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**AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**
**COURS AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES**

**THE MATTER OF**

**IBRAHIM BEN MOHAMED BEN IBRAHIM BELGUITH**

**V.**

**REPUBLIC OF TUNISIA**

**APPLICATION NO. 017/2021**

**JUDGMENT**

**22 SEPTEMBER 2022**

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**The Court composed of**: Imani D. ABOUD, President; Blaise TCHIKAYA, Vice-President, Ben KIOKO, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO, Dennis D. ADJEI - Judges, and Robert ENO, Registrar.

Pursuant to Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as “the Protocol”) and Rule 9(2) of the Rules of Court (hereinafter referred to as “the Rules”), Judge Rafaâ BEN ACHOUR member of the Court and a national of Tunisia, did not hear the Application.

In the Matter of:

IBRAHIM BEN MOHAMED BEN IBRAHIM BELGUITH
Advocate at the Cassation Court of Tunisia
*Self-represented*

Versus

REPUBLIC OF TUNISIA
Represented by:
Ali Abbès, State Litigation Officer, Ministry of State and Land Affairs

After deliberation,

*renders the present Judgment:*

## I. THE PARTIES

1. Mr Ibrahim Ben Mohamed Ben Ibrahim Belguith, is a national of Tunisia and a lawyer (hereinafter “the Applicant”). He alleges a violation of his rights in Articles 1, 7, 13(1), 20(1) of the Charter and other human rights instruments as a result of the promulgation of several presidential decrees in 2021.

2. The Application is filed against the Republic of Tunisia (hereinafter “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) on 21 October 1986 and to the Protocol on 5 October 2007, The Respondent State also deposited with the Chairperson of the African Union Commission on 2 June 2017, the Declaration provided for in Article 34 (6) of the Protocol by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations.

## II. SUBJECT OF THE APPLICATION

### A. Facts of the matter

3. The Applicant alleges in his Application that the President of the Respondent State, abrogated the Constitution, halted the democratic process and arrogated to himself more powers by promulgating the following presidential decrees:
   - No. 69 of 26 July 2021, pertaining to the termination of the duties of the Head and members of Government,
   - No. 80 of 29 July 2021, pertaining to the suspension of the powers of Parliament, lifting the immunity of its members for one month, starting 25 July 2021 subject to extension, by a presidential decree as per the provision of Article 80 of the Constitution.

- No. 109 of 24 August 2021, pertaining to the extension of exceptional measures on the suspension of the powers of Parliament and lifting the immunity of its members until further notice,
- No. 117 of 22 September 2021, pertaining to exceptional measures, Article 20 of which revokes the constitution, except Chapters I and II and maintaining the provisions which do not contradict the Presidential Order, and
- Nos. 137 and 138 of 11 October 2021, pertaining to the appointment of the Head and members of Government, respectively.

4. The Applicant asserts that the above decrees unlawfully terminated the functions and appointment of the Head and members of Government, and suspended the powers of Parliament and the provisions of the Constitution, except the preamble and Chapters I and II.

## B. Alleged violations

5. The Applicant alleges the violation of the following rights:
   i. The right of the people to self-determination within the meaning of Article 20(1) of the Charter, Article 1(1) of the International Covenant on Economic and Social Rights (hereinafter "the ICESCR"), the International Covenant on Civil and political Rights (hereinafter "the ICCPR")[1]and Article 21(3) of the Universal Declaration of Human Rights (hereinafter "the UDHR");
   ii. The right to participate in the conduct of public affairs guaranteed by Article 13(1) of the Charter, and Article 21(5) of the ICCPR[2] ;
   iii. The right to develop democratic values and human rights, guaranteed in Articles 2, 3, 4, 5, 10 11, 14 and 15 of the African Charter on Democracy, Elections and Governance (hereinafter "the ACDEG")[3];
   iv. The right to have the guarantees of human rights protected by Article 1 of the Charter; and

[1] The Respondent State ratified the instruments on 18 March 1969.
[2] Error by the Applicant, the article concerned is 25(a).
[3] Although the Respondent State signed the ACDEG on 27 January 2013, it has not ratified it to date; See https://au.int/sites/default/files/treaties/36384-sl-AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf (accessed on 30 March 2022).

v. The right of access to justice guaranteed by Article 7(1)(a) of the Charter, Article 8 of the UDHR and Articles 2(3) and 14 of the ICCPR.

6. The Applicant also alleges violation of Articles 1, 2, 3, 5, 20, 21, 49, 50, 52, 62, 65, 70, 72, 76, 77, 80, 81, 91, 92, 94, 95, 97, 100, 102, 110 and 148 (7) of the Constitution of the Respondent State of 27 January 2014.

## III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application, together with the request for provisional measures, was received at the Registry on 21 October 2021.

8. On 10 November 2021, the Application was served on the Respondent State for its Response to the request for provisional measures within fifteen (15) days and to the main application within ninety (90) days.

9. The Respondent State did not respond to the request for provisional measures. On 16 February 2022, the Respondent State submitted its Response to the Application. This was served on the Applicant for his Reply, and which he submitted on 23 February 2022.

10. On 7 March 2022, the Applicant's Reply was notified to the Respondent State for its information.

11. Pleadings were closed on 8 March 2022 and the Parties were duly notified.

12. On 24 March 2022, the Court issued an Order on procedure in which it ruled on the request for provisional measures together with the merits as both had substantially the same allegations and prayers.

## IV. PRAYERS OF THE PARTIES

13. The Applicant prays the Court to issue an order for provisional measures to put an end to the so-called exceptional measures taken by the Respondent State, and return to constitutional democracy and respect for the Constitution.

14. The Applicant also prays the Court to:
    i. Declare that it has jurisdiction
    ii. Declare the Application admissible.

15. He also requests the Court to declare that the Respondent State has, by promulgating the aforementioned decrees, violated both his rights and the rights of the Tunisian people, particularly:
    iii. the right of peoples to self-determination guaranteed under Article 20(1) of the Charter;
    iv. the right to participate in the conduct of the affairs of the country guaranteed in Article 13(1) of the Charter;
    v. the right to enjoy democratic values and human rights enshrined under Articles 2, 3, 4, 5, 10, 11, 14 and 15 of the ACDEG;
    vi. the right to have the guarantees of human rights protected by Article 1 of the Charter;
    vii. the right of access to justice guaranteed by Article 7 of the Charter.

16. The Applicant further requests the Court to order the Respondent State to repeal all the six (6) presidential decrees listed in paragraph 3 above; namely, No. 69 of 26 July 2021, No. 80 of 29 July 2021, No. 109 of 24 August 2021, No. 117 of 22 September 2021 and No. 137 and No. 138 of 11 October 2021 and guarantee the human rights set out in the Charter and the other instruments, by taking the following measures:
    viii. Adopt the necessary legislative and regulatory instruments to ensure the supremacy of the Constitution, including the speedy operationalisation of the Constitutional Court and the removal of all legislative, regulatory, political and practical challenges hindering it;

ix. Pass laws that criminalise participating in, and supporting unconstitutional change of power;
x. Pass laws that guarantee the inculcation of the democratic culture in the people, in particular young people;
xi. Provide effective procedural avenues to remedy the violation of the Constitution, pending the operationalisation of the Constitutional Court, by ordering the Respondent State to submit to the Court a report on the procedures for the execution of the judgment and guarantees of non-repetition.

17. On its part, the Respondent State requests the Court to find that:
    i. The Applicant has not exhausted all local remedies;
    ii. No evidence of a human rights violation has been provided;
    iii. The subject of the case infringes the principle of national sovereignty;
    iv. Dismiss the Application in form and on the merits.

## V. JURISDICTION

18. The Court notes that Article 3 of the Protocol provides as follows:

> 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and Application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

19. Under Rule 49(1) of the Rules of Court, "[t]he Court shall ascertain… its jurisdiction and the admissibility in accordance with the Charter, the Protocol and these Rules."

20. Based on the above-mentioned provisions, the Court must conduct an assessment of its jurisdiction and rule on any objections to its jurisdiction, if any.

21. In the instant case, the Respondent State raises two (2) objections to the Court's material jurisdiction. The first is based on the fact that the subject of the Application does not relate to violations of human rights while the second is based on the fact that the subject of the Application affects national sovereignty. The Court will therefore rule on these two objections before deciding on other aspects of its jurisdiction.

## A. Objections to material jurisdiction

### i. The subject of the Application is not related to any violation of human rights

22. The Respondent State submits that, in accordance with Articles 3 and 26 of the Protocol, the jurisdiction of the Court is primarily limited to taking measures to stop and prevent violations against African citizens and to deter governments from doing so, in order to preserve the rights of citizens, as defined by international instruments, mainly the Charter from which the Protocol emanated.

23. The Respondent State considers that the rights of citizens are entirely centred on four (4) rights as stipulated in the Charter, namely the right to freedom, the right to equality, the right to justice and the right to dignity. It avers that the concept of human rights violations refers to depriving individuals of their fundamental rights and treating them as if they were sub-human and do not deserve life and dignity by committing abominable acts such as genocide, torture, starvation and slavery. Furthermore, the concept of human rights violations also refers to the violation of economic, social and cultural rights whereby the State does not fulfil its obligations to ensure

the enjoyment of these rights without discrimination for example, by failing to guarantee the right to work to lead a decent life.

24. The Respondent State also submits that the main mission of this Court is to protect universal and inalienable human rights and to help avoid grave and imminent cases of violations and the occurrence of irreparable harm. As regards the original subject of the case, however, the Respondent State submits that the Applicant based his claims on a series of decrees issued by the President of the Republic based on the powers conferred upon him by the Constitution.

25. The Respondent State challenges the Applicant to prove the human rights which he was deprived of and how the said right was violated, if at all, leading him to bring a case before this Court. It asks the Applicant whether the issuance of presidential decrees in line with the powers conferred on him by the Constitution constitutes a violation of his human rights. With regard to the Applicant's allegation that the Tunisian people were deprived of their will for self-determination, the Respondent State questions who authorised the Applicant to take the place of all Tunisian people and to bring a case before a foreign regional court to obtain a judgment in his favour against the said people and on their behalf. The Respondent State requests that he produces the popular mandate given to him to act against an entire people. It further contends that if, as the Applicant claims, the Tunisian people have been deprived of their right to self-determination, then he has also deprived them of their right to decide who should act on their behalf. Further, the Applicant also abused the Court’s jurisdiction by filing a case without obtaining authorisation.

26. The Respondent State concludes that there is no human rights violation alleged or proven by the Applicant. It therefore argues that his case before this Court is frivolous and must be dismissed.

27. The Applicant did not respond to this objection.

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28. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any Application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[4]

29. In the instant case, the Court notes that the Applicant alleges violation of Articles 2, 3, 4, 5, 10, 11, 14 and 15 of the ACDEG. The Court further notes that the Respondent State is not a State party to this Charter and therefore, the Court cannot apply this instrument to the instant case.

30. However, the Applicant also alleges violations of the rights guaranteed in Articles 1, 7, 13(1), 20(1) of the Charter and Articles 1(1), 2(3), 14 and 21(5) of the ICCPR and Article 1(1) of the ICESCR. The Respondent State is a party to these three instruments and thus, the Court has the power to interpret and apply them to this case and consider the Applicant's allegations in accordance with the provisions thereof.

31. The Court notes the Respondent State's objections that the Applicant has not provided proof of the alleged human rights violations and that he does not have an attestation of representation from the Tunisian people to file a case on their behalf.

32. With respect to the first issue, the Court observes that the proof of alleged violations is irrelevant to the determination of its competence to consider an application filed before it. It is a question that can only be dealt with at the merits stage.

[4] *Masoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No. 008/2016 Judgment of 25 June 2021 (merits and reparations) § 21.

33. As regards the second issue, the Court notes that the Applicant alleges violations of his own rights and that of the Tunisian people. However, it is evident from his Application that the Applicant has instituted a public interest case and, in this vein, the Court has previously observed that the Protocol does:

> […] not require individuals or NGOs to demonstrate a personal interest in an Application in order to access the Court, especially in the case of public interest litigation. The only precondition is that the Respondent State, in addition to being a party to the Charter and the Protocol, should have deposited the Declaration allowing individuals and NGOs to file a case before the Court. This is also in cognisance of the practical difficulties that ordinary African victims of human rights violations may encounter in bringing their complaints before the Court, thus allowing any person to bring applications to the Court on others' behalf without a need to demonstrate victimhood or a direct vested interest in the matter.[5]

34. Accordingly, the Court dismisses the Respondent States' objections in this regard.

**ii. Objection to material jurisdiction based on the infringement of national sovereignty**

35. The Respondent State submits that international relations are based on the principle of sovereignty, which grants the State full authority over its territory and vests in its supreme authority over its territory, its institutions, its political, legal and economic choices, and the conduct of its external relations, so that in all this, it is not subject to any higher authority.

36. It also submits that in the preamble to the Charter: "The Member States of the Organization of African Unity which are parties to this Charter... [Reaffirm] the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify

[5] *XYZ v. Republic of Benin*, ACtHPR, Application No. 010/2020, Judgment of 27 November 2020 (Merits and Reparations), §§ 47-48.

their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights ".

37. The Respondent State further submits that Article 2(7) of the United Nations Charter similarly states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter …". The Respondent State considers that this article enshrines the principle of non-interference, which is one of the cardinal principles of public international law and on which the actions of sovereign states and international courts are based. It asserts that this concept of non-interference is what is considered the nucleus of the internal power of the State to protect its independence and sovereignty, unless the State takes actions that threaten international peace and security or commits aggression against another State, as spelt out in Chapter VII of the United Nations Charter.

38. The Respondent State contends that State sovereignty is manifested in the sovereignty of its government through the exercise of three powers, namely the legislature, the executive and the judiciary. It further submits that the legislative and judicial powers represent an aspect of State sovereignty and are considered to be the nucleus of its internal authority, as set out in Article 2(7) of the Charter of the United Nations. The Respondent State avers that the UN Charter is one of the sources of law that the Court should consider in its jurisprudence, so that it does not intervene in the work of its national courts and compel them to deliver certain judgments or decisions, or to control them by issuing external opinions and decisions influencing or opposing their decisions.

39. The Respondent State recalls the Applicant's request to order it to adopt the necessary legislative and regulatory instruments to ensure the supremacy of the Constitution, to criminalise unconstitutional change of power and foster a democratic culture in the people, as well as to compel it

to provide procedural avenues and solutions to remedy violations of the Constitution. In response, the Respondent State notes that the independence of its authorities is governed by Constitutional provisions and that no one may interfere in cases which fall within the internal power of a State, and that citizens are not allowed to submit these issues to be resolved under the Charter of the United Nations.

40. The Respondent State further submits that the task of the legislature and the adoption of laws and regulations within it are at the heart of its internal authority and that no party has the right to interfere with it or the power to compel it to adopt laws and regulations in any domain. It further contends that, from a purely legal point of view, decisions rendered by this Court are decisions rendered by the Member States in their capacity as legal persons, independent of their internal authorities. According to the Respondent State, the decisions of this Court are not to be rendered against the internal authority of Member States, neither are its decisions considered as decisions above that of its judiciary since no decision is superior to the internal judicial decisions of African Union Member States.

41. The Respondent State concludes that this Court cannot render a decision which infringes its sovereignty except where the State undertakes actions that threaten international peace and security or has committed aggression against another State, as stipulated in Chapter VII of the Charter of the United Nations. It reiterates that an outside party is not allowed to interfere in cases that fall within the internal jurisdiction of the Respondent State. Consequently, the Respondent State requests the Court to dismiss the Application on the merits.

42. The Applicant did not respond to this objection.

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43. The Court notes that at the heart of the Respondent State's objection is the contention that this Court does not have the jurisdiction to examine an

application except where the application relates to acts that threaten international peace and security within the terms of Chapter VII of the UN Charter. It is the Respondent State's submission that, in all other cases, the Court does not have jurisdiction to consider an application as this would be against the Respondent State's sovereignty and the principle of non-intervention enshrined in Article 2 of the UN Charter.

44. The Court observes that rules of international law, including the provisions of the Protocol from which it derives its jurisdiction, stem from the consensual undertakings of States. In general, States are not bound by any rules to which they have not consented and this is one of the highest manifestations of their sovereignty. Nonetheless, once they have given their consent, they cannot raise the defence of sovereignty to circumvent or limit their obligation arising from a rule that they have voluntarily agreed to be bound by.

45. In this regard, the Court underscores that the ratification by a State of international treaties and instruments establishing an international tribunal is an expression of its will or consent to cede part of its sovereignty and submit itself to the jurisdiction of that tribunal. [6]

46. In the instant Application, the Respondent State has ratified the Protocol and deposited the Declaration required under Article 34 (6) thereof. The ratification and deposit of the Declaration are both optional and voluntary acts but they generate an international obligation towards the Respondent State *vis-à-vis* the Court, that is, to submit to its jurisdiction.[7] Such an obligation stems from the Respondent State's own conduct in the exercise of its sovereign power. It cannot therefore invoke its sovereignty and the principle of non-intervention in its internal affairs to oust the jurisdiction of the Court.

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**6** See Article 2 (b) of the Vienna Convention on the Law of Treaties (1969).

7 *Ali Ben Hassen Ben Youssef v. Republic of Tunisia,* ACtHPR, Application No. 033/2018, Judgment of 25 June 2021, § 45; *Ingabire Victoire Umuhoza v. Rwanda* (jurisdiction) (2014), Decisions on the effects of the withdrawal of the Declaration provided for in Article 34(6) of the Protocol, 3 June 2016 (including a corrigendum to the decision, 5 September 2016) 1 AfCLR 540, § 58.

47. The Court wishes to point out that its jurisdiction is not limited to considering applications containing allegations of violations of human rights only, insofar as these threaten 'international peace and security'. It reiterates its position that as long as an application contains allegations of the violation of one or more of the rights protected in the Charter or any other human rights instrument ratified by the Respondent State, it assumes jurisdiction over such application, regardless of whether the violations allegedly relate to international peace and security. The Court thus dismisses the Respondent State's objection in this regard.

48. In view of the foregoing, the Court finds that it has material jurisdiction to consider the instant Application.

**B. Other aspects of jurisdiction**

49. The Court notes that no objection has been raised to its personal, temporal and territorial jurisdiction.

50. Having established that nothing on the record indicates that it lacks jurisdiction, the Court concludes that it has:
    i. Personal jurisdiction insofar as the Respondent State is a party to the Charter and Protocol and has deposited the Declaration allowing individuals and NGOs such as the Applicant to bring cases before the Court.
    ii. Temporal jurisdiction, insofar as the alleged violations were committed after the entry into force of the above instruments in relation to the Respondent State.
    iii. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the Respondent State's territory.

51. The Court therefore declares that it has jurisdiction to rule on the case.

## VI. ADMISSIBILITY

52. Article 6 (2) of the Protocol provides that “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.

53. Rule 50 (1) of the Rules provides: “the Court shall ascertain (…) the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules.”

54. Rule 50(2) of the Rules, which, in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all of the following conditions:
>
> a) Indicate their authors even if the latter request anonymity;
> b) Are compatible with the Constitutive Act of the African Union and with the Charter;
> c) Not contain any disparaging or insulting language;
> d) Are not based exclusively on news disseminated through the mass media,
> e) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f) Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
> g) Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

55. The Court notes that the Respondent State raises an objection to the admissibility of the Application based on non-exhaustion of local remedies.

## A. Objection based on non-exhaustion of local remedies

56. The Respondent State contends that Article 50 of the Charter stipulates that ‘the Commission” may consider a case before it only after ensuring that all local remedies, if any, have been exhausted, unless it appears that the examination procedures have been unduly prolonged. It also states that Article 56 of the Charter also stipulates that “the Commission” shall examine the communications referred to in Article 55 on human and peoples' rights only after local remedies have been exhausted, where appropriate, unless it is clear to “the Commission” that the procedures for these remedies have been unduly prolonged.

57. The Respondent State similarly submits that Article 6 of the Protocol provides that when deciding on a case instituted before it under Article 5 of the Protocol to assess whether it meets the admissibility requirements, the Court may request the opinion of the Commission, which shall give it as soon as possible. Moreover, the Court decided that the Applications submitted must satisfy the admissibility requirements, in line with the provisions of Article 56 of the Charter.

58. The Respondent State considers that the Applicant has brought the matter directly before this Court without prior recourse to the competent domestic court of the Respondent State, which the Applicant has acknowledged in his Application.

59. Accordingly, the Respondent State asserts that one of the admissibility requirements of Applications before the Court in accordance with Articles 50 and 56 of the Charter and Article 6 of the Protocol has not been met. It further contends that, Article 8 of the Protocol provides that after having declared a case admissible in line with the above-mentioned provisions, the Court may, by a two-thirds majority of its members, decide to dismiss it[8]if,

[8] Error by the Respondent State, Article 8 of the Protocol states: “The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court”

in its opinion, one of the requirements mentioned in Article 56 of the Charter is not met.

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60. On his part, the Applicant considers that the Constitution of the Respondent State is the highest law in the hierarchy of the Respondent State's laws. According to the Constitution, the Constitutional Court has jurisdiction to review the constitutionality of draft laws, to resolve conflicts of jurisdiction between the President of the Republic and the Prime Minister, to dismiss the President of the Republic, to receive the oath and to declare the post of President of the Republic vacant. It is the Applicant's submission that this makes the Constitutional Court the only competent authority exclusively empowered to rule on serious breaches of the Constitution by the Head of State (Article 69 of this organic law) and on the power relations between the Head of the Executive (Articles 47 to 76)) and more generally all the constitutional violations that can be imputed to him.

61. The Applicant affirms that, although more than five (5) years have elapsed since Organic Law No. 50 of 2015 was passed, the Constitutional Court has not yet been set up and that all attempts to set it up and elect its members have failed, which makes domestic litigation impossible with regard to violations imputed to the Respondent State in the present case. He also avers that Law No. 50 of 2015 stipulates in its transitional provisions (Article 80) that the provisional body in charge of determining the constitutionality of draft laws established under Organic Law No. 14 of 2014 of 18 April 2014 (hereinafter "the Law of 18 April 2014 on IPCCPL") shall remain in place until the establishment of the Constitutional Court. However, he contends that the jurisdiction of IPCCPL is limited to examining challenges to the constitutionality of draft laws raised only by the President of the Republic, the Prime Minister or a number of parliamentarians, so that it is impossible to bring cases before it. He further submits that, in any event, Article 21 of Presidential Decree No. 117 of 2021, having dissolved the IPCCPL, there is therefore no mechanism for ascertaining the constitutionality of laws and thus, no remedies are available in this regard.

62. The Applicant also asserts that the unavailability of a local remedy is confirmed by the last paragraph of Article 3 of the Law of 18 April 2014 on IPCCPL, which states that: “The courts lack jurisdiction to examine the constitutionality of laws”. This corresponds to the first paragraph of Article 120 of the Constitution relating to the exclusive jurisdiction of constitutional control.

63. Furthermore, the Applicant considers that, even in the event of recourse to the Administrative Court in accordance with its Law of 4 February 2002 as amended, which provides for the possibility of appealing against regulatory decrees, this remedy is nonetheless sterile and ineffective owing to the unsettled nature of that court's jurisprudence. He avers to this effect that the jurisdiction of the court is based on the administrative character of the law. This means that the decrees challenged must be organisational, that is, within the scope of the administrative law, which is not the case with the decrees that occasioned the violations in question.

64. The Applicant also argues that, the existence of the act of State doctrine, the absence of an administrative character, that is, the normal administrative activity and operation of a public administrative establishment, and the constitutional nature of the subject of the orders, prevents the administrative court from accepting cases brought against such Orders, which makes the standing to bring cases before it inoperative. In this regard, he recalls the *Al-Sahbi Al-Omari administrative decision against the Prime Minister* issued by First Appeals Chamber No. 26758 on 15 July 2008. The Applicant considers that, since the contested decree relates to a call of electors to a referendum on the draft constitutional law pertaining to the amendment of certain constitutional provisions, it does not belong to the category of administrative decisions which may be challenged for annulment within the meaning of Article 3 of the Administrative Tribunal Law, but rather falls in the category of sovereign acts which the administrative judge does not have the power to control.

65. He further submits in the same vein that in the decision on stay of execution in *Ziyad Al-Hani v. the President of the Republic*, which sought to repeal Presidential Ordinance No. 95 of 2016, pertaining to the appointment of a person to form a government, (Resolution No. 4100120 of August 25, 2016), the administrative court ruled that it was not allowed to consider the appeal or to request for a stay of execution of the decisions regarding the relationship between public authorities as provided for in the Constitution. The court also held that citizenship does not confer the legal capacity to challenge a presidential order, because it is a public interest issue that does not relate directly to individual request, except only for where a direct personal interest is involved. The Applicant further refers to Administrative Decision No. 134049 of 6 July 2018 in *Abdel-Raouf Al-Ayadi and Rabi' Al-Abedy v. the President of the National Constituent Assembly* and Decision No. 123610 issued on 14 July 2016, *Muhammad Imad Trabelsi v. the Prime Minister.*

66. The Applicant alleges that the decrees that occasioned the violations in question do not, for the most part, fall within the limited regulatory jurisdiction of the President of the Republic, within the meaning of Article 78 of the Constitution. General regulatory power is exercised by the Head of Government, explicitly in Article 94 of the Constitution, which stipulates that the latter lacks jurisdiction unless the Administrative Tribunal has ruled on compliance with the above material standard.

67. The Applicant further submits that the Court's jurisprudence in its judgment in *Christopher Mtikila v. United Republic of Tanzania* is that it is not necessary to resort to the same remedy where the outcome is already known, a position confirmed in its judgment in *Lohe Issa Konate v. Burkina Faso* at paragraph 112 thereof. This also resonates with the jurisprudence of the Inter-American Court of Human Rights in the decision in *Velasquez Rodriguez v.* Honduras of 29 July 1988, at paragraph 64 thereof, which states that: "If a remedy is not adequate in a specific case, it obviously need not be exhausted". Moreover, this Court has defined the effectiveness of the judicial procedure as "the ability to find a solution to the case

complained of by the one who initiates the procedure", as stated in *Norbert Zongo v. Burkina Faso,* 28 March 2014, paragraph 92.[9]

68. The Applicant also contends that the Court has dealt with the question of the domestic remedy of administrative courts examining the constitutionality of legislative and regulatory instruments. This was in its judgment in the case *of Association Pour la Protection le Droits de L'Homme v. Republic of Cote d'Ivoire* at paragraph 98 wherein the Court concluded that administrative courts, by virtue of the laws that govern them, have no jurisdiction to examine the constitutionality of laws, and therefore this Application cannot be contested on the basis that this remedy was not utilised. Accordingly, the Applicant concludes from the foregoing that local remedies are unavailable, which makes them ineffective. Therefore, the Application is admissible in relation to the requirement to exhaust local remedies.

69. Finally, the Applicant submits that the Respondent's State's response states nothing new that would negate his Application or warrant its dismissal. To the contrary, the Applicant asserts that the Response itself seemingly confirmed what was stated in the Application, thereby making it consistent with his requests therein.

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70. The Court notes that, in accordance with Article 56(5) of the Charter and Article 50(2)(e) of the Rules of Court, all applications before the Court must be filed after the exhaustion of local remedies, unless it is clearly demonstrated that domestic proceedings for such remedies are unduly prolonged. The requirement to exhaust local remedies aims at providing States the opportunity to deal with human rights violations within their

[9] The correct reference is to paragraph 92 of *Lohé Issa Konaté v. Burkina Faso* (Merits), Judgment of 5 December 2014, 1 AfCLR, 319.

jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.[10]

71. The Court emphasises that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they can be used without hindrance by the Applicant, be effective and satisfactory in the sense that they are *"*capable of satisfying the complainant or of remedying the situation in dispute".[11]

72. In the present case, the Court finds, on the one hand, that the Respondent State has not indicated which remedy the Applicant may exhaust at the national level. On the other hand, the Court notes that the Applicant has raised the question of compliance with the requirement to exhaust local remedies and concluded that the Respondent State's judicial system provides no avenues for challenging the constitutionality of laws, owing to the fact that the Constitutional Court has not been put in place. This means that the only means of appealing decisions is to lodge a complaint of abuse of authority. The Applicant contends that these remedies are not effective and cannot settle the conflict caused by the publication of the presidential decrees.

73. The Court observes that Article 148(7) of the Respondent State's Constitution provides that: "...Ordinary Courts are deemed to lack jurisdiction to ascertain the constitutionality of laws". In the same vein, Article 120 of the Constitution states that:

> The Constitutional Court has exclusive jurisdiction to check the constitutionality of the laws submitted to it by the courts, upon an objection based on constitutionality raised by one of the parties to a dispute, in the cases and in accordance with the procedures defined by law (...).

[10] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (Merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.
[11] *Beneficiaries of Norbert Zongo, Abdoulaye Nikiema dit Ablassé, Ernest Zongo, Blaise Ilboudo and Burkinabè Movement for Human and Peoples' Rights c. Burkina Faso*, Judgment (merits) (28 March 2014), 1 AfCLR 219, §68; *Lohé Issa Konaté v. Burkina Faso* Application No. 004/2013 (merits) (5 December 2014), 1RJCA 314, §108; S*ébastien Germain Marie Ajavon v. Republic of Benin*, ACtHPR, Application No. 027/2020 Judgment of 2, (jurisdiction and admissibility), December 2021, § 73.

74. The Court notes that on 3 December 2015, the President of the Republic of the Respondent State promulgated Organic Law No. 050/2015 on the Constitutional Court and that this law was published in the Official Gazette. Article 1 of the Law states:

> The Constitutional Court is an independent judicial body guaranteeing the supremacy of the Constitution, and protecting the republican democratic regime and rights and freedoms, in accordance with its powers and prerogatives provided for in the Constitution and laid down in this Law.[12]

75. The Court further notes that Article 54 of Organic Law No 2015- 50 of 3 December 2015 on the Constitutional Court provides "The parties in cases on the merits pending in the courts may raise an objection based on the constitutionality of the law applicable to the dispute".

76. On the other hand, the Court notes that Article 3 of the IPCCPL Law No. 14 of 18 April 2014, in its last paragraph, provides that "The courts are deemed to lack jurisdiction to ascertain the constitutionality of laws".

77. The Court further notes that Presidential Decrees are decrees of a legislative nature in accordance with Article 7 of Presidential Decree No. 117, and cannot be challenged before existing ordinary courts for the purpose of annulment.

78. The Court observes that according to afore-cited Article 120 of the Constitution, the determination of the constitutionality of laws is within the exclusive jurisdiction of the Constitutional Court, which according to Article 1 of Organic Law No. 2015-50 on the Constitutional Court of 3 December 2015, "(…)is an independent judicial body guaranteeing the supremacy of the Constitution, and protecting the republican democratic regime and rights and freedoms, in accordance its powers and prerogatives provided for in the Constitution and set forth in this Law."

[12] Official Journal of the Republic of Tunisia No 98 of 8 December 2015.

79. The Court notes that given that the Constitutional Court has not been operationalised since the promulgation of its constituting law referred to above, the remedy that would allow the Applicant to challenge the constitutionality of the presidential decrees in question are not available in the Respondent State's judicial system. In the circumstances, the Applicant is not required or expected to exhaust a remedy which is not available in the Respondent State.

80. Accordingly, the Court finds that the Application is deemed to have met the requirement of exhaustion of local remedies.

## B. Other conditions of admissibility

81. The Court notes that the Respondent State does not contest the compliance with the admissibility requirements set out in Article 56(1)(2)(3)(4)(6) and (7) of the Charter, which are restated in Rule 50(2)(a)(b)(c)(d)(f) and (g) of the Rules. Nevertheless, the Court must satisfy itself that these requirements have been met[13].

82. It emerges from the records that the Application meets the requirement of Rule 50(2)(a) of the Rules since the identity of the Applicant has been clearly stated.

83. The Court further notes that the by filing the instant Application, the Applicant seeks to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. The Application also does not contain any claim or prayer that is incompatible with a provision of the Act. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus meets the requirement of Rule 50(2)(b) of the Rules.

[13] *Kennedy Owino Onyachi and Charles John Mwanini v. United Republic of Tanzania* (Merits) Application No. 003/2015 (28 September 2017) (2017) 2 ACtHPR 65, § 56.

84. The Court further finds that the Application does not contain disparaging or insulting language and therefore, meets the admissibility requirement of Rule 50 (2)(c) of the Rules.

85. The Court also notes that the Application is not based exclusively on news disseminated through the mass media, so that it fulfils the requirements set out in Rule 50(2)(d) of the Rules.

86. With regard to the reasonable time-limit for bringing a case before the Court, Rule 50(2)(f) requires that Applications be filed before the Court within a reasonable time after local remedies have been exhausted or after the date set by the Court. The Court recalls that the Presidential decrees which gave rise to the instant Application were issued on 26 and 29 July, 24 August, 22 September and 11 October 2021. The Applicant filed this Application on 21 October 2021.

87. The Court notes that only a period of ten (10) days elapsed between the date of the last decree issued on 11 October 2021 and the date of filing of the Application on 21 October 2021. The Court considers this to be a reasonable time and accordingly, holds that the Application meets this admissibility requirement.

88. Finally, as regards the requirement in Rule 50(2)(g) of the Rules, the Court finds that the present Application does not relate to a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union. Accordingly, it holds that it meets the requirement of Rule 50(2)(g) of the Rules.

89. In view of the foregoing, the Court finds that the Application meets all the admissibility requirements under Article 56 of the Charter, as restated in Rule 50(2) of the Rules, and accordingly, finds it admissible.

## VII. MERITS

90. The Applicant alleges violations of the right to be heard, the right to self-determination, the right to participate in the conduct of public affairs, and the right to the protection of human rights and freedoms guaranteed in Articles 7 (1), 13(1), 20(1), and 1 of the Charter and Article 1(1) of ICESCR and Articles 1(1), 25(1), 2(3) and 14 of ICCPR.

### A. Alleged violation of the right to have one's cause heard

91. The Applicant alleges violation of the right to have his cause heard contrary to in Articles 7 of the Charter, Article 8 of the UDHR and Articles 2(3) and 14 of the ICCPR.

92. The Applicant further avers that the Presidential Decree No. 2021-117 violates the right to be heard before the courts by stipulating in its Article 7 that decrees issued by the President of the Republic are not subject to appeal.

93. The Applicant submits that the said Decree jeopardises the guarantees of the right to bring a case before the courts as provided for in international instruments ratified by the Respondent State, to the extent that the organisation of justice and judicial power is done by decrees issued by the President of the Republic. However, the Applicant avers that the Constitution guarantees human rights relating to the right to bring a case before the courts and the right to a fair trial by conferring on the legislative branch the organisation of judicial power and the judiciary in the form of organic laws, in line with Article 65 of the Constitution, which are inviolable compared to ordinary laws.

94. The Respondent State did not respond on the alleged violation of this right.

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95. The Court notes that, Article 7(1)(a) of the Charter provides that:

> Every individual shall have the right to have his cause heard. This comprises:
>
> (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

96. The Court notes that the right to be heard confers on the individual a set of rights, including the right to bring proceedings before a competent tribunal of a judicial or quasi-judicial nature, the right to have the opportunity to express one's opinion on matters and procedures that affect one's rights, and the right to appeal to higher courts or authority when one's causes are not properly considered by the lower courts or authorities.[14]

97. The Court emphasises that Article 7(1)(a) of the Charter makes it clear that the existence of a competent tribunal is a *sine qua non* to the enjoyment of the right to be heard, including the right to appeal. This must be read together with Article 26 of the Charter which imposes on State Parties the obligation to establish and improve appropriate national institutions for the promotion and protection of human rights and freedoms and to guarantee the independence of the courts.

98. The Court observes that for the enjoyment of the right to be heard, the competent tribunal or authority should exist both in law (*de jure*) and in fact (*de facto*). The right to be heard becomes illusory if the competent judicial or quasi-judicial authority or institution is established in the law but does not exist in fact.

99. In the instant Application, the Court observes that according to Article 118 of the 2014 Respondent State Constitution and the Organic Law No. 50 of 2015, a Constitutional Court was created within the structures of the Respondent State's judiciary. Pursuant to Article 120 of the Constitution,

[14] *Jebra Kambole v. United Republic of Tanzania*, ACtHPR, Application No. 018/2018, Judgment of 15 July 2020, § 96. *Werema Wangoko Werema v. United Republic of Tanzania* (merits) (2018) 2 AfCLR 520, § 69.

the Constitutional Court was mandated to consider, among others, cases involving disputes that require the interpretation and application of the Constitution. These, according to Article 101 of the Constitution, includes "Any disputes that arise regarding the respective powers of the President of the Republic and of the Head of Government".

100. Nevertheless, at the time the Application was filed before this Court, the Constitutional Court had not been operationalised. The Court notes that there was also no other Court or authority in the Respondent State that could consider constitutional disputes relating to the powers of the President. The absence of the Constitutional Court thus created a vacuum in the Respondent State's judicial system in relation to resolution of constitutional disputes, particularly, those questioning the constitutionality of decrees issued by the President.

101. As a result, it is evident that the Applicant was not able to challenge the constitutionality of the Presidential decrees. This in effect left him with no legal avenue to seek a remedy for his grievances and deprived him of his right to be heard.

102. In view of the foregoing, the Court holds that the Respondent State violated the Applicant's right to be heard contrary to Article 7(1)(a) of the Charter as read together with Article 26 of the Charter.

## B. Alleged violation of the people's right to self-determination and the right to political participation

103. The Applicant alleges a violation of Article 20(1) of the Charter and Article 1(1) of the ICCPR relating to the right of the people to existence and self-determination. He submits that respect for the right of the people to self-determination is one of the most important human rights achievements enshrined in the Constitution of the Respondent State, which led to the prohibition of its violation by constitutional amendment and, more

importantly, it is not possible for any text below the constitution to infringe this right.

104. The Applicant asserts that these rights were violated by the presidential decrees, in particular, Presidential Decree No. 117. He contends that this jeopardises human rights and freedoms by removing them from the ambit of organic laws pursuant to Article 65 of the Constitution which, in terms of its form and procedures, provides guarantees which elevate ordinary laws to decrees. According to the Applicant, this means that a mere decision taken by one person, namely, the President of the Republic constitutes a "menace" and a grave violation of rights and freedoms, especially in the absence of any oversight or counter authority and in the absence of any imminent danger within the meaning of Article 80 of the Constitution.

105. The Applicant further alleges a violation of the right guaranteed under Article 3(1)[15] of the Charter, Article 21(1) of the Universal Declaration of Human Rights and Article 25(1) of the ICCPR concerning participation in the conduct of the country's political affairs. In this regard, the Applicant cites the judgment of the Court of 22 September 2011[16] in *the Tanganyika Law Society, the Legal Centre for Human and Peoples' Rights and the Reverend Christopher Mtikila v. United Republic of Tanzania*, where the Court emphasised that the rights contained in Article 13(1) of the Charter are individual rights which may be exercised by the citizen directly and individually. The Applicant contends that by issuing the Presidential Decrees Nos. 69, 80, 109, 117, 137 and 138 of 2021, the Respondent State created a situation where citizens could not enjoy their right to participate in the affairs of their own country.

106. Consequently, the Applicant submits that the Respondent State has violated his and Tunisian peoples' right to political participation and right to

[15] This is an error by the Applicant as the correct reference should be Article 13(1) of the Charter.
[16] This is an error by the Applicant as the correct reference should be to the judgment on the merits in the above-mentioned case, dated 14 June 2013.

self-determination contrary to its obligations under Articles 13 and 20 of the Charter.

107. The Respondent State did not respond to both alleged violations.

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108. The Court notes that the Applicant alleges violations of both the right to self-determination and the right to political participation, which are guaranteed in Articles 13 and 20 of the Charter. The Court acknowledges in this regard the fundamental importance of the individual's right to political participation under Article 13 and to the peoples' free determination of their political status within the terms of Article 20 (1) of the Charter.

109. However, the Court finds that in the instant Application, the main issues raised by the Applicant relate to the right to political participation, and thus, the Court limits its determination to this aspect of the Applicant's allegation. In the circumstances of this case and considering the nature the Applicant's submissions, the Court does not find it necessary to consider the allegation relating to the violation of the right to self-determination.

110. The Court notes that, the right of citizens to participate in the political affairs of their country is one of the fundamental democratic rights protected by the Charter and other international human rights instruments.[17] Article 13(1)(c) of the Charter provides that:

> 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.

[17] Similarly, Article 21(1) of the UDHR also stipulates that "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives". Article 25(1) of the ICCPR also states that "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".

111. The right to participation confers on all citizens the right to be involved in the government of their country directly or through their freely chosen representatives. It includes the right to vote and stand for elections to assume political or official positions as well as obtain, without discrimination, the opportunity to serve their nation being part of the government. Where citizens vote to indirectly participate in the affairs of their country through representatives, the right entails respect for the citizens' freedom to choose their representatives and the prohibition of any measure that would compromise their representatives' ability to perform functions that they have assigned to them.

112. The Court has previously held that, under the Charter, the right to participate in the conduct of public affairs may be subject to some exceptional restrictive measures in the public interest, respect for the rights of others and to considerations in relation to the security and higher national interests of the State.[18] Such measures must also be taken in accordance with procedures established by law and must be necessary and proportionate to the legitimate aim(s) that they are designed to achieve.

113. In the instant case, the Court notes that the exceptional measures taken by the Respondent State were implemented within the framework of Presidential decrees issued by a democratically elected President owing to certain situations. The decrees were passed in accordance with Article 80 of the Respondent State's Constitution (2014), which provided that:

> In the event of imminent danger threatening the nation's institutions or the security or independence of the country, and hampering the normal functioning of the state, the President of the Republic may take any measures necessitated by the exceptional circumstances, after consultation with the Head of Government and the Speaker of the Assembly of the Representatives of the People and informing the

[18] *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34, § 100.

President of the Constitutional Court. The President shall announce the measures in a statement to the people.

114. The Court also notes that, as mentioned in the preamble of the Presidential Decree No. 117 of 2021, the circumstances that led to the issuance of the decrees would have resulted from a dysfunction of a democratically elected institution, namely the Assembly of People's Representatives. Moreover, as the above-mentioned Presidential Decrees shows, the functioning of the public authorities "was hampered, that the danger became not imminent, but real''. The Court observes that, in the light of these findings, there is every reason to believe that the measures adopted in the decrees were purportedly, aimed at ensuring the normal function of the State, to achieve the legitimate objective of preserving collective security or common interest within the terms of Article 27 of the Charter.

115. However, the Court observes that the above-cited provision of the Constitution of the Respondent State allows the President to take "any measures", which could include promulgating Presidential decrees, to counter "imminent danger threatening the nation's institutions or the security, independence of the country, and hampering the normal functioning of the state". The President's power to take such measures is however limited by the substantive conditions and procedural requirements indicated in Article 80 the Constitution, including the need for "consultation with the Head of Government and the Speaker of the Assembly of the Representatives of the People" and the duty to inform "the President of the Constitutional Court".

116. The Court notes that there is nothing on record showing that the substantive conditions of an imminent danger to the nation's institutions or the security and independence of the country or the abovementioned procedural requirements were met before the President issued the decrees in question. In this regard, the Court recalls the its finding in paragraph 79 above that the Constitutional Court was not operational at the time the decrees were promulgated. This simply means that there was no possibility for the

President to inform the President of the Constitutional Court prior to issuing the decrees. Accordingly, the decrees were not promulgated in accordance with the legal procedures provided for by the Constitution.

117. Furthermore, the Court finds that the decrees in question disproportionately disrupted the work of the government including that of elected institutions such as the House of People's Representatives. In this regard, the Court again finds that there is nothing on the record indicating that the measures introduced by the decrees to resolve the dispute among the government organs and reinstate the normal functioning of the state were taken after consideration and implementation of other less restrictive measures.

118. In this vein, the Court notes that the Respondent State was under an obligation to consider other least restrictive measures to deal with the said dispute prior to taking such drastic measures as the suspension of the powers of Parliament, and limiting the immunity of its members, who were freely elected by citizens in the exercise of their right to participate in the affairs of their government. The Respondent State's failure to do so made the adopted measures not only disproportionate in relation to the stated goals[19] but also with the Respondent State's own Constitutional dispensation. [20]

119. Accordingly, the Court finds that the Respondent State's restrictive measures were neither adopted in accordance with the law nor were they proportionate for the purpose for which they were adopted.

120. Consequently, the Court holds that the Respondent State has violated the right of the people to participate in the conduct of public affairs contrary to Article 13 (1) of the Charter.

[19] *Lohé Issa Konaté v. Burkina Faso* (merits), §-§ 145-166.
[20] *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits), § 100.

## C. Alleged violation of guarantees of human rights and freedom

121. The Applicant alleges a violation of the right to obtain guarantees for the protection of human rights and freedoms as provided in Article 1 of the Charter. He submits that the Constitution of the Respondent State accords great importance to human rights and public freedoms, which are embodied in its preamble as one of the pillars of the State. The Applicant further alleges that by the Respondent State recognising and enumerating in Part One on General Principles and in Part Two on Rights and Freedoms under Article 49 of the Constitution[21] it underscores the importance it attaches to the said rights and freedoms.

122. Furthermore, the Applicant submits that the Tunisian Constitution also stipulates in its last paragraph that no amendment may undermine the human rights and freedoms guaranteed by the Constitution.

123. The Respondent State did not respond to the alleged violation of this right.

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124. The Court recalls that Article 1 of the Charter provides as follows:

> The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

125. The Court notes that this provision imposes dual obligations on State Parties, namely, the duty to recognise the rights, duties and freedoms

[21] The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations. No amendment may undermine the human rights and freedoms guaranteed in this Constitution.

protected by the Charter and the duty to adopt legislative or other measures to give effect to the same.

126. The Court also recalls its established position that a violation of any of the rights contained in the Charter results in a violation of Article 1 of the Charter.[22]

127. In the instant Application, the Court further notes that the right to be heard and various forms of the right to political participation are provided for in the Respondent State's Constitution.[23] However, as was established in paragraph 79 above, the Respondent State has failed to operationalise its Constitutional Court to give effect to its citizens' right to be heard by enabling them to challenge the constitutionality of Presidential decrees. This has violated their right to participation in political affairs of their country directly and through their freely chosen representatives.

128. Consequently, the Court finds that the Respondent State also violated Article 1 of the Charter.

## VIII. REPARATIONS

129. The Court notes that in the present case, the Applicant does not seek pecuniary reparations because, according to him, even if it is present, real and continuous, the material harm caused by the violations, is not personal or direct, and that he has no standing to seek compensation on behalf of the Tunisian people.

130. However, the Applicant requests the Court to order the Respondent State to repeal all the decrees mentioned in paragraph 3 of this judgment in order to guarantee the human rights set out, by taking the following measures:

[22] *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin*, (Merits and Reparations) ACtHPR, Application No. 065/2019, Judgment of 2 December 2021, § 125;
[23] See Articles 34, 35, 50, 60 and 139 of the Constitution (2014).

i. Adopt the necessary legislative and regulatory instruments to ensure the supremacy of the Constitution, including the speedy establishment of the Constitutional Court and the removal of all legislative, regulatory, political and realistic impediments hindering it;
ii. Pass laws that criminalize participation in, and support of, unconstitutional change of power;
iii. Adopt laws that guarantee the inculcation of democratic culture among the people, especially young people;
iv. Provide procedural avenues and effective solutions to remedy violations of the Constitution, pending the establishment of the Constitutional Court, such as obliging it to submit to the Court a report on judgment enforcement procedures and guarantees of non-repetition.

131. The Respondent State does not address the issue of reparations and only requests that the case be declared inadmissible and be dismissed on the merits.

***

132. Article 27(1) of the Protocol provides that:

> If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation.

133. The Court recalls its earlier judgments and restates its position that, "to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim".[24]

[24] Abubakari v Tanzania (reparations) (2019) 3 AfCLR 33, § 19; *Thomas v. Tanzania* (reparations) (2019) 3 AfCLR 28, § 11; Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 1, § 19*; Ingabire Victoire Umuhoza v. Rwanda*(reparations) (2018) 2 AfCLR 202, § 19.

134. The Court also restates that reparation "… must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed."[25]

135. The measures that a State must take to remedy a violation of human rights includes notably, restitution, compensation and rehabilitation of the victim, satisfaction and measures to ensure non-repetition of the violations taking into account the circumstances of each case.[26]

136. In the instant case, the Court recalls its finding that Presidential Decrees Nos. 80, 109 and 117 of June 2021 suspended the work of Parliament and abrogated sections of the Constitution and thus has violated the right to be heard and the right of Tunisian citizens to political participation in the affairs of their own country contrary to Articles 7 (1) (a) as read together with Article 27, and 13 (1) of the Charter, respectively. The Court further recalls that the Respondent State in consequence of these violations has also violated its obligation under Article 1 of the Charter.

137. Consequently, the Court orders the Respondent State to repeal the presidential decrees in force, as a measure of restitution.

138. The Court also reiterates that the failure to operationalise the Constitutional Court constitutes a significant vacuum and dysfunction in the Respondent State's judicial system.

139. Accordingly, as a guarantee of non-repetition of the violations, the Court orders the Respondent State to put in place the Constitutional Court as an independent judicial body to contribute to the balance and stability of the Respondent State's judicial system.

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[25] *Mohamed Abubakari v. Tanzania* (reparations), § 20; *Alex Thomas v. Tanzania* (reparations), § 12; *Umuhoza v. Rwanda* (reparations), § 20; *Lucien Ikili Rashidi v. Tanzania* (merits and reparations), § 118.

[26] *Mohamed Abubakari v. Tanzania* (reparations), § 21; *Alex Thomas v. Tanzania* (reparations), § 13; *Ingabire Victoire Umuhoza v. Rwanda* (reparations), § 20.

## IX. REQUEST FOR PROVISIONAL MEASURES

140. The Court recalls that the Applicant filed the Application on 21 October 2021, together a request for provisional measures.

141. The Court further recalls that on 24 March 2022 it issued a Ruling to the effect that it would rule on the request for provisional measures together with the merits as both had substantially the same allegations and prayers.

142. In the light of this decision on the merits, the requested provisional measures are therefore rendered moot.

## X. COSTS

143. Neither party has made submissions on costs.

***

144. Rule 32(2) of the Rules provides that "[u]nless otherwise decided by the Court, each party shall bear its own costs, if any".

145. The Court notes that in the present case there is no reason to depart from this provision.

146. Consequently, the Court decides that each Party shall bear its own costs.

## XI. OPERATIVE PART

147. For these reasons,

THE COURT

*Unanimously,*

*On Jurisdiction*

i. *Dismisses* the objections to its jurisdiction;
ii. *Declares* that it has jurisdiction.

*On Admissibility*

iii. *Dismisses* the objection based on the failure to exhaust local remedies.
iv. *Declares* the Application admissible.

*On Merits*

v. *Finds* that the Respondent State violated the Applicant's right to be heard under Article 7(1)(a) of the Charter as read together with Article 26 of the Charter;
vi. *Finds* that the Respondent State violated the Applicant's right to participate in the conduct of public affairs in his country under Article 13(1) of the Charter;
vii. *Finds* that, the Respondent State violated Article 1 of the Charter;

*On Reparations*

viii. *Orders* the Respondent State to repeal Presidential Decrees No. 2021-117 of 22 September 2021, which includes Decrees Nos. 69, 80 and 109 of 26, 29 July, 24 August 2021, and Decrees Nos. 137 and 138 of 11 October 2021 and to return to constitutional democracy within two (2) years from the date of notification of this judgment.
ix. Orders the Respondent State to take all measures necessary for the operationalisation of an independent Constitutional Court and

remove all legal impediments thereto within two (2) years from the date of notification of this judgment.

*On implementation and reporting*

x. Orders the Respondent State to report to the Court, within six (6) months from the date of notification of this Judgment, on the on the implementation of item (viii) and (ix) of this operative part and every six (6) months thereafter until the Court considers that there has been full implementation thereof.

*On the request for provisional measures*

xi. Finds that the request for provisional measures is moot.

*On Costs.*

xii. *Orders* that each Party shall bear its own costs.

**Signed:**

Imani D. ABOUD, President;

Blaise TCHIKAYA, Vice-President;

Ben KIOKO, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM Judge;

Dumisa B. NTSEBEZA, Judge;

Modibo SACKO, Judge;

Dennis D. ADJEI

and Robert ENO, Registrar.

Done at Arusha, this Twenty-Second Day of September in the year Two Thousand and Twenty-Two, in Arabic, English and French, the Arabic text being authoritative.