



**FOR IMMEDIATE RELEASE**

**June 11, 2013**

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**Carter Center Urges Tunisia's Constituent Assembly to Protect Political Rights**

As Tunisia's National Constituent Assembly prepares to debate the draft Political Immunization of the Revolution law, The Carter Center urges assembly members to reconsider several provisions, especially proposed restrictions on fundamental political rights.

The right to be elected and the right to association are protected under international law, and the right of the people to freely choose their representatives is a cornerstone of democracy. Measures to restrict these rights should be narrowly defined to abide by Tunisia's international obligations to use the least restrictive means to accomplish the law's intended goal. The assembly should consider whether the restrictions in the draft law are reasonable, proportional, and necessary in a democratic society.

The Carter Center also expresses concern that the *Instance Supérieure Indépendante pour les Elections* (ISIE) would be required to compile the list of excluded persons, which could negatively impact public confidence in the work of the election management body and perceptions of its impartiality and independence.

Finally, the Center recommends that the assembly amend the appeals mechanism to ensure the protection of fundamental rights, including by having a court make the final determination regarding the restriction of any individual's political rights.

Prior to the 2011 National Constituent Assembly elections, thousands were prohibited from standing as candidates due to their alleged association with the previous regime. In its [Final Report](#) on those elections, The Carter Center recommended that the assembly should carefully consider lifting such a ban for future elections. The Center also recommended that if such measures were to be adopted in the future, a more transparent mechanism for determining which individuals should be excluded from candidacy should be developed using the least restrictive means to accomplish the intended goal.

While the decision of whether to enact a political exclusion law is obviously a matter for Tunisians to decide, The Carter Center notes that there are international obligations regarding the right to be elected and the right to take part in the public affairs of one's country that are relevant to Tunisia and that should be taken into account while considering the draft law. These include the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. Given its mandate of election observation, the Center offers its comments to assist Tunisian institutions in ensuring that any limits on electoral rights are consistent with international obligations.

Following its observation of the October 2011 National Constituent Assembly elections, The Carter Center is monitoring the constitution drafting process and developments related to the establishment of institutional and legal frameworks for subsequent elections. The Center assesses these processes against Tunisia's national laws and international treaty obligations.

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## **Carter Center Urges Tunisia's Constituent Assembly to Protect Political Rights**

**10 June 2013**

As the National Constituent Assembly (NCA) prepares to debate the draft Law on Political Immunization of the Revolution, The Carter Center urges its members to reconsider several provisions of the legislation, especially proposed restrictions on fundamental political rights. The right to be elected is protected under international law, as is the right to association. Measures to restrict these rights in the draft legislation should be more narrowly defined to abide by Tunisia's international obligations to use the least restrictive means to accomplish the law's intended goal. In doing so, the Assembly should consider whether the restrictions are reasonable, proportional and necessary in a democratic society.

The Carter Center also expresses concern that the *Instance Supérieure Indépendante pour les Elections* (ISIE) would be required to compile the list of excluded persons, which could negatively impact public confidence in the work of the election management body and perceptions of its impartiality and independence. Finally, the Center recommends that the appeal procedure be amended and that the final determination of loss of candidacy rights be made by a Court.

The draft Law on Political Immunization of the Revolution mandates the compilation of a list of citizens belonging to specified categories of people connected to the Ben Ali regime or the *Rassemblement constitutionnel démocratique* (RCD) and bans them from holding a number of public office and political positions for a seven-year period.<sup>1</sup> In addition to other exclusions, the individuals identified would not be eligible to hold most elected offices, be founders of a political party, or serve as a member of a political party's central or regional executive body.<sup>2</sup>

Prior to the 2011 NCA elections, Article 15 of decree-law 2011-35 and Article 2 of decree 2011-1089 prohibited certain categories of people connected to the former regime from standing as candidates, resulting in thousands of people being barred from running in the elections.<sup>3</sup> In practice, the prohibition presented practical difficulties for the ISIE and its regional bodies (*Instances Régionales Indépendantes pour les Elections*, or IRIEs), which had the responsibility of approving candidate lists for the elections.

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<sup>1</sup> Article 2 of the draft law provides for the exclusion of all those who, between 7 November 1987 and 14 January 2011, held positions in the State at the level of minister or secretary of State, were RCD candidates at legislative elections, held specified leadership positions in the RCD at national, regional or local level, or were members of central bodies of RCD-related youth organizations. Those who called on Ben Ali to run for president in 2014 would also be excluded.

<sup>2</sup> In addition to exclusion from elected positions and from being founding members of political parties, Article 3 of the draft law excludes listed people from being appointed to certain non-elected positions, such as ambassador, consul, governor, governor of the Central Bank, director functions in political cabinets, or member of a constitutional authority.

<sup>3</sup> The total number is unknown. The report of the ISIE on the elections mentions 3000 people, but only in one category.

In its Final Report on the NCA elections, The Carter Center recommended that the NCA “should carefully consider lifting such a ban for future elections.” The Center also recommended that if such measures were to be adopted in the future, “a more transparent mechanism for determining which individuals should be excluded from candidacy should be developed using the least restrictive means to accomplish the intended goal.”<sup>4</sup> It should be recalled that the ISIE recommended in its own official report on the 2011 NCA elections that depriving a person of his/her candidacy rights should be done either by a court decision as an additional sanction for penal offenses or by having a quasi-judicial body which would consider each case on an individual basis.<sup>5</sup>

While the decision of whether or not to enact the law is obviously a matter for Tunisians to decide, The Carter Center notes that there are international obligations regarding the right to be elected and the right to take part in the public affairs of one’s country which are relevant to Tunisia and which should be taken into account while considering the draft law. Given its mandate of election observation, the Center offers its comments to assist Tunisian institutions in ensuring that any limits on electoral rights are consistent with international obligations.

### **International obligations and the denial of candidacy rights**

The right to be elected forms part of the suffrage rights protected under international law. Especially important in this regard is Article 25 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees citizens the right to be elected without unreasonable restrictions.<sup>6</sup> There are two important aspects of this right, public and individual. The public aspect is that citizens must have the possibility to choose their own representatives. The power of the citizens to determine who will represent them is recognized as a cornerstone of democracy. The second aspect, the individual right for a citizen to be elected, in equality with other citizens, is related to this public right. These rights are also reflected in Article 13 of the African Charter on Human and Peoples’ Rights (Banjul Charter).<sup>7</sup>

Nevertheless, the right to be elected is not absolute. Under international law, restrictions may be imposed under certain conditions. Under U.N. General Comment 25, the interpretive document for article 25 of the ICCPR, any restrictions must be objective, reasonable, and non-discriminatory.<sup>8</sup> Political affiliation is expressly rejected as an acceptable restriction. For its part, the African Commission has expressly endorsed General Comment 25 in its decisions regarding violations of the African Charter.<sup>9</sup>

Restrictions on the right of candidacy based on positions held in former, non-democratic regimes have been applied in some countries, notably in Eastern Europe. This experience is cited

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<sup>4</sup> Final Report: Observing the October 23, 2011, National Constituent Assembly Elections in Tunisia, May 24, 2012, p.56.

<sup>5</sup> ISIE, “Rapport relatif au déroulement des élections de l’Assemblée Nationale Constituante”, February, 2012, p.193 (French) / p.205 (Arabic).

<sup>6</sup> “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (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;
- (c) To have access, on general terms of equality, to public service in his country.”

<sup>7</sup> “1. Every 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. 2. Every citizen shall have the right of equal access to the public service of his country...”

<sup>8</sup> General Comment 25 of the United Nations Human Rights Committee.

<sup>9</sup> See decision 241/01, Purohit and Moore / Gambia (The), 29 May 2003, paragraph 76.

as a precedent in the General Legislation Commission's report accompanying the draft Law on Political Immunization of the Revolution. However, most countries emerging from dictatorships in Eastern Europe chose not to include restrictions on candidacy to elected office in their "lustration" (exclusion) laws, but rather tended to focus on preventing excluded persons from taking up sensitive executive, judicial, security and other positions in these young democracies. The 1996 guidelines of the Parliamentary Assembly of the Council of Europe (PACE) on lustration laws go so far as to state that lustration should not be applied to candidacy rights.<sup>10</sup>

International jurisprudence permits narrowly defined restrictions on the right to be elected. The European Court of Human Rights has considered several cases regarding restriction on the right to be elected on the basis of activities or positions held in non-democratic regimes in Eastern Europe. The Court has found that restrictions may be permissible under certain conditions; namely, that such restrictions must pursue a legitimate aim, must be proportionate and must not be arbitrary.<sup>11</sup> An additional condition is that the broader the categories of persons to be excluded, the greater there is a requirement for an approach that takes into account individual actions and circumstances; the need for individualization becomes even more important with the passage of time.<sup>12</sup> Finally, these conditions are subject to the overriding principle that restrictions on the right to be elected must be necessary in order to protect the newly emerged democracy; they can never be a means of revenge, punishment or to obtain political advantage.

The right to association, the basis of the right to form and join political parties, is addressed by Article 22 of the ICCPR, as well as by Article 25. Notably, Article 22 specifies that restrictions on this right may be imposed only if they are "necessary in a democratic society".<sup>13</sup> The African Charter provides for the right of free association in Article 10.<sup>14</sup>

### **Provisions of draft law with respect to international law**

It is the role of the NCA to decide whether the proposed legislation is necessary in principle; the Carter Center does not address that issue. Limiting its comments to the restrictions in the draft legislation on the right to be elected, the right to associate, and the right to take part in public affairs, the Center is of the view that the relevant provisions do not fully respect the conditions identified in international law.

The widespread violation of human rights under the former regime is widely acknowledged. As a young democracy, Tunisia has a prerogative to defend itself against those who are deemed to pose a threat to the consolidation of that democracy. Although the law can be said to pursue a legitimate aim, the Carter Center considers the scope of the proposed legislation to be overly broad concerning the categories of people whose electoral and political rights would be affected. For instance, it excludes those who called on Ben Ali to run for president in 2014 (*mounachidin*). The sole fact of having made such a public call in 2009, even when an individual did so voluntarily, cannot reasonably be said to make someone a threat to the consolidation of Tunisian democracy in 2013, much less for the next seven years. Moreover, it is known that some names

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<sup>10</sup> See *Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law*, para 16 e), contained in "Measures to dismantle the heritage of former communist totalitarian systems", Doc. 7568, 3 June 1996. See also PACE Resolution 1096 (1996)1, adopted on 27 June 1996.

<sup>11</sup> Judgment in the case of *Adamsons v. Latvia*, Application no. 3669/03, 24 June 2008, paragraphs 111, 117-121.

<sup>12</sup> *Ibid.* para 125.

<sup>13</sup> "1. Everyone shall have the right to freedom of association with others... 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others..."

<sup>14</sup> "1. Every individual shall have the right to free association provided that he abides by the law..."

which appeared on published lists calling for Ben Ali to run in 2014 were included without those people's consent, while in other cases some felt coerced or pressured to sign and did not do so freely.

Similar considerations may be raised for other categories of persons identified in the law. Although the behavior of many of these people under the former regime was morally reprehensible, this is not necessarily the same as constituting a threat to the consolidation of democracy that would warrant restriction of fundamental electoral rights. It is rather a matter for Tunisian citizens to consider when freely choosing their representatives. Unless the election of certain categories of people pose a real threat to Tunisian democracy, the proposed restrictions on the right to be elected and on the people's right to choose their representatives could be considered disproportionate and unreasonable under international law.

Regarding the prohibition on being founders of political parties or members of their central or regional bodies, the draft law and its accompanying report do not identify why this restriction would be necessary in a democratic society. Such restrictions should be limited only to those persons who have been determined by their actions, not only by their previous positions, to represent a threat to the established democratic order.

### **The ISIE as implementing body**

The proposed law assigns the ISIE the role of compiling the preliminary list of people to be excluded within three months of the adoption of the law. The justification – to have the list compiled by a neutral body – is positive in principle. In practice, however, it would be problematic for several reasons. Foremost among these is the potential impact on public confidence in the ISIE and perceptions of its ability to administer elections in an independent and impartial manner. The ISIE must enjoy the confidence of political parties and voters in order to conduct elections effectively and credibly. Public confidence is built over time, by scrupulous adherence to impartiality and independence. If one of the first tasks of the newly constituted ISIE is to compile a list that will have political consequences, there is a risk that confidence in its work would be severely damaged. The ISIE could be subject to accusations that it has not implemented the law sufficiently or, on the other hand, that it has done so too zealously. In either case, perceptions of the ISIE's impartiality would be compromised at the very beginning of its mandate, undermining its ability to implement its core task – the conduct of genuine democratic elections.

Assigning these responsibilities to the ISIE is also impractical. Once formed, the ISIE will have to first address basic operational matters: setting up its office, establishing its executive body, establishing regional bodies, adopting internal rules, recruiting staff, preparing a budget, etc. The ISIE should begin planning for the upcoming elections as soon as operationally possible. Obliging the ISIE to compile the list of excluded persons as a matter of urgency could reduce its effectiveness in carrying out its primary responsibilities, thereby affecting the quality of the elections.

Finally, it should be noted that in countries where exclusion from candidacy rights on the basis of positions held in a former regime has been applied previously, election management bodies have not been responsible for deciding which persons would have their rights restricted; instead this has been done by courts or by special commissions.

## **Appeals**

The draft law provides for recourse to the Administrative Court for people who wish to dispute their exclusion. While the draft law appears to allow appeals based on substantive reasons and not only formal reasons, it does not give any guidance to the Court that would allow it to individualize the decisions. It does not appear that the Court could, for example, remove a person from the exclusion list on the grounds that their actions before, during or since the revolution indicates that they are not a danger to Tunisian democracy. Moreover, the Court does not have leeway to determine, for example, that a particular individual should not be excluded from elected office but may be excluded from other positions identified in the law.

Furthermore, the appeals procedure is based on individuals verifying whether they are on the provisional list of people to be excluded. However, they must undertake this verification within 10 days of the public notification that the provisional list has been finalized; there is no individual notification procedure. This could result in a situation in which an individual who is erroneously included on the list does not become aware of this fact until he or she is denied the right to run for office – at which point it will be too late to appeal. In view of the seriousness of the loss of rights and the irreversibility of the exclusion once decided, there are insufficient guarantees in the draft law to protect those who may be erroneously included in the list. One such guarantee would be a requirement for any deprivation of electoral or political rights to be finally determined by a Court.

It should be noted that if the scope of the law is too broad, without scope for the consideration of individual circumstances, or results in arbitrary loss of fundamental rights, this could give rise to potential invalidation by the judiciary.

## **Recommendations**

- The Carter Center urges the National Constituent Assembly to reconsider proposed restrictions on fundamental electoral and political rights in view of Tunisia's international obligations. In doing so, the Assembly should consider whether the restrictions would be reasonable, proportional and necessary in a democratic society.
- Should any restrictions on candidacy be retained, the Carter Center urges the Assembly to consider identifying or constituting a body other than the ISIE to compile the list of people to be excluded, so as not to risk damage to the perception of impartiality and independence of the new ISIE. Regardless of the body compiling the list, it is recommended to require that any restriction on electoral and political rights be finally determined by a Court.
- Finally, should any restrictions on candidacy be retained, the Carter Center encourages the Assembly to review the procedures for appeal. The Assembly could consider providing for the possibility for the Court to determine whether individuals who would otherwise be affected by restrictions of candidacy rights might be exempted on the grounds that their actions indicate that they do not pose a threat to Tunisian democracy.