



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

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Tunisia's October 2011 election of a National Constituent Assembly (NCA) tasked with drafting a new constitution is a milestone for the country's transition to democracy ever since a popular revolution forced the ouster of the former regime. Members of the assembly began the drafting process on Feb. 14, 2012, which will set the course for the values and principles of the future Tunisian state, system of government, electoral system, and institutional framework. In addition to drafting a constitution, the NCA has also assumed legislative powers to review discriminatory laws inherited from the former regime and enact new legislation to govern the country and prepare for the next cycle of elections.

Following its international election observation mission, conducted from July to November 2011, The Carter Center retained a small presence in Tunisia to monitor the constitutional drafting process and developments related to the establishment of the institutional and legal framework for the next elections. The Carter Center attended some commissions' meetings and plenary sessions of the NCA. The Center met also with a wide range of stakeholders, including: NCA members and administrative staff, civil society organizations, political parties' representatives and Tunisian academics to understand the functioning of the NCA and assess the constitutional drafting process against the NCA Rules of Procedure and international obligations to uphold principles of transparency and participation in public affairs of one's country and other fundamental freedoms.¹ Furthermore, comparative examples of constitution drafting processes demonstrate the added value of a genuinely transparent and participatory constitutional drafting process, particularly in terms of increased understanding and ownership by the people.²

This statement outlines the Carter Center's findings and recommendations in support of a credible and genuine constitutional drafting process, and the timely resumption of election preparations.

The constitution drafting process:

Constitutional Commissions

The NCA has created six permanent commissions, each of which are responsible for drafting articles under specific chapters of the future constitution³: 1) preamble, fundamental principles,

¹ Article 25, International Covenant on Civil and Political Rights (ratified by Tunisia on March 18, 1969) which states that every citizen shall have the right and the opportunity (...) to take part in the conduct of public affairs, directly or through freely chosen representatives.

² Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes, « Constitution-Making and Reform: Options for the Process », published by Interpeace, Nov 2011. Lessons Learned From Constitution-Making: Processes With Broad Based Public Participation, Democracy Reporting International (DRI) – 2011, IDEA, A Practical Guide to Constitution Building

³ Article 65, NCA Rules of Procedure (RoP)

constitutional review; 2) rights and freedoms; 3) legislative and executive powers and the relationships between the powers; 4) judicial, administrative, financial and constitutional justice; 5) constitutional bodies; and 6) regional and local public authorities.

These commissions are each composed of 22 members, proportionally allocated according to their political representation in the NCA. Members are allowed to be part of several commissions providing that they are not of the same category.⁴ One of the six commissions is presided over by a woman. Three female members were elected as deputies and six as rapporteurs. The presence of commission members during meetings is obligatory: any member who is absent from more than three consecutive sessions without authorization can be disqualified.⁵ The president of each commission is tasked with facilitating the work of his or her commission to create consensus among the various parliamentary blocks.⁶ A commission may entrust specific issues to one of its members to conduct in-depth research or establish a working group and prepare a report.⁷ Commissions can also consult experts on a given issue, such as representatives of the government, institutions, civil society or academics.⁸ Decisions are taken by a majority of those present.⁹ In total, almost two-thirds of the NCA members are actively involved in the constitutional drafting process. While all members will eventually discuss and vote on the final text, other members are entrusted with drafting new and reviewing existing laws.

Aside from permanent commissions, the NCA also established a Constitutional Drafting and Coordination Committee tasked with coordinating commission work, preparing a general report on the constitutional drafting project before its submission to the plenary assembly, and establishing a final version of the report.¹⁰ The Constitutional Drafting and Coordination Committee is composed of NCA President Mustapha Ben Jaâfar from Ettakatol, NCA General Rapporteur Habib Khedher from Ennahdha, his two deputies and the presidents and rapporteurs of the permanent commissions. The Rules of Procedure do not outline in detail what the committee's prerogatives imply in practice, such as the methods and pace of work of different commissions. The Carter Center suggests that the NCA should consider providing this committee with clearer prerogatives to ensure more consistency in the methods of work.

Adoption of the Constitution

Once the commissions have agreed on the wording of articles for which they are responsible, the complete draft of the constitution together with a general report on the Constitution and the reports of the commissions will be transmitted to all the members of the NCA, the president, and the prime minister. According to the Rules of Procedure, this should be done two weeks before the draft constitution will be discussed by the plenary session of the Assembly, in view of its adoption.¹¹ The NCA will consider and adopt the draft constitution article by article through an absolute majority vote and then in its entirety by a two-thirds majority. Should members of the NCA disagree on the final text, and not reach a two-thirds majority, the constitution will be submitted to a popular referendum.¹² The law is silent as to the possible recourse if the draft is rejected by a popular referendum.

The time period between the finalization of the draft and its submission to NCA vote will prove crucial to disseminate and explain the text to the public at large, and increase its legitimacy before the vote.

⁴ Article 48, RoP

⁵ Article 53, RoP

⁶ Article 57, RoP

⁷ Article 58, RoP

⁸ Article 59, RoP

⁹ Article 60, RoP

¹⁰ Article 104, RoP

¹¹ Article 105, RoP

¹² Article 3 of the Constitutional Act n°2011-6 dated December 16, 2011 related to the provisional organization public authorities

The Carter Center is concerned that the two-week period foreseen by the Rules of Procedure may be insufficient to plan for such outreach efforts. The Center recommends therefore that adequate time be devoted between the finalization of the draft and the moment it is voted on to gather public opinions and views.

Timeframe for the adoption of the constitution

All political parties represented in the High Authority for the Achievement of Revolutionary Objectives, except for the Congress for the Republic (CPR), signed a declaration on Sept 15, 2011, limiting the timeframe of NCA activities to one year. The constitutional act on the provisory organization of public authorities, often referred to as the “small constitution” adopted on Dec 16, 2011, has no mention, however, of a specific time period, nor has the NCA established a timeline detailing its work plan. While acknowledging declarations by Troika leaders referring to spring 2013 as the end of the current transitional period, implying the adoption of the constitution and the holding of elections, the Carter Center considers that the establishment of a comprehensive work plan, with intermediary objectives, would allow for better planning and commitment to stated objectives. In addition, such a work plan, that should be public, would increase much needed visibility and understanding among the Tunisian people about the complexity of the process. The Carter Center urges the NCA to establish a clear work plan for the commissions to plan their work accordingly and meet stated objectives.¹³

Transparency and accessibility of the process

A transparent constitutional drafting process is one where the public is aware of what is occurring at each stage of the process and can access information easily. Such a process increases the accountability of the constitutional drafting body to the public and the public’s confidence that their voices have been heard.¹⁴

Access to the debates of the NCA

The NCA Rules of Procedure suggest that NCA members acknowledge transparency as an important principle, as Article 54 states that commission meetings are public. Meetings behind closed doors are the exception to the principle and can only be held following the request of the majority of commission members. While access to media representatives has been granted without restriction so far, Article 54 has been interpreted inconsistently and mostly restrictively when it comes to civil society organizations, thus hindering their effective access to the debates. This issue has created controversy among members of the NCA. Some of them deem that the spirit and the letter of Article 54 should be respected; others suggest that each commission should be entitled to decide who may attend its sessions and when. Others, still, refer to a debate held during a plenary session of the NCA on Feb 28, where the general rapporteur explained that during the preparatory work for the adoption of the Rules of Procedure, some deputies advocated for the right of civil society organizations to observe the commissions’ work, though the NCA decided against this.¹⁵ Despite several inquiries, the Carter Center could not acquire any written record of this restrictive interpretation of Article 54.

¹³ For an overview of country cases and good practices, see: “Constitution-Making and Reform : Options for the Process”, published by Interpeace, November 2011.

¹⁴ The UN Human Rights Committee recommends that constitutional reform should be a “transparent process and on a wide participatory basis” (see Concluding observations to the 2005 state report on Bosnia and Herzegovina, CCPR/C/BIH/CO/1, paragraph 8.d.)

¹⁵ The debate can be viewed online at http://www.anc.tn/site/main/AR/docs/vid_debat.jsp?id=28022012s&t=s (starting at minute 101).

NCA plenary sessions are also open to the public in accordance with the procedures established by the NCA Bureau¹⁶, which is composed of the NCA president and nine members.¹⁷ The Carter Center notes that no such procedures have been issued and information regarding public access to plenary sessions varies according to the interlocutor and from one session to the next. The Center urges the NCA Bureau to establish and disseminate procedures that comply with the Rules of Procedure and allow for smooth and indiscriminate access to plenary sessions.

The Carter Center welcomes the NCA's positive initiative to allow media coverage of NCA work, thereby informing citizens on issues debated in commissions and plenary sessions.¹⁸ The Center encourages media representatives to provide substantive coverage of this important process, and to help bridge the gap between elected officials and their constituents. However, the Center deems it equally important for civil society organizations to be able to directly follow NCA work, providing them with a better position with which to elaborate informed analysis and meaningfully contribute to the constitution drafting process, both through advocacy and awareness raising efforts.¹⁹ Several civil society organizations officially requested to attend NCA plenary and commission sessions, but have yet to receive a response. This unresponsiveness has led some organizations to request a meeting with President Ben Jaâfar, which to date has not taken place. Advocating for increased transparency, the organization Al Bawsala issued a petition calling for civil society organizations to have access to the NCA and its commissions. To date, the petition has garnered some 40 signatures by NCA members.²⁰ The Carter Center recommends that the NCA abides by the spirit of the Rules of Procedure and ensures that plenary sessions of the NCA and commissions' debates are open, and establish a formal procedure to grant access and observer status to civil society organizations and interested citizens.

Access to official documents

The Rules of Procedure also require commissions to post reports prepared by commission rapporteurs or their deputies on the NCA website, after internal commission approval.²¹ These reports are meant to describe activities or specific topics of discussion. Two special commissions, Administration Reform and Fight against Corruption and Martyrs Families and Injured of the Revolution, have published such reports thus far. The Carter Center encourages this good practice that ensures access to relevant information by interested parties.

The Rules of Procedure do not require verbatim records of meetings to be published. Such documents would be a valuable source of information for interested citizens, highlighting issues debated during the sessions. Some assembly members have taken the initiative to publish meetings notes and official verbatim records prepared by the rapporteurs on their personal Facebook pages or blogs. Despite this practice, many members are reluctant to officially publish the minutes of working sessions, to avoid leaving the public with the perception that the work of the NCA is slow. The Center notes that several local civil society organizations are advocating for increased access to information, calling on the NCA to publish systematically any official document and highlighting the need for more staff dedicated to public information.²² The Carter Center emphasizes that the right of access to information is essential to guarantee transparency

¹⁶ Article 76, RoP

¹⁷ Article 28, RoP

¹⁸ Tunisia Live, live-streams from some commissions, and offers recordings of others through their Ustream channel. There is however a limited number of Ustream users in Tunisia and therefore this outreach effort does not reach many citizens (<http://www.ustream.tv/channel/tunisia-live3>).

¹⁹ Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes, paragraph 4, [http://www.unrol.org/files/Guidance Note United Nations Assistance to Constitution-making Processes FINAL.pdf](http://www.unrol.org/files/Guidance%20Note%20United%20Nations%20Assistance%20to%20Constitution-making%20Processes%20FINAL.pdf)

²⁰ <https://www.change.org/fr/pétitions>

²¹ Article 62, RoP

²² Bus Citoyen, Opengov TN, Mouwatinoun, Al Bawsala

and to permit the active participation of all stakeholders in the constitutional drafting process.²³ This right implies that the authorities should undertake all possible measures to guarantee simple, rapid, effective, and practical access to all information of general interest.²⁴

Outreach efforts

The Carter Center notes that thus far no outreach campaign on the work of the NCA has been put in place. Such campaigns, when well conceived, may raise public understanding of NCA members' work and the importance of the process. The Center therefore encourages the NCA to consider launching a comprehensive information campaign using all forms of media. The campaign should focus also on opportunities for the public to participate in the process.

Political parties could also play an important role in educating their supporters on the mandate of the NCA, their contributions to the constitutional drafting process, and their positions on issues under consideration that will shape the State's relationship with its citizens for the future. Some political parties, including Ennahdha, POCT, and PDP, have drafted a text outlining their respective party's positions on central constitutional issues. The Carter Center encourages political parties to conduct increased constituent outreach and inform the public about their work within the NCA, their party's position on important constitutional issues, and the constitutional drafting process overall.

Public participation and consultation

A participatory constitutional drafting process is one in which citizens are informed about the process and choices at stake, and are given a genuine opportunity to directly express their views to decision makers involved in the drafting and debating of the constitution.²⁵ Lessons learned from countries undergoing constitutional drafting processes, both post-conflict and in democratic transitions, highlight the benefits of public consultations in terms of increased legitimacy, added relevance, and stronger acceptance of the new constitutional order.²⁶

Opportunities for citizen involvement

Article 79 of the NCA Rules of Procedure foresees one week a month, in principle the fourth week of each month, for NCA members to reach out directly to citizens. The week from March 19 - 25, 2012, was the first opportunity for NCA members to get in touch with the population. The Carter Center observed that no information about planned meetings or activities was available with the administrative services of the NCA, its website, or other media outlets. NCA members who met with The Carter Center explained that activities during the week "in the regions", as it is often referred, are left to their own initiative and individual commitment. There is no administrative, financial, or logistical support provided by the NCA for outreach activities. Some members appear very committed to report back to their constituencies and were able to organize on their own, while others relied on their political party's structure to prepare meetings. According to their own account many have used methods such as door-to-door outreach or visiting popular

²³ ICCPR, Article 19 (2)

²⁴ Human Rights Committee, General Comment No. 34 "Article 19: Freedoms of opinion and expression", para.19

²⁵ The "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms", adopted by the UN General Assembly on Dec 9, 1998, states in its article 8 that participation in the conduct of public affairs, includes, inter alia, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms. By analogy, this should also apply to constitutional drafting processes.

²⁶ Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes. Lessons Learned From Constitution-Making: Processes With Broad Based Public Participation, Democracy Reporting International (DRI) - 2011

market places. The Carter Center welcomes the efforts of NCA members to inform and consult their constituencies, but notes that no mechanisms have been created to formally report back to the NCA on citizen recommendations and comments.

The Carter Center encourages the NCA to provide support in planning and implementing activities during the week devoted to consultations in the constituencies. In an effort to receive citizen feedback on NCA work, the Center suggests the establishment of a formal procedure to receive, analyze, process and record such inputs. Synergies with local civil society organizations engaged in promoting such consultations could also be developed for increased impact. Some civil society organizations have already organized town hall meetings and information sessions, bringing together NCA members and citizens in different regions of the country.²⁷ The Carter Center supports such initiatives encouraging citizens to play an active role in this historical process. However, initiatives by civil society organizations should be seen as complementary to, and not a substitute for, NCA-driven citizen consultation, aimed at creating a sense of ownership and building consensus around the future constitution.

The week devoted to outreach was cancelled in April, as it coincided with NCA consideration of the government's program, draft State budget, and supplementary budget. The Carter Center acknowledges that the prerogatives of the NCA do not only involve constitution drafting. For this reason, engaging and consulting with citizens should be considered an important aspect of the work of the constituent body given the current economic situation facing the country and the fact that many Tunisians are showing growing dissatisfaction and impatience towards decision-makers. By reaching out to their constituents, NCA members can build public awareness on other areas of NCA progressive achievements and reinforce their legitimacy.

Experts' hearings

Article 59 of the Rules of Procedure entitles the commissions to consult experts on a given issue, such as government and institution representatives, academics and civil society organizations. The commissions have conducted several hearings with Tunisian and international experts and some NCA members have undertaken study trips to the European Court of Human Rights and the German Constitutional Court in Karlsruhe. The Carter Center suggests that the NCA take advantage of this procedure to also hear foreign expertise from countries that have experienced similar constitution drafting processes, such as South Africa,²⁸ Bolivia, or Uganda²⁹ and benefit from their experiences on designing mechanisms to ensure public participation and increased ownership of constitution drafting processes. The NCA could also build on recent Tunisian initiatives in nationwide and diverse consultation mechanisms, including those utilizing the Internet, conducted by several ministries.³⁰ Such consultations, to be effective, should be coupled with a widespread and well-designed information campaign.

Preparing for the next election cycle

²⁷ Several organizations, including, amongst others, ATIDE, Jeunesse Sans Frontières, with the support of international partners, organized such meetings various regions, in Ben Arous, Beja, El Kef, Kairouan, Sfax and Tunis.

²⁸ The South African constitutional process was coupled with a very high level of public education on the issues and public input (via email, meetings, surveys, and contributions on the internet). Public participation included several components: publication and media broadcasts of all the constitutional debates, consultation by each of the parties at the village level, radio broadcasts educating the public on the constitutional process, and 2 million submissions from the general population. UNDP, *Constitution-Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries; Lessons Learned From Constitution-Making: Processes With Broad Based Public Participation*, DRI - 2011

²⁹ In Bolivia, the Constituent assembly organized public participation and then formed committees to collect the public input. In Uganda, an independent commission educated the public and collated views. IDEA, *A Practical Guide to Constitution Building*, p.17

³⁰ Ministry for Regional Development, Ministry for Human Rights and Transitional Justice, Ministry in charge of administrative reform (<http://www.consultations-publiques.tn>)

The 2011 Constituent Assembly elections have been largely acknowledged by national stakeholders and the international community as a meaningful step in the democratization process of Tunisia. Tunisian stakeholders concur that the country shall take stock from these first democratic elections, by building upon positive achievements and drawing lessons from weaknesses to improve the next electoral process.

The final report on the electoral process issued on Feb. 21 by the High Independent Authority for the Elections provides key direct insights to inform discussions and decisions about the future institutional and legal framework for the elections. In the same spirit, national and international observers groups came together on Feb. 23 at the initiative of The Carter Center, to identify joint priority recommendations for consideration by decision-makers. At other workshops organized by international partners, NCA members, government officials and representatives of the judiciary gathered to reflect and provide comparative experiences on issues such as existing models of election management body and the legal framework for future elections.³¹

The Carter Center welcomes the government proposal for the next elections to be held on March 20, 2013. While Prime Minister Jebali declared on April 26 that a draft law on the future election management body would be transmitted to the NCA within days, The Carter Center notes that this announcement hasn't taken effect by the time of writing. A draft law by the government has been leaked but has not been officially submitted to the NCA. The Carter Center encourages the NCA to ensure that inputs from relevant national and international stakeholders are taken into consideration.

The Center also stresses the government and the NCA, in their respective roles, should lay the groundwork without undue delay for the effective preparation of the next elections. In light of the lessons learned from the 2011 elections, The Carter Center underscores the need to ensure sufficient time for election preparation, starting with voter registration, an update of the voter list and implementation of a robust voter education campaign.

Conclusion and recommendations

The Carter Center has conducted several meetings with relevant stakeholders to understand the work of the NCA and assess strengths and weaknesses of the constitutional drafting process thus far. The Center appreciates the commitment demonstrated by all interlocutors in sharing information and discussing potential areas for improvement. In a view to further entrench the objectives of the revolution towards the establishment of a transparent and participatory governance system, The Carter Center encourages the NCA and the government to consider the following recommendations:

- Establish a detailed work plan for the NCA, including intermediary objectives, to ensure better planning and structured work as well as to provide the public with greater visibility on the way forward and progresses achieved.
- Ensure that plenary sessions of the NCA and commission debates are open, and establish a formal procedure to grant access and observer status to civil society organizations and interested citizens.
- Publish and disseminate in a timely manner all NCA official documents – minutes, reports, decisions, and submissions – including by posting them on its website.

³¹ "Building Key Principles into the Design of the Future Electoral Management Body: Tunisian and International Perspectives", workshop organised by the United Nations Development Programme (UNDP), the European Union (EU), and the International Foundation for Electoral Systems (IFES), Feb. 27, 2012. "What future legal framework for Tunisian elections? National and international perspectives", workshop organized by IFES in partnership with the EU, the UNDP, The Carter Center and Democracy Reporting International, March 12-13, 2012.

- Provide support to NCA members in planning and implementing activities during the week devoted to consultations in the constituencies, and develop synergies with local civil society organizations engaged in facilitating such consultations.
- Establish a formal procedure to receive, analyze, and process submissions, as well as to record comments and suggestions expressed during consultations between NCA members and citizens.
- Ensure prompt submission by the government of the draft law on the election management body and timely consideration by the NCA to allow adequate time for planning and preparations for the next elections.
- Ensure that recommendations from relevant stakeholders are taken into account and positive achievements are built upon, while considering the draft law on the election management body.