with few exceptions, explicitly afford protections to everyone, and not only citizens.

As affirmed by the UN HRC, under the ICCPR, “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”⁸⁹ The only exception in the ICCPR is set out in article 25, which explicitly applies to “citizens,” in relation to the rights to take part in the conduct of public affairs, to vote and be elected in elections, and to have equal access to public services. The Committee on Economic, Social and Cultural Rights (CESCR) has emphasized, “[t]he ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”⁹⁰

Article 63 of the draft Constitution provides that the State facilitates the “citizens’” access to water, health and housing. Such guarantees should be extended to non-citizens, and the reference to “citizens” should be removed in the articles relating to, *inter alia*, the right to equality before the law (article 37); freedom of movement (article 49); the right to access information and documents (article 55); the right to housing (article 63); the right to a healthy environment (article 64); and the right to file complaints to public authorities regarding acts that violate their “basic rights” (article 77). Provisions relevant to the right to work (article 66) and other economic rights should be reviewed to ensure they conform with article 2(3) of the ICESCR, which provides, “[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

3.4.1.5. Equality between women and men

⁸⁸ ICJ, “the Tunis Declaration on Reinforcing the Rule of Law and Human Rights,” March 2019, p. 3, available at: <https://www.icj.org/icj-congress-2019-the-tunis-declaration-video/>

⁸⁹ Human Rights Committee, General Comment No. 15, UN Doc HRI/GEN/1/Rev.1, 30 September 1986, para. 2.

⁹⁰ CESCR, General Comment No. 20, UN Doc HRI/GEN/1/Rev.1, 30 Sep 1992, para. 30.

As mentioned in the previous section, article 37 of the draft Constitution provides for the right to equality before the law and the prohibition of discrimination for reasons relating to origin, race, sex, opinion or any other personal or social circumstance. Article 40 of the draft Constitution ensures the protection of women from all forms of violence in public places and circumstances in both the professional and private domains, and provides for legal aid for victims of such violence. The right of women to access remedies and “free” legal aid was purportedly provided for in the draft adopted by the Committee of Experts, but removed from the draft approved by Parliament. Article 68 further provides that the State is obliged to guarantee equality between men and women in the labour market, and to encourage appointing women in leadership positions in public departments, administrations and institutions. While these articles are a positive step towards recognizing and ultimately addressing the endemic, systemic discrimination against women in Algeria,⁹¹ they fall short of international standards and Algeria’s obligations under international law.

Article 1 of the CEDAW provides:

[D]iscrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2 of the CEDAW further requires States Parties to:

Embody the principle of 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.

In addition, article 5(a) of the CEDAW encourages States to:

Take appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

In its General Comment No. 19, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) recommended that States take “preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women.”

Articles 40 and 68 of the draft Constitution should accordingly be amended to provide for effective measures and mechanisms so as to ensure gender equality and eliminate all forms of discrimination against women, including by providing for the establishment of national institutions aimed at protecting and promoting women’s rights and gender equality, and by adopting temporary special measures aimed at accelerating *de facto* equality between men and women, including quota systems.

3.4.1.6. *Minority rights*

⁹¹ Committee on the Elimination of Discrimination against Women, Fifty-first session concluding observations on Algeria, UN Doc CEDAW/C/DZA/CO/3-4, 23 March 2012.

In addition to the non-discrimination and equal protection provisions of human rights treaties, including article 2 and 26 of the ICCPR, article 3 of the ACHR, article 2 of the ACHPR, and the specific protections of groups under treaties such as the ICERD, the CEDAW and the CRPD, article 27 of the ICCPR enshrines specific protections for minority groups, stating: “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” This is reinforced by the UN Declaration on the Rights of Persons belonging to National or Ethnic, Linguistic or Religious Minorities.⁹²

Article 4 of the draft Constitution provides that Tamazight is “a” national and official language. However, article 3 states that Arabic is “the” official language of the State. Even though acknowledging Tamazight as an official language is a positive development, the draft Constitution falls short of recognizing and addressing the State-sanctioned discrimination against people speaking Tamazight.

Discrimination against certain minority groups in Algeria, including the Amazigh populations, has been an issue for decades.⁹³ The CERD Committee expressed concerns in 2017 that Tamazight cannot be used in all government offices, courts, social services or other state services, and that some families continue to be denied the possibility of registering their children with Amazigh first names. The Committee also noted its concern about the reported destruction of historic sites of cultural significance to the Amazigh population.⁹⁴

In addition to the specific protections for minorities afforded by virtue of article 27 of the ICCPR, in General Comment No. 23, the HRC stated that article 27 requires state authorities to:

ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.⁹⁵

The HRC further stated, “positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language.”

Article 15 of the ICESCR protects the right of everyone to, *inter alia*, “take part in cultural life.” The UN Minorities Declaration⁹⁶ affirms the rights of minority persons to, among other things: participate effectively in cultural, religious, social, economic and public life (art. 2 (2)); participate effectively in decisions which affect them on the national and regional levels

⁹² UN Declaration on the Rights of Persons belonging to National or Ethnic, Linguistic or Religious Minorities, adopted by the UN General Assembly resolution 47/135, 18 December 1992.

⁹³ In its 2017 concluding observations, the Committee on the Elimination of Racial Discrimination (CERD Committee) expressed concern over reported instances of racist hate speech by public officials and in the media directed against certain Amazigh groups and migrants. The CERD Committee was further concerned that such speech may have led to a climate conducive to acts of racially motivated violence. See CERD, Concluding observations on the combined twenty-first periodic reports of Algeria, 21 December 2017, UN Doc CERD/C/DZA/CO/20-21, p. 11.

⁹⁴ *Ibid.*

⁹⁵ Human Rights Committee, General comment 23, UN Doc HRI/GEN/1/Rev.1/Add.5, 8 April 1994), para 6.1.

⁹⁶ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Resolution 47/135, UN Doc A/RES/47/135, 3 February 1993.

(art. 2 (3)); and the requirement for states to create favourable conditions to enable minorities to express their characteristics and to develop their culture, language, religion, traditions and customs (art. 4 (2)).

To ensure that articles 3 and 4 of the draft constitution are fully in line with Algeria's obligations under international law, the draft Constitution should explicitly provide that minorities, including the Amazigh population, have enforceable rights to use and learn their language, enjoy their own culture and to participate in cultural, religious, social, economic and public life, and participate effectively in decisions that affect them.

3.4.1.7. Economic, social and cultural rights

Civil, political, economic, social and cultural rights should be recognized, guaranteed and protected by the draft Constitution on an equal footing. Under international law, "[a]ll human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."⁹⁷

Algeria became a party to the ICESCR in 1989 and must therefore comply with its obligations to respect, protect and fulfil the rights guaranteed in the Covenant. In this regard, the draft Constitution guarantees a number of ICESCR rights. Article 64 guarantees the right to a healthy environment within a sustainable development framework. Articles 65 and 66 guarantee the right to education and to work, respectively. Moreover, article 66 prohibits child labour, and guarantees the right to social security, to rest, and to a protected, healthy and safe work environment. The "right of every person to health" was allegedly included in the draft Constitution adopted by the Committee of Experts, but not in that adopted by the Parliament. In similar vein, the right of a minimum wage and the prohibition on forced labour were omitted in the final draft Constitution approved by Parliament.

This is a welcome step towards establishing a legal framework that conforms to Algeria's obligations under international law. However, certain gaps remain, and further clarity is needed for specific provisions. In particular, the rights to water, health and housing should be clearly guaranteed as rights to be enjoyed by all in Algeria, including non-citizens. Article 11 of the ICESCR states, "[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." Article 12 of the ICESCR provides, "[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

Moreover, the draft Constitution should provide for implementation measures of these rights. General Comment No. 3 of the CESCR sets out the obligations of States parties to implement the ICESCR in good faith, including by:

- Taking all necessary measures (not restricted to legislative measures only);
- Foreseeing a judicial remedy where policies relevant to the realization of ESCR are set out in a legislative text; and
- Adopting targeted, effective and low-cost programmes, even in instances of limited resources, to protect populations most at risk.⁹⁸

⁹⁷ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5

⁹⁸ Committee on Economic, Social and Cultural Rights, General Comment No.3: The nature of

3.4.2. Limitations and derogations from human rights

Under international human rights law, certain rights may be absolute, while others may be subject to some form of limitation or restriction in exceptional circumstances. Such limitations are provided for in two possible ways. First, some, but not all human rights provisions expressly provide for circumstances and conditions for their limitations, as well as the permissible scope. For instance, under the ICCPR, fundamental freedoms of expression, association, assembly, and movement may be restricted only when stipulated in law, and for a limited range of purposes such as public health. However, even these limitations must be strictly necessary and proportionate to their purpose and must be non-discriminatory in purpose and effect.

Second, pursuant to the terms of article 4 of the ICCPR, refers to situations where there is a public emergency so severe that it threatens the life of the nation. In such circumstances, certain rights may be derogated from, provided derogation measures are taken only to the extent that is strictly necessary to meet a specific threat. In its General Comment No. 29, the HRC states:

[m]easures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed.⁹⁹

Article 34 of the draft Constitution provides that rights and freedoms cannot be restricted except by virtue of a law and/or for reasons that are related to maintaining public order, protecting the “fundamentals of the nation,” or protecting other rights and freedoms enshrined in the Constitution. It further provides that in all cases the restrictions cannot touch the essence of these rights and freedoms, which is a positive development. Article 81 further provides, “[e]very person may exercise all freedoms while respecting the rights of others recognized by the Constitution; in particular, respecting the right to honour, privacy and protection of the family, youth and childhood.”

As noted above, measures of limitation are subject to the conditions of legality, necessity proportionality and non-discrimination. Legal provisions which provide for such limitations must include the nature of the right to be limited, the nature and the extent of the limitation, the relation between the limitation and its purpose, and why it is necessary to limit the exercise of the right instead of a less restrictive means to achieve the purpose. Article 34 should be amended to reflect these elements, as well as to remove the protection of “fundamentals of the nation” as a basis for the limitation of the exercise of human rights. Similarly, article 81 should be amended to remove the restrictions on exercising human rights related to “respecting the right to honour, privacy and protection of the family, youth and childhood.” The wording of these two articles is imprecise, overly broad and is accordingly likely to lead to unnecessary and arbitrary restrictions on the enjoyment of human rights.

Article 97 of the draft constitution gives the President the authority to declare a state of emergency for 30 days “when necessary.” Article 98 vest him with the power to declare a “state of exception” for 60 days if the country is facing a threat to its constitutional

states parties obligations, (Art. 2, par.1), 14 December 1990

⁹⁹ Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, UN doc CCPR/C/21/Rev.1/Add.11.

institutions and independence. The draft Constitution adopted by the Committee of Experts gave the Constitutional Court a significant role in reviewing the conditions of the declaration of the state of exception, including the mandatory referral of decisions taken by the President during states of exception to the Constitutional Court for review. Moreover, the draft Constitution stipulated that the renewal of the applicable 60 day period for states of exception was subject to the approval of both chambers of Parliament. The final draft Constitution adopted by the Parliament, however, did not include these provisions. The ICJ is concerned that while the draft Constitution places restrictions on the period of time and process for declaring a state of emergency or state of exception, there are no safeguards provided for with regard to the protection of human rights in times of emergency or exception, including those contained in article 4(2) of the ICCPR.¹⁰⁰ Article 4(2) provides:

[I]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Although this provision recognizes that States may take measures derogating from their obligations under the Covenant, it also explicitly prescribes that no derogation may be made in respect of: article 6 (right to life); article 7 (prohibition of torture or ill-treatment); article 8 (prohibition of slavery, the slave-trade and servitude); article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation); article 15 (the principle of legality); article 16 (the recognition of everyone as a person before the law); and article 18 (freedom of thought, conscience and religion). Furthermore, the HRC has stated:

[T]he category of preemptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or preemptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.¹⁰¹

While not explicitly designated under conventions as non-derogable, a number of other rights have attained that status. The right to challenge the lawfulness of detention (*habeas corpus*), in particular, is widely regarded as non-derogable.¹⁰² The HRC has also stated that the right to be tried by an independent and impartial tribunal "is an absolute right that may suffer no exception."¹⁰³ Components of the right to a fair trial are also widely regarded as non-derogable.¹⁰⁴

Other rights may be derogated from only in certain circumstances and providing specific requirements are met. As the HRC has stated, "[t]he fact that some of the provisions of the

¹⁰⁰ ICCPR, article 4(2): "No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."

¹⁰¹ Human Rights Committee, General Comment No. 29, UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

¹⁰² *Ibid.*, paras. 15-16.

¹⁰³ Human Rights Committee, *M. Gonzalez del Río v. Peru*, UN Doc CCPR/C/46/D/263/1987, 2 November 1992, para. 5.2.

¹⁰⁴ Human Rights Committee, General Comment No. 29, para.16.

Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists.”¹⁰⁵ Consequently, “measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.”¹⁰⁶ In addition, once a state of emergency has been validly declared, any measure that derogates from a provision of the ICCPR must not impair the essence of the relevant right. Rather, it may only reduce the scope of application of the right to the extent strictly necessary to meet a threat to the life of the nation. As the HRC has affirmed:

[T]he mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.¹⁰⁷

The draft Constitution should therefore ensure that the rights mentioned above are expressly recognized as non-derogable, from which no exception is permitted including in times of emergency; and that any measures derogating from other rights do not impair the essence of such rights and are absolutely required by the exigencies of the situation.

In this regard, article 45 of the draft Constitution, which allows a judge to deprive a person under detention of his/her right to have access to a lawyer in “exceptional circumstances provided for by the law,” should be removed.

3.4.3. Enforcement of human rights

Article 46 of the draft Constitution provides for the right to compensation in the event of arbitrary detention and stipulates that the law should provide for the conditions and procedures for the enforcement of this right. While a welcome development, the article falls short of international standards and Algeria’s obligations under international law on ensuring an effective remedy.

The right to an effective remedy and reparation is a fundamental right under international human rights law. It is important that the right to a remedy, as well as the duty of the State to ensure that a remedy is enforced, is enshrined in the Constitution, reflecting, in particular, article 2(3) of the ICCPR. Article 12 of the Arab Charter requires States “to guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels,” and article 2(3) of the ICCPR requires States “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also affirms, “[e]veryone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter,” and that this right includes, among other things, enforceable judicial remedies.¹⁰⁸

¹⁰⁵ *Ibid.*, para. 6.

¹⁰⁶ *Ibid.*, para. 2.

¹⁰⁷ *Ibid.*, para. 4.

¹⁰⁸ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Part C.

The HRC reaffirmed that States Parties have an obligation to establish appropriate judicial and administrative mechanisms to address claims of rights violations under domestic law.¹⁰⁹ As such, the right to an effective remedy encompasses other rights, including:

1. The right to a prompt, thorough, independent and impartial investigation. Principle 19 of the UN Set of Principles to Combat Impunity states that "States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."¹¹⁰
2. The right to reparation. Reparation includes, as necessary and appropriate, restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.¹¹¹
3. The right to know the truth, which is a principle that "lies both at the root and at the outcome of a right to a remedy and to investigation."¹¹² Under the UN Set of Principles to Combat Impunity, "[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."¹¹³

Under article 77 of the draft Constitution, "citizens" have the right to file complaints with public authorities concerning acts that violate their "basic rights." This provision should be amended to include all individuals under Algeria's jurisdiction, not only citizens, in addition to all the above-mentioned elements and other rights encompassed by the right to an effective remedy.

The Constitution should also provide for effective and independent mechanisms to ensure and monitor the protection of human rights against any abuse, including by providing for the establishment of an independent human rights institution. While article 211 of the draft constitution provides that the National Human Rights Council has administrative and financial independence, the ICJ is concerned that few guarantees set out its institutional independence and the independence of its members. In its 2018 Concluding Observations on Algeria, the HRC expressed concern about the alleged lack of independence of members of the National Human Rights Council.¹¹⁴ On several occasions, the UN General Assembly has reaffirmed the importance of developing effective, independent and pluralistic national institutions for the promotion and protection of human rights in accordance with the Paris Principles.¹¹⁵ The UN General Assembly has also acknowledged the role of national institutions in strengthening

¹⁰⁹ Human Rights Committee, General Comment No. 31, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15.

¹¹⁰ Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102, 18 Feb. 2005.

¹¹¹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, UN Doc A/RES/60/147, 21 March 2006, Articles 18-23.

¹¹² International Commission of Jurists, The right to a remedy and to reparation for gross human rights violations, A Practitioners' Guide, Series No. 2, 2018, p. 84.

¹¹³ Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, UN Doc E/CN.4/2005/102/Add.1, 8 February 2005, Principle 2,. See also Human Rights Council, Resolution 18/7, UN Doc A/HRC/18/L.22, 29 September 2011; and Human Rights Council Resolution 9/11, Right to the truth, UN Doc A/HRC/RES/9/11, 24/09/2008.

¹¹⁴ Human Rights Committee, Concluding Observations on Algeria, UN Doc CCPR/C/DZA/CO/4, 17 August 2018, para. 15.

¹¹⁵ UN General Assembly resolution 60/154 (para.2) and 63/172 (para.2)

the rule of law and the promotion and protection of human rights in all sectors,¹¹⁶ and has encouraged them to continue playing an active role in preventing and combatting all violations of human rights.¹¹⁷

4. Recommendations

In light of the above, the ICJ calls on the Algerian authorities, including members of the Committee of Experts, to:

With regard to the constitution-making process:

- i) Ensure the right of Algerians, from the broadest range of constituencies and sectors, to fully participate in the Constitution-making process, so as to facilitate the exercise of their right to take part in the conduct of public affairs, including by convening a new consultative forum or mechanism that allows for the requisite public participation and debate to take place;
- ii) Ensure adequate time and facilities are provided for the Constitution-making process to allow for a comprehensive public dialogue and the production of a draft Constitution that fully represents the views of Algerians;
- iii) Ensure that the Constitution-making process complies with the international standards of inclusivity, participation and transparency;
- iv) Ensure that women and people belonging to minorities, among persons from other marginalized and disadvantaged groups, play an active role in the Constitution-making process, and that their rights are recognized in any resulting Constitution.

With regard to civilian oversight over the military:

- i) Ensure in the Constitution the full accountability of and civilian oversight over the armed forces and their effective subordination to a legally constituted civilian authority;
- ii) Ensure the role of the armed forces is adequately defined in the Constitution and specifically limited to matters of national defence;
- iii) Provide for legislative and other mechanisms of oversight and control over the armed forces, including over financial and budgetary matters;
- iv) Ensure that the Ministry of Defence operates under the authority of civilian, democratically elected leadership.

With regard to the rule of law and separation of powers:

- i) Ensure that Constitutional provisions consistent with international law have primacy over ordinary legislation, and that the powers of the State are not exercised arbitrarily;
- ii) Fully embed the rule of law in the framework for the functioning of the State, including by ensuring the clear separation of powers, attribution of competences and checks and balances between the legislature, the executive and the judiciary;
- iii) Enshrine the power of judicial review over all legislative and executive acts;

With regard to the independence of the judiciary:

¹¹⁶ UN General Assembly resolution 63/172 (para.12)

¹¹⁷ UN General Assembly resolution 64/161 (para.8)

- i) Ensure that the HJC is independent from the executive, including by amending its composition to exclude the President from its membership and by ensuring that the majority of members are from the legal profession and are elected by judges; that it is pluralistic and gender representative; and that it is empowered to uphold the independence of the judiciary;
- ii) Ensure that the HJC is competent to decide on all issues relating to the career of judges, including the discipline, appointment, promotion, transfer and removal of judges, and on the financing and administration of the judicial sector;
- iii) Ensure the Constitution prohibits any restrictions, improper influences, inducements, pressures, threats or interferences in judicial decision-making and other judicial issues, including by other branches of government;

With regard to human rights:

- i) Assert the primacy of international human rights law over domestic law. To this end, unequivocally assert that internal law, including the Constitution, cannot be invoked or deployed as a justification for non-compliance with human rights treaties to which Algeria is a State party or customary international law;
- ii) Ensure that the Constitution guarantees human rights protections to all individuals under Algeria's jurisdiction and are not limited to citizens;
- iii) Provide for the full protection for the rights of minorities as required under international law, including their right to enjoy their own culture and to use their own language; participate in public life and in the conduct of public affairs; and participate effectively in all decisions that affect them;
- iv) Prohibit the use of the death penalty;
- v) Prohibit torture and other ill-treatment, and incorporate a definition of torture that fully complies with article 1 of the CAT;
- vi) Prohibit the transfer of any individual to another country where that individual is at risk of torture or other ill-treatment, extra-judicial killing, enforced disappearance or other serious human rights violations;
- vii) Define permissible limitations or restrictions of the human rights the State may be able to impose that are consistent with international human rights law;
- viii) Ensure that these limitations or restrictions are undertaken only for legitimate purposes as defined in international human rights law; and are precise, free of ambiguity, limited in time and necessary and proportionate to the legitimate purpose;
- ix) Ensure that no derogation to international human rights obligations be permitted, except during a declared time of public emergency which threatens the life of the nation, and only to the extent strictly necessary to meet a specific threat. Ensure that those rights identified as non-derogable in international human rights law never be subject to derogation, including in times of emergency or exception, in respect of, *inter alia*, the right to life, the right to be free from torture or other ill-treatment, the right not to be subjected to enforced disappearance, and the right to a fair trial;
- x) Guarantee in the Constitution the right of victims of human rights violations to an effective remedy and reparation, including by providing for adequate enforcement mechanisms.

Commission Members

October 2020 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Robert Goldman, United States

Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org