

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
UNIÓN AFRICANA		UMOJA WA AFRIKA
<b>AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS  COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES</b>		

**THE MATTER OF**

**ELYSSA**

**V.**

**REPUBLIC OF TUNISIA**

**APPLICATION NO. 061/2019**

**JUDGMENT**

**4 DECEMBER 2025**



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**The Court composed of:** Modibo SACKO, President; Chafika BENSAOULA, Vice President; Suzanne MENGUE, Tujilane R. CHIZUMILA, Blaise TCHIKAYA, Stella I. ANUKAM, Imani D. ABOUD Dumisa B. NTSEBEZA, Dennis D. ADJEI, Duncan GASWAGA – Judges; and Grace W. KAKAI, Deputy Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights (hereinafter referred to as “the Protocol”) and Rule 9(2) of the Rules of Procedure of the Court (hereinafter referred to as “the Rules”),<sup>1</sup> Judge Rafaâ Ben Achour, a member of the Court and national of the Republic of Tunisia, did not hear the Application.

In the matter of:

Elyssa

*represented by*

Advocate Brahim BELGHITH

Versus

Republic of Tunisia

*Represented by:*

- i. Mr. Farhad Khalif, Secretary of State for Foreign Affairs, Director General of Legal Affairs; and
- ii. Mr. Chadli Rahmani, State Litigation Officer.

After deliberation,

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<sup>1</sup> Article 8(2) of the Rules of Court of 2 June 2010.

*Renders this judgment:*

## **I. THE PARTIES**

1. Ms Elyssa,<sup>2</sup> (hereinafter referred to as “the Applicant”) is a national of the Republic of Tunisia and a computer engineer by profession. She requested and granted anonymity by the Court. She alleges violation of her rights in relation to proceedings before domestic courts following her divorce and subsequent sentencing to seven months imprisonment for adultery.
2. The Application is filed against the Republic of Tunisia (hereinafter referred to as the “Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 16 March 1983 and to the Protocol on 21 August 2007. The Respondent State also deposited, on 16 April 2017, the Declaration provided for in Article 34(6) of the Protocol, by virtue of which it accepts the Court’s jurisdiction to receive applications from individuals and Non-Governmental Organizations having observer status before the African Commission on Human and Peoples’ rights (hereinafter referred to as “the Declaration”). On 7 March 2025, the Respondent State deposited with the African Union Commission the instrument of withdrawal of the said Declaration. The Court has ruled that the withdrawal of the Declaration has no effect either on pending cases or new cases filed before it until the withdrawal comes into effect one year after the deposit of the instrument thereof, in this case, on 8 March 2026.<sup>3</sup>

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<sup>2</sup> Pseudonym adopted by the Applicant.

<sup>3</sup> *Mouaz Khariji Ghannouchi and Others v. Republic of Tunisia*, AfCHPR, Application No. 004/2023, Decision of 17 March 2025 (setting aside the ruling on provisional measures of 28 August 2023), §§ 12 and 13.

## II. SUBJECT OF THE APPLICATION

### A. Facts of the matter

3. It emerges from the Application that the Applicant filed an application for divorce before the Ariana Court of First Instance (Tunisia). On 4 June 2014, the said Court rendered a decision (hereinafter referred to as “the Judgment of 4 June 2014”) in the Applicant’s favour, granting her divorce, child custody and alimony. On 10 June 2014, the Applicant’s husband appealed the Judgment of 4 June 2014 before the Tunis Court of Appeal.
4. On 1 June 2015, the Tunis Court of Appeal issued a judgment (hereinafter referred to as “the Judgment of 1 June 2015”), by which it upheld the judgment of 4 June 2014 in part, namely with regards to the divorce but granted custody of the children to the Applicant’s husband, while allowing the Applicant visitation days.
5. On 16 June 2016, the Applicant appealed the Judgment of 1 June 2015 before the Cassation Court with regards to custody of the children and, the payment of alimony. On 7 December 2016, the Cassation Court dismissed the appeal in its entirety.
6. Subsequently, the Applicant’s husband concurrently initiated an adultery suit against the Applicant. It emerges from the record that on 8 November 2014, the Applicant accompanied one Hannibal, a friend of hers, on a trip from Tunis to Yasmine Hammamet. On their arrival, the said Hannibal handed the Applicant the keys to his apartment and left for a conference. After the conference, Hannibal returned to the apartment and requested the Applicant to let him spend the night on the sofa in the living room, while she slept in the bedroom.
7. It also emerges from the record that the Applicant’s husband had been trailing the Applicant and Hannibal since they left Tunis. After the pair entered the apartment at night, he called the police and the Grombalia court

prosecutor, who authorized a police team to carry out an inspection in the apartment. The police entered the apartment at 11:25 pm and, having seized the Applicant and Hannibal's underwear, took the pair to the police station.

8. On 12 November 2014, the Grombalia Public Prosecutor decided to open investigations against the Applicant and Hannibal for adultery, under Docket Number 4/30943 1070. The initial medical examination of the Applicant conducted on 10 November 2014 showed that she had not engaged in sexual intercourse recently. A second forensic examination of the Applicant and Hannibal's underwear on 14 November 2014, revealed traces of semen matching Hannibal's genetic characteristics.
9. On 9 December 2014, the Grombalia Court of First Instance handed down Judgment No. 8210 (hereinafter referred to as "the Judgment of 9 December 2014"), in which it found the Applicant and Hannibal guilty of adultery, an offence punishable under Article 236 of the Respondent State's Penal Code.<sup>4</sup> They were sentenced to seven months' imprisonment and ordered to jointly pay the Applicant's husband an amount of 5,000 Tunisian dinars as reparation for moral prejudice, and 300 dinars as costs and lawyer's fees.
10. The Applicant, her husband and Hannibal appealed the above-mentioned the Judgment of 9 December 2014 before the Nabeul Court of Appeal. On 19 January 2015, the Nabeul Court of Appeal rendered Judgment No. 7380 (hereinafter referred to as "the judgment of 19 January 2015) in which it upheld the contested judgment.

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<sup>4</sup> "Adultery by the husband or wife is punishable by five years' imprisonment and a fine of five hundred (500) dinars. It may only be prosecuted at the request of the other spouse, who retains the right to halt the proceedings or the effect of the sentence. Where adultery is committed in the marital home, article 53 of the present code shall not apply. The accomplice is punished by the same penalties as the guilty wife or husband".

11. On 15 March 2015, the Applicant was released from prison. On 10 April 2015, the Applicant, pursuant to Article 172<sup>5</sup> of the Penal Code, filed complaint No. 709636/15 with the Public Prosecutor of the Tunis Court of First Instance, against the two officials who signed the forensic report dated 14 November 2014.
12. The complaint was referred to the Ariana Public Prosecutor on 14 April 2015, who in turn referred it to the Second Central Division of the National Guard in El Aouina on 20 December 2016. It was referred back to the Tunis Public Prosecutor on 26 September 2018.
13. According to the Applicant, the complaint was still in the preliminary investigation phase and the Public Prosecutor had yet to take any decision at the time the present Application was filed.

## **B. Alleged violations**

14. The Applicant alleges the violations of the following rights:
  - i. The right to equality before the law and the right to equal protection of the law, protected by Article 3(1), (2), of the Charter.
  - ii. The right to personal physical integrity, protected by Article 4 of the Charter and Articles 7 and 9(1) and (2) of the International Covenant on Civil and Political Rights (hereinafter referred to as “the ICCPR”).<sup>6</sup>
  - iii. The right to freedom, protected by Article 6 of the Charter, Article 3 of the Universal Declaration of Human Rights (hereinafter referred to as “the UDHR”) and Article 9 of the ICCPR.

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<sup>5</sup> A public official or equivalent, or any notary who, in the exercise of his or her duties, commits forgery likely to cause public or private harm, shall be liable to life imprisonment and a fine of one thousand dinars in the following cases:

- by fabricating, in whole or in part, a false document or deed, either by altering or distorting an original document by any means whatsoever, or by affixing a forged seal or signature, or by falsely attesting to the identity or status of persons.

- by fabricating a false document or knowingly distorting the truth by any means whatsoever in any medium, whether tangible or intangible, of a computer or electronic document, microfilm or microfiche, with the intent to provide evidence of a right or of a fact having legal effects.

<sup>6</sup> The Respondent State became a Party to the Covenant on 18 March 1969.

- iv. The right to a fair trial protected, by Article 7 of the Charter and Article 14 of the ICCPR, which includes:
  - a. The right to take legal action;
  - b. The right to benefit from the presumption of innocence;
  - c. The right to defence;
  - d. The right to be tried within a reasonable time;
  - e. The right to respect for the principle of the legality of offences.
- v. The right to terminate marriage in accordance with Article 12 of the UDHR and Article 1(e)(i) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter referred to as "the Maputo Protocol").<sup>7</sup>

### **III. SUMMARY OF PROCEDURE BEFORE THE COURT**

- 15. The Application together with a request for anonymity was received at the Registry of the Court on 9 October 2019. On 17 December 2019, the Applicant was informed that the Application was registered on 17 December 2019 and that her request for anonymity was granted.
- 16. On 17 December 2019, the Application was served on the Respondent State for its Response within 60 days.
- 17. The Parties filed their other pleadings within the time-limits set by the Court.
- 18. Pleadings were closed on 6 January 2021 and the Parties were duly informed.

### **IV. PRAYERS OF THE PARTIES**

- 19. The Applicant prays the Court to:

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<sup>7</sup> The Respondent State became a Party to the Maputo Protocol on 27 September 2018.

- i. Declare that the Court has jurisdiction in the instant case;
- ii. Declare the Application is admissible;
- iii. Declare that the violations alleged are well-founded;
- iv. Order the Respondent State to pay the following sums as reparation for material prejudice:
  - a) Five Thousand (5,000) Tunisian dinars as compensation for the amount awarded to her husband by the court;
  - b) Three Hundred (300) Tunisian dinars in respect of attorney's fees awarded to her husband by the court;
  - c) One Thousand Five Hundred (1,500) Tunisian dinars in respect of the costs of investigation, prosecution and appearance before the Hammamet Judicial Police Brigade;
  - d) Two Thousand Five Hundred (2,500) Tunisian dinars for costs in respect of the initial proceedings before the Grombalia Court;
  - e) Three Thousand Five Hundred (3,500) Tunisian dinars for costs in respect of the appeal proceedings before the Nabeul court;
  - f) Two Thousand (2,000) Tunisian dinars as costs in respect of the appeal against the divorce judgment before the Tunis Court of Appeal;
  - g) Four Thousand (4,000) Tunisian dinars for costs in respect of the pursuing the divorce case;
  - h) One Thousand Five Hundred (1,500) Tunisian dinars as costs in respect of drafting, filing and following up the criminal complaint against Ministry of the Interior laboratories;
  - i) Seventy-Eight Thousand (78,000) Tunisian dinars as financial compensation for the loss of her job in Tunisia;
  - j) Seven Thousand Eight Hundred (7,800) Tunisian dinars as end-of-service indemnities;
  - k) Ten Thousand Four Hundred (10,400) Tunisian dinars as reparation for lost wages during her detention in police custody and imprisonment from 9 November 2014 to 15 March 2015 when she was released;
  - l) Ten Thousand (10,000) euros as costs of proceedings in the instant case.
- v. For moral reparations, the Applicants pray the Court to order the Respondent State to pay the following sums:

- a) Twenty Thousand (20,000) euros as reparation for moral damage for being held in police custody beyond the maximum legal duration;
  - b) Two Hundred Thousand (200,000) euros as reparation for moral damage for having been deprived of liberty;
  - c) One Hundred Thousand (100,000) euros as reparation for moral damage resulting from the oppression and sense of injustice caused by the violation of her procedural rights and the adoption of illegal and exceptional procedures;
  - d) One Hundred Thousand (100,000) euros as reparation for moral damage resulting from the violation of her right to defence, and for having been convicted based on an invalid examination, as well as for the court's refusal to conduct a new examination and failure to comply with the requirements of a fair trial;
  - e) Two Hundred Thousand (200,000) euros as reparation for moral prejudice resulting from the loss of custody of her two sons;
  - f) Two Hundred Thousand (200,000) euros for moral prejudice resulting from the family and social scandal that continues to haunt her to this day;
  - g) One Hundred Thousand (100,000) euros as reparation for moral prejudice resulting from the fact that she was forced to leave her country and reside in France to avoid the disastrous consequences of the violations she suffered.
- vi. Order the Respondent State to apply the provisions of Article 277 of its Code of Criminal Procedure, by reviewing decision of 19 January 2015 rendered by the Nabeul Court of Appeal, and to vacate the judgment of 9 December 2014 on grounds of invalid proceedings and, as a precautionary measure, to close the case as there is no evidence that the Applicant committed any crime;
  - vii. Order the Respondent State to guarantee non-repetition of the violations found, by taking all legislative, judicial and administrative measures to:
    - a) Help expedite and facilitate the establishment and operationalization of the Constitutional Court, in accordance with the requirements of the Respondent State's law;
    - b) Clarify that divorce is the right to terminate a conjugal relationship and that neither spouse may be prevented from terminating a

conjugal relationship or compelled to remain bound [by the bonds of marriage] for reasons that do not fall within the scope of public law;

- c) Establish the particulars of the crime of adultery, even if in general terms, to respect the principle of legality of crimes;
- d) Raise awareness among investigating magistrates, judges and law enforcement officials of the crucial importance of the right to liberty and compliance with the principles of a fair trial;
- e) Establish a serious and effective penalty to be applied against the above-mentioned officials who do not comply with human rights requirements.

20. The Respondent State prays the Court to:

- i. Find that it lacks jurisdiction;
- ii. Find that the Applicant did not exhaust local remedies;
- iii. Find that the Applicant did not adduce any evidence of a human rights violation;
- iv. Find that the subject-matter of the Application infringes the Respondent State's sovereignty; and
- v. Declare the Application inadmissible in form and substance.

## **V. JURISDICTION**

21. The Court notes that Article 3 of the Protocol provides:

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.

22. Furthermore, under Rule 49(1) of the Rules, “The Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules”.
23. In view of the foregoing, the Court must examine all aspects of its jurisdiction and rule on objections thereto, if any.
24. In the present case, the Respondent State raises objections to the Court’s material jurisdiction. Accordingly, the Court will rule on these objections before deciding on other aspects of its jurisdiction, if necessary.

**A. Objections to material jurisdiction**

25. The Respondent State raises a two-pronged objection to the Court’s material jurisdiction: first, based on the fact that the subject-matter of the Application does not relate to a violation of a human right and; second, based on the fact that the subject-matter of the Application infringes on its national sovereignty.

**i. Objection alleging that the Application does not relate to a human rights violation**

26. The Respondent State considers that, under the Charter, the Applicant’s allegations, as a whole, relate to four rights, namely, the right to liberty, the right to equality, the right to have recourse to the courts and the right to dignity. It submits that the concept of human rights violation means depriving individuals of their fundamental rights and, sometimes, treating them as if they were less than human and undeserving of life and dignity, as in the cases of genocide, torture, forced starvation and slavery. It further argues that the concept of human rights violation also refers to the deprivation of economic, social and cultural rights resulting from the failure of the state to meet its obligations to guarantee the enjoyment of these rights without discrimination.

27. The Respondent State maintains that the fact of the Applicant being arrested at night with her partner in an apartment and convicted for adultery cannot be considered a violation of her human rights. It contends that this crime was proven by a forensic test carried out by the Sub-Directorate of Criminal and Scientific Laboratories of the Ministry of the Interior. The tests, the Respondent State avers, established the presence of semen matching the characteristics of Hannibal.

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28. The Applicant on her part avers that the Respondent State is misguided about the Court's jurisdiction and the human rights it protects, and that it confuses human rights with crimes against humanity. She also submits that the Respondent State distorts the content of her Application by claiming that it is vague, which is not the case, since the Application alleges ten human rights violations supported by evidence.

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29. The Court recalls, in accordance with Article 3(1) of the Protocol, that it has jurisdiction to hear all cases submitted to it concerning an alleged violation of the rights guaranteed by the Charter, the Protocol and any other human rights instrument ratified by the State concerned.

30. The Court notes that the Applicant alleges violation of the rights guaranteed by Articles 3, 4, 6 and 7 of the Charter and Articles 9 and 14(1) of the ICCPR. As the Respondent State is a Party to the Charter and the ICCPR, the Court has jurisdiction to interpret and apply them in the present case, and to examine the violations alleged by the Applicant in light of the rights provided for by said articles.<sup>8</sup>

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<sup>8</sup> *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465, §45; *Kennedy Owino Onyachi and another v. United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65, § 34 to 36; *Jibu Amir Alias Mussa and another v. United Republic of Tanzania* (merits and reparations) (28 November 2019), 3 AfCLR 629, § 18 *Masoud Rajabu v. United Republic of Tanzania*, (merits and reparations), (25 June 2021), 5 AfCLR 282, § 21.

31. It follows that the Respondent State's argument that the violations alleged in the Application do not pertain to human rights is unfounded.
32. Accordingly, the Court dismisses the objection to material jurisdiction on the grounds that the Application does not relate to a human rights violation.

**ii. Objection alleging that the Application infringes on national sovereignty**

33. The Respondent State submits that international relations are based on the principle of sovereignty, which confers on the State full and supreme authority over its territory, its institutions, its political, legal and economic choices, as well as over the handling of its foreign relations, and that, in all of these respects, it is not subject to any higher authority.
34. The Respondent State considers that State sovereignty is embodied in the sovereignty of the government to exercise three powers, namely, the legislative power, the executive power and the judicial power. It further submits that the legislative and judicial branches embody an aspect of State sovereignty and are considered an essential component of its internal authority, as enshrined in Article 2(7) of the Charter of the United Nations.
35. The Respondent State argues that under its Constitution, courts are independent in their decisions and are subject to no authority other than the law. It is the Respondent State's submission that the courts are thus independent even from the other branches of the State under whose banner they operate, in order to operationalize the principle of their independence from the government embodied in the legislative and executive powers, and to guarantee rights, freedoms and justice within the State.
36. The Respondent State concludes that this Court cannot render a decision that infringes the sovereignty of a State Party to the Protocol on a matter that falls within the domestic jurisdiction of the State concerned. The only exception, according to the Respondent State, is where a State commits

acts that threaten international peace and security, or commits acts of aggression against another State.

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37. The Applicant asserts that the Respondent State conflates international relations law with the international human rights law and its protection mechanisms. She explains that subjecting to the jurisdiction of the Court does not constitute an infringement of State sovereignty, but rather the expression that sovereignty, since the Respondent State freely accepted the Court's jurisdiction through legal means. The Applicant reminds the Respondent State that ratification of, and compliance with, international agreements is a manifestation of national sovereignty. This is evidenced, the Applicant submits, by the fact that Article 20 of the Respondent State's Constitution confers on international agreements a higher status than domestic law.
  
38. The Applicant further asserts that the decisions of the Court are international judicial decisions that are binding on States and their three branches. According to the Applicant, this is notwithstanding the fact that the said decisions are not organically linked to the Respondent State's judicial system and do not fit in the hierarchy of domestic courts' decisions.

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39. The Court recalls Article 26 of the Vienna Convention on the Law of Treaties<sup>9</sup> which provides, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".<sup>10</sup>

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<sup>9</sup> The Respondent State became a party to the Vienna Convention on 23 June 1971.

<sup>10</sup> This is a well-established principle of law, both in public international law and in international human rights law. The Respondent State acceded to the Vienna Convention on the Law of Treaties on June 23, 1971.

40. The Court notes, as indicated in paragraph 2 of this judgment, that the Respondent State is a party to the Charter and the Protocol. Consequently, the Respondent State cannot invoke its sovereignty to evade compliance with the provisions of the Charter and the Protocol or, for that matter, any other human rights instrument to which it is a party.
41. The Court considers that, in any event, it has material jurisdiction to hear an application submitted to it provided that it alleges violation of a human right protected by the human rights instruments to which the Respondent State is a party.<sup>11</sup>
42. In the present Application, the Court notes, as earlier stated, that the Applicant alleges violation of several human rights, namely, the right to equality before the law, the right to equal protection of the law, the right to a fair trial, and the right to liberty and security, as provided for in Articles 3, 4, 6 and 7 of the Charter and Articles 7, 9 and 14 of the ICCPR, which are human rights instruments to which the Respondent State is a Party.
43. The Court, therefore, dismisses the Respondent State's objection that the Application infringes on its sovereignty.
44. In view of the above, the Court dismisses the Respondent State's objection to its material jurisdiction and holds that it has material jurisdiction to hear the present Application.

## **B. Other aspects of jurisdiction**

45. The Court notes that no objections have been raised to its personal, temporal and territorial jurisdiction. Nonetheless, it must ensure that all aspects of its jurisdiction are met before proceeding to consider the matter.

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<sup>11</sup> *Hongue Éric Noudéhouenou v. Republic of Benin* (merits) 4 AfCLR 749, § 26; *Alex Thomas v. United Republic of Tanzania* (merits) (2015) 1 AfCLR 465, § 45.

- i. The Court finds that its personal jurisdiction is established insofar as, as indicated in paragraph 2 above, the Respondent State is a Party to the Charter and the Protocol. On 7 March 2025, the Respondent State deposited the instrument of withdrawal of the said Declaration with the African Union Commission. In this regard, the Court reiterates its position, as set out in paragraph 2 of this judgment, that the withdrawal of the Declaration does not affect cases pending before the said withdrawal takes effect. As the present Application was already pending before the Respondent State withdrew its Declaration, the withdrawal has no effect on the case.<sup>12</sup>
- ii. The Court also finds that its temporal jurisdiction is established insofar as the facts of the case occurred after the Respondent State became a party to the instruments referenced in paragraph 2 above.
- iii. With regard to territorial jurisdiction, the Court finds that the violations alleged by the Applicant took place on the territory of the Respondent State. Consequently, the Court has territorial jurisdiction to consider this Application.

46. The Court, therefore, holds that it has jurisdiction to hear the instant Application.

## **VI. ADMISSIBILITY**

47. Under Article 6(2) of the Protocol, “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter. “

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<sup>12</sup> *Ingabire Victoire Umuhoza v. Republic of Rwanda* (jurisdiction) (2016) 1 AfCLR 540, §§ 66-68; *Houngue Eric Noudehouenou v. Republic of Benin*, AfCHPR, Application No. 003/2020, Order of 5 May 2020 (provisional measures), §§ 4- 5 and Corrigendum of 29 July 2020; *Kouadio Kobena Fory v. Republic of Côte d’Ivoire* (merits and reparations) (2 December 2021) 5 AfCLR 682, § 2 and *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, § 38.

48. Under Rule 50(1) of the Rules, “The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter [...]”.
49. Rule 50(2) of the Rules, which restates the content of Article 56 of the Charter, provides:

Applications filed to 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. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,
  - 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 seized 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 Charter of the Constitutive Act of the African Union or the provisions of the Charter.
50. The Court notes that the Respondent State raises an objection based on failure to exhaust local remedies. The Court will consider the said objection before examining other admissibility requirements, if necessary.

## **A. Objection based on failure to exhaust local remedies**

51. The Respondent State raises an objection based on non-exhaustion of local remedies in relation to three issues: (i) the Applicant's divorce; (ii) the adultery case; and (iii) the Applicant's complaint to the Prosecutor of the Tunis Court of First Instance regarding the officials who signed the forensic report.

### **i. Exhaustion of local remedies in the divorce case**

52. The Respondent State merely avers that the Applicant did not exhaust local remedies in respect of the divorce case without substantiating the objection.

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53. On her part, the Applicant simply submits copies of the judgments rendered in the divorce case before the national courts, which includes orders on child custody, alimony and residence.

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54. The Court notes that Article 56(5) of the Charter and Rule 50(2)(e) of the Rules stipulate that, applications which are filed before it, shall be filed, after exhausting local remedies, if any, unless it is manifestly clear that the proceedings thereof are unduly prolonged. The Court has consistently held that this requirement seeks to afford the Respondent State the opportunity to address the allegations within its domestic judicial system before recourse to an international human rights court on the matter.<sup>13</sup>

55. The Court also recalls that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they must be capable of being pursued by the Applicant without hindrance. These remedies must

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<sup>13</sup> *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93 - 94.

also be effective and satisfactory in the sense that they are capable of remedying the situation in question.<sup>14</sup>

56. The Court notes that divorce in the Respondent State is only pronounced in court, as per article 31 of the Tunisian Code of Personal Status, which reads as follows:

Divorce can be declared:

1. In case of mutual consent by both parties;
2. Upon the request of one of the spouses because of prejudice suffered at the hands of the other spouse;
3. Upon the request of the husband or wife.

It is stipulated that reparation will be awarded for material and moral prejudice suffered by one of the spouses at the hands of the other spouse.

57. Article 32(12) of the law also provides that “the parts of the judgment relating to custody, alimony, residence and visiting rights shall be enforced notwithstanding any appeal or objection.”
58. It follows that the decision of the Court of First Instance on divorce is subject to appeal and is, therefore, not final. Accordingly, the proceedings brought before the Court of Appeal of the Respondent State by the Applicant’s husband, in respect of which final decision on divorce was issued, is founded in law.
59. The Court notes that divorce proceedings are not essentially different from other proceedings applied in all civil cases, despite the peculiarity of the matter. Thus, the preamble of the Tunisian Family Law states: “in line with the order of 3 August 1956 (25 doulhidja 1375), on the amendment of the

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<sup>14</sup> *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema aka Ablassé, Ernest Zongo, Blaise Ilbouldo and Mouvement burkinabè des droits de l’homme et des peuples v. Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 68; *Lohé Issa Konaté v. Burkina Faso* Application No. 004/2013 (merits), § 108; *Sébastien Germain Marie Ajavon v. Republic of Benin* (jurisdiction and admissibility) (2 December 2021) 5 AfCLR 623, §73.

Code of Civil Procedures”, thus recalling that the procedures relating to personal status are the same as those provided for in the Code of Civil Procedure.

60. The Court further notes that the Ariana Court of First Instance, by Judgment No. 29907 of 4 June 2014, pronounced the Applicant’s divorce and awarded her custody of her two children, alimony and residence in the marital home. Her husband appealed the said judgment on 10 June 2014, following which the Tunis Court of Appeal, by Judgment 1 June 2015, relieved the Applicant of child custody, alimony, and the marital home. On 7 December 2016, the Cassation Court, the highest court of the Respondent State, dismissed the cassation appeal filed by the Applicant against the judgment of 1 June 2015.
61. The Court also notes that there was no further remedy for the Applicant to pursue regarding the divorce proceedings in order to challenge the decisions regarding child custody, alimony and residence in the matrimonial home.
62. Accordingly, the Court dismisses the Respondent State’s objection based on non-exhaustion of local remedies in relation to the divorce case.

## **ii. Exhaustion of local remedies in the adultery case**

63. The Respondent State maintains that, under Article 56 of the Charter, the Court must not examine the Application until it has ascertained that domestic remedies have been exhausted, unless it finds that the remedies in question have been unduly prolonged.
64. Regarding the adultery case, the Applicant submits copies of the decisions of domestic courts in relation to her conviction.
65. The Applicant further asserts that Article 236 of the Penal Code, under which she was tried and convicted, is unconstitutional insofar as it does not define the material particulars of the offence of adultery. She further

contends that she was unable to pursue the relevant remedy as the Respondent State has yet to operationalise its Constitutional Court.

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66. The Court notes that, under the provisions of Rule 258 of the Respondent State's Code of Criminal Procedure entitles a convicted person to appeal decisions on the merits originally issued as final before the Cassation Court, even if they have been implemented, based on lack of jurisdiction, excessive authority, breach or error of the law.
67. The Court further notes that the Grombalia Court of First Instance, by Judgment No. 8210 of 9 December 2014, convicted the Applicant of adultery, and sentenced her to seven months in prison and ordered her, together with her friend, to pay her husband an amount of Five Thousand (5,000) Tunisian Dinars as reparation. On 19 January 2015, the Nabeul Court of Appeal upheld the above judgment in its Judgment No. 7380. After serving her sentence, the Applicant was released from prison on 15 March 2015.
68. The Court observes that another remedy was available for the Applicant to exhaust as she could appealed the Court of Appeal of Nabeul's Decision No. 7380 of 19 January 2015 before the Court of Cassation, in accordance with Article 258 above. Having failed to do so, she did not exhaust the said remedy.
69. The Court further notes that the Applicant could have also filed a petition to the Constitutional Court of the Respondent State challenging the constitutionality of Article 236 of the Penal Code under which she was tried and convicted, on the ground that the said provision does not define the material particulars of the offence of adultery. However, given that the Respondent State has yet to operationalise its Constitutional Court, the requirement relating to the existence and availability of the remedy is not met. As such, this remedy should be considered to have been exhausted.

70. Accordingly, the Court upholds the Respondent State's objection based on the failure to appeal the conviction for adultery before the Cassation Court and dismisses the objection based on the constitutionality of Article 236 of the Penal Code.
71. Consequently, the Court holds that the Application meets the requirement of exhaustion of local remedies in respect of the alleged violation of the right to have one's cause heard, concerning the adultery case.

**iii. Objection relating to the Applicant's complaint to the Tunis Court of First Instance Prosecutor**

72. The Respondent State avers that the Applicant had previously filed a complaint with the Public Prosecutor against the officials who signed the forensic report conducted in her case, which proved that the Applicant had committed adultery with Hannibal. The Respondent State argues that the case is still pending, has not gone through the prescribed litigation stages, and has not yet been finalized.

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73. The Applicant considers that her complaint Number 7019636/15 of 10 April 2015 registered with the Public Prosecutor is still in the preliminary investigation phase and that the Public Prosecutor has not taken a decision to send it to court. She further submits that she decided to seize this Court due to undue delay in hearing her case. She points out that the appeals procedure was unduly prolonged.
74. She explains that between 10 April 2015 when she filed the complaint with the Public Prosecutor, and 9 October 2019 when she filed the present Application with this Court, a period of five years elapsed during which the Public Prosecutor made only one decision which is to open an investigation;

while the Applicant was never heard. In her view, this shows inaction and undue prolongation of the internal judicial process.

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75. The Court notes that the bone of contention between the Parties regarding exhaustion of local remedies relates exclusively to the complaint lodged by the Applicant with the Public Prosecutor against the two officials who signed the forensic report based on which the courts convicted her for adultery and sentenced her to seven months in prison.
76. The Court further notes that this complaint was referred to the Ariana Public Prosecutor on 14 April 2015, who in turn referred it to the Second Central Division of the National Guard in El Aouina on 20 December 2016, and that the complaint was referred to the Tunis Public Prosecutor on 26 September 2018.
77. The Court further observes that from the date of the last action relative to the complaint, that is, 26 September 2018, to the date of filing the instant Application on 19 October 2019, one year and 13 days elapsed. According to the Applicant, this period is shorter than it would have taken to obtain a decision in her case, which decision, should forgery be established, would have afforded her the right to appeal the adultery conviction, in accordance with Article 278 of the Tunisian Code of Criminal Procedure.
78. The Court therefore upholds the Respondent State's objection in relation to the complaint filed by the Applicant against the officials who signed the forensic report, and holds that the Application does not meet the requirement of exhaustion of local remedies regarding the allegation that the proceedings involved were unduly prolonged.
79. In view of the above, the Court dismisses the Respondent State's objection based on non-exhaustion of local remedies relative to the divorce case, and relative to the constitutionality of Article 236 of the Penal Code. The Court

conversely upholds the Respondent State's objection regarding the case of adultery and the complaint against the officials who signed the forensic report.

80. Consequently, the Court holds that the Application meets the requirement of exhaustion of local remedies only in respect of the divorce case and the constitutionality of Article 236 of the Penal Code.

## **B. Other admissibility requirements**

81. Having declared the Application inadmissible for non-exhaustion of local remedies as regards both the adultery case and the complaint against the two officials who signed the forensic report, the Court will examine other admissibility requirements only in respect of the divorce case and the constitutionality of Article 236 of the Penal Code.
82. The Court notes that other admissibility requirements under Article 56(1), (2), (3), (4), (6) and (7) of the Charter as restated in Rule 50(2)(a), (b), (c), (d), (f), (g) of the Rules are not in contention by the parties. Nonetheless, the Court must ensure that all admissibility requirements are met.<sup>15</sup>
83. The Court notes from the record that the requirement under Rule 50(2)(a) of the Rules is met, insofar as the Applicant has revealed her identity to the Court.
84. The Court also notes that the Applicant's Application seeks to protect her rights guaranteed by the Charter. The Court further notes that one of the objectives of the Constitutive Act of the African Union, as set out in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. The Court therefore finds that the Application complies with the Constitutive Act of the African Union and the Charter, so that it meets the requirement under Rule 50(2)(b) of the Rules.

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<sup>15</sup> *Kennedy Owino Onyachi and Charles John Mwanini v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 56.

85. The Court further notes that the Application does not contain any insulting or disparaging language against the Respondent State, its institutions or the African Union, so that it meets the requirement of Rule 50(2)(c) of the Rules.
86. The Court also notes that the Application is not based exclusively on news disseminated through the mass media and therefore meets the requirement under Rule 50(2)(d) of the Rules.
87. With regard to the reasonable time for filing an Application before it, the Court considers that Rule 50(2)(f) of the Rules stipulates that the application be filed with the Court within a reasonable time after exhaustion of local remedies or after the date set by the Court as the starting point for calculating the time to be observed before filing an application before it.
88. The Court notes that the present case involves a dispute concerning the Applicant's divorce, granted by the Court of First Instance, and her conviction for adultery after being accused by her husband. The divorce case was subsequently brought before the Cassation Court, the highest court of the Respondent State. By judgment of 7 December 2016, the Cassation Court affirmed the revocation of the Applicant's right to custody of her minor children, alimony and ownership of the marital home. In assessing the reasonableness of the time for referral, the Court will therefore take into account the date on which the Respondent State deposited the Declaration, which is 2 June 2017, as the starting point for computing the time to be assessed.
89. The Court recalls that the Applicant filed the present Application on 9 October 2019, that is, a period of two years, four months and two days from the date the Respondent State deposited the Declaration.
90. The Court has consistently held that determination of reasonable time for filing applications is done on a case-by-case basis and takes into

consideration the peculiar circumstances of each case.<sup>16</sup> In the present application, taking into account the origin and status of the case before domestic courts, including the time it may take an applicant to secure legal representation for purposes of filing an application, the Court considers that a period of two years, four months and seven days is reasonable within the meaning of Article 56(5) of the Charter.

91. The Court considers that the Applicant could not challenge the constitutionality of Article 236 of the Penal Code, on the basis of which she was convicted, as the Constitutional Court had not been established.
92. Consequently, the Court considers that the Application satisfies the admissibility requirement of reasonable time to file an application in respect of the constitutionality of Article 236 of the Penal Code.
93. The Court notes that the Application does not concern a matter already settled by the State 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 any legal instrument of the African Union. It, therefore, meets the requirements of Rule 50(2)(g) of the Rules.
94. In view of the foregoing, the Court holds that the Application meets the admissibility requirements under Article 56 of the Charter as restated in Rule 50(2) of the Rules and declares it admissible, only with regard to the issue of divorce and the constitutionality of Article 236 of the Penal Code.

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<sup>16</sup> *Armand Guehi v. United Republic of Tanzania* (Merits and Reparations) (7 December 2018) 2 AfCLR 477, § 56 ; *Nguza Viking & Another v. United Republic of Tanzania* (Merits) (23 March 2018) 2 AfCLR 287, § 61.

## VII. MERITS

95. The Applicant alleges the following human rights violations: The right to a fair trial, the right to equality before the law and equal protection of the law, the right to respect for her life, the right to liberty and the right to terminate her marriage.
96. Given its findings on admissibility, the Court will limit its consideration of the merits of the Application to (i) the alleged violation in the issue of termination of marriage and (ii) the alleged violation of the right to a fair trial, which rights are guaranteed, respectively, by Articles 1(f)(g) and 7 of the Maputo Protocol and Article 12 of the UDHR regarding the right to terminate marriage ; and Article 7(1)(a) of the Charter and Article 14(1) of the ICCPR in respect of the right to have one's cause heard.

### **i. On the alleged violation of the right to terminate marriage**

97. The Applicant alleges violation of her right to terminate her marriage. She recalls that the Ariana Court issued a decision granting the Applicant divorce. However, the Court of First Instance and the Court of Appeal, taking into account all particulars governing the application of the provisions of Article 236 of the Penal Code, accused and convicted her of the offence of adultery. She submits that there are three divorce regimes in the Respondent State, namely, divorce by mutual consent, divorce at the request of one of the spouses on grounds of prejudice suffered, and lastly, no-fault divorce at the request of the husband or wife. This shows that the law provides for ending a marriage and proscribes coercing a spouse to remain in a marriage. She avers that she filed for divorce and that the court granted same on 4 June 2014, notwithstanding that she had not lived with her husband since 2013, having been awarded child custody in 2014.
98. The Applicant explains that under Article 29 of the Personal Status Code, divorce in the Respondent State is the dissolution of a marriage contract by virtue of Article 34, which reads as follows: “[t]he woman, divorced after the

consummation of the marriage or widowed before or after the consummation of the marriage, must observe a waiting period as determined in the following article". This is a period not exceeding three months, in accordance with Article 35 of the Personal Status Code. She submits that between the pronouncement of the divorce judgment and being accused of adultery, five months elapsed. It follows that the fact of her husband appealing the divorce judgment did not oblige the Applicant to remain in the marriage.

99. The Applicant further submits that coercing her to stay married constitutes a violation of the right to personal freedom and discrimination against women within the meaning of Article 1(f) and (g) of the Maputo Protocol.<sup>17</sup>

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100. The Respondent State maintains that the Applicant does not prove any of the human rights violations she alleges.

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101. Article 2 of the Charter provides as follows:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

102. Article 1 of the Maputo Protocol provides thus:

[...]

- (f) "Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose

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<sup>17</sup> The Respondent State became a Party to the Maputo Protocol on 27 September 2018.

objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;

- (g) “Harmful Practices” means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity;

103. Article 7 of the Maputo Protocol on its part provides:

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that: a) Separation, divorce or annulment of a marriage shall be effected by judicial order; b) Women and men shall have the same rights to seek separation, divorce or annulment of a marriage; c) In case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance; d) In case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

104. Article 12 of the UDHR states that

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

105. The Court notes that after the Applicant obtained a preliminary divorce ruling in her favour from the Tunis Court of First Instance on 4 June 2014, her husband appealed the ruling before the Tunis Court of Appeal on 10 June 2014.

106. The Court notes that the Court of Cassation, the highest judicial body in the Respondent State, held that “if the spouses appeal the divorce judgment,

the marital bond between them continues, and the filing of a case of adultery against one party is valid as long as the judgment has not become final.”<sup>18</sup>

107. The Court recalls that the Applicant alleges that she was unaware of her husband’s appeal of the above ruling. However, the Applicant being unaware of her husband’s appeal does not negate the fact that the divorce ruling was not final with the result that, under Tunisian law, the marriage relationship is considered to be in effect until a decision is rendered on the appeal. In the circumstances, it was the Applicant’s duty to verify her marital status in accordance with the laws of the Respondent State. Specifically in this context, the Applicant ought to have taken steps to verify whether an appeal had been lodged and whether it had been concluded so that the divorce ruling, in her favour, would become final.

108. Given that the particular law being challenged by the Applicant applies equally to both men and women, in the context of divorce proceedings, the Applicant’s allegation that she was forced to continue her marital life in violation of her right to personal liberty and discrimination against women has no basis and is therefore dismissed by the Court.

109. Consequently, the Court finds that the Respondent State did not violate the Applicant’s right to terminate her marriage, protected under Articles 1(f)(g) and 7 of the Maputo Protocol as read jointly with Article 12 of the UDHR.

## **ii. On the alleged violation of the right to a fair trial**

110. The Applicant maintains that the absence of a constitutional court in the Respondent State violates her right to bring legal proceedings, as there was no avenue to challenge the constitutionality of Article 236 of the Penal Code in terms of violation of the right to liberty and to the legality of offenses.

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<sup>18</sup> Penal decision of supreme court No. 1323 dated 04/06/1975.

111. The Respondent State maintains that the Applicant does not provide any evidence of the human rights violation she alleges.

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112. The Court notes that although the Applicant invokes her right to liberty and the legality of offenses, the facts of the case and the record show that her allegation pertains to the failure of the Respondent State to provide her with a forum to challenge the constitutionality of the law under which she was tried and sentenced. Such a forum relates to the right to a fair trial protected under Article 7(1)(a) of the Charter and 14(1) of the ICCPR. The Court will therefore consider the allegation.

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

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.

114. The Court also notes that Article 14(1) of the ICCPR states

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...

115. In the instant case, the Court notes that the Applicant alleges that the absence of a Constitutional Court prevented her from mounting a constitutional challenge against Article 236 of the Penal Code, which leads her to conclude that there is no available remedy in a case such as hers.

116. The Court recalls its jurisprudence in *Brahim Belghith v. Republic of Tunisia* where it held that the absence of a Constitutional Court in the Respondent State constitutes an impediment to litigants bringing constitutional challenges.<sup>19</sup> In the present case, the Court finds that the continued absence of a Constitutional Court constitutes an impediment to the Applicant's ability to bring a constitutional challenge against Article 236 of the Respondent State's Code of Criminal Procedure.

117. Consequently, the Court considers that the Respondent State violated the Applicant's right to a fair trial, protected by Article 7(1)(a) of the Charter as read jointly with Article 14(1) of the ICCPR, insofar as it failed to afford her the avenue to challenge the constitutionality of Article 236 of the Code of Criminal Procedure.

## VIII. REPARATIONS

118. The Applicant prays the Court to order the Respondent State to pay her the following sums as reparation for material prejudice:

- i. Five Thousand (5,000) Tunisian dinars as reparation for the amount awarded her husband by the trial court;
- ii. Three Hundred (300) Tunisian dinars in respect of legal fees awarded her husband by the trial court;
- iii. One Thousand Five Hundred (1,500) Tunisian dinars as costs in respect of investigation, prosecution and appearance before the Hammamet Judicial Police Brigade;
- iv. Two Thousand Five Hundred (2,500) Tunisian dinars as costs relating to the misdemeanour case before the Grombalia court of first instance;
- v. Three Thousand Five Hundred (3,500) Tunisian dinars as costs in respect of the appeal proceedings before the Nabeul court;

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<sup>19</sup> *Brahim Belghith v. Republic of Tunisia*, 22 September 2022, Application No. 17/2021 (merits and reparations), §§ 95-102.

- vi. Two thousand (2,000) Tunisian dinars as costs in respect appealing the divorce judgment before the Tunis Court of Appeal;
- vii. Four Thousand (4,000) Tunisian dinars as costs in respect of [her husband's appeal in her divorce case;
- viii. One Thousand Five Hundred (1,500) Tunisian dinars as costs in respect of drafting, filing and follow-up of the criminal complaint against the Ministry of the Interior laboratories;
- ix. Seventy-eight Thousand (78,000) Tunisian dinars as pecuniary reparation for the loss of her job in Tunisia;
- x. Seven Thousand Eight Hundred (7,800) Tunisian dinars as end-of-service benefits;
- xi. Ten Thousand Four Hundred (10,400) Tunisian dinars as reparation for lost salary during her detention in police custody and imprisonment from 9 November 2014 to 15 March 2015, the date of her release;
- xii. Ten Thousand (10,000) euros in respect of legal fees and litigation costs in connection with the present case;

119. The Applicant further prays the Court to order the Respondent State to pay her the following sums as reparation for moral prejudice:

- i. Twenty Thousand (20,000) euros as reparation for moral prejudice resulting from being detained in police custody beyond the legal maximum period;
- ii. Two Hundred Thousand (200,000) euros as reparation for moral prejudice resulting from being deprived of liberty;
- iii. One Hundred Thousand (100,000) euros as reparation for moral prejudice resulting from the oppression and sense of injustice caused by the violation of procedural law she suffered and the adoption of illegal and exceptional procedures;
- iv. One Hundred Thousand (100,000) euros as reparation for the moral prejudice resulting from the violation of his right to defence and his conviction on the strength of an invalid forensic examination, the court's refusal to conduct a new forensic examination and failure to comply with the requirements of a fair trial;
- v. Two Hundred Thousand (200,000) euros as reparation for moral prejudice resulting from being deprived of the custody of her two sons;

- vi. Two Hundred Thousand (200,000) euros as reparation for moral prejudice resulting from the family and social scandal that continues to haunt her to this day;
- vii. One Hundred Thousand (100,000) euros as reparation for moral prejudice resulting from being forced to leave her country and reside in France to avoid the disastrous consequences of the violations of which she was a victim.

120. The Applicant also prays the Court to order the Respondent State to implement the provisions of Article 277 of the Code of Criminal Procedure, to review the appeal decision of 19 January 2015 rendered by the Nabeul Court of Appeal, and to compel the said court to rule anew upholding her appeal on form and substance, thereby quashing the first-instance judgment No. 8210 of 9 December 2014 rendered by the Grombalia Court, on grounds of flawed proceedings and, as a precautionary measure, to close the case due to the absence of evidence that the Applicant committed a crime Applicant.

121. Finally, as a guarantee of non-repetition, she prays the Court to order the Respondent State to take the following legislative, administrative and judicial measures:

- i. Help expedite and facilitate the establishment of the Constitutional Court and to make it operational in accordance with the requirements of the Respondent State's law;
- ii. Clarify that divorce is the right to terminate a matrimonial union and that neither spouse may be prevented from terminating the matrimonial union or be forced to remain bound [by marriage ties] for reasons that are not a matter of public law.
- iii. Establish the elements of the crime of adultery, even if in general terms, in order to comply with the principle of legality of crimes;
- iv. Raise awareness among investigating magistrates, judges and law enforcement officers of the capital importance of the right to liberty and respect for the principles of a fair trial;

- v. Establish a serious and effective penalty to be applied against the above-mentioned persons who fail to comply with human rights requirements.

122. The Respondent State requests that the Application be dismissed in its entirety.

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123. The Court notes that Article 27(1) of the Protocol provides:

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

124. The Court considers, in line with its established jurisprudence, that for it to award reparations, the Respondent State must have been found internationally responsible for the wrongful act. Secondly, a causal link must be established between the wrongful act and the alleged injury suffered. On the other hand, when reparation is awarded, it must redress the prejudice suffered.<sup>20</sup>

125. The Court notes that it is for the Applicant to provide evidence in support of her claims, in particular as regards material prejudice.<sup>21</sup> With regard to moral prejudice, the Court considers that the requirement to provide evidence is not strict,<sup>22</sup> as moral prejudice is presumed whenever violations are established.<sup>23</sup>

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<sup>20</sup> *Rajabu and Others v. Tanzania* (merits and reparations), *supra*, § 136; *Armand Guéhi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 55 and *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119.

<sup>21</sup> *Kennedy Gihana and others v. Republic of Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139.

<sup>22</sup> *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, § 55.

<sup>23</sup> *Ibid.*

126. The Court also recalls that the measures a State may take to remedy a human rights violation include restitution, reparation, victim rehabilitation and measures to ensure that violations do not recur, taking into account the circumstances of each case.<sup>24</sup>

127. In the present case, the Court has established that the Respondent State violated the Applicant's right to a fair trial in relation to the challenge of the provisions of Article 236 of the Penal Code. The Court will examine claims of reparation in respect of these violations.

## **A. Pecuniary reparations**

### **i. Material prejudice**

128. The Applicant makes various prayers for pecuniary reparations in respect of material prejudice.

129. While it does not make any specific prayer regarding material prejudice; the Respondent State prays that the Application be dismissed in its entirety.

130. The Court however notes that it has not, in the present judgment, made any findings or established any violations in relation to the Applicant's prayers on material prejudice.

131. Accordingly, the Court does not deem it necessary to make any finding on reparation for material prejudice.

### **ii. Moral prejudice**

132. The Applicant makes various prayers for pecuniary reparations in respect of moral prejudice.

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<sup>24</sup> *Ingabire Victoire Umuhzo v. Republic of Rwanda*, (reparations) (7 December 2018) 2 AfCLR 202, § 20.

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133. While it does not make any specific prayer regarding moral prejudice, the Respondent State prays that the Application be dismissed in its entirety.

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134. The Court recalls its established jurisprudence that moral prejudice is always presumed in the event of a human rights violation. In such cases, the quantum of reparation is assessed in fairness, taking into account the circumstances of each case.<sup>25</sup>

135. In the present case, the Court notes that the violations suffered by the Applicant caused her moral harm, in particular, her inability to challenge the constitutionality of Article 236 of the Penal Code.

136. Consequently, the Court awards the Applicant Tunisian Dinars One Thousand (TND 1,000) as pecuniary reparation for the moral prejudice she suffered.

## **B. Non-pecuniary reparation**

### **i. Guarantees of non-repetition**

137. The Applicant prays the Court to order the Respondent State to take legislative, judicial and administrative measures to ensure non-repetition of the violations found. The Applicant also prays the Court to order the Respondent State to expedite and facilitate the establishment of the Constitutional Court and to make it operational in accordance with the requirements of the Respondent State's law.

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<sup>25</sup> *Zongo and Others v. Burkina Faso* (reparations), *supra*, § 55; *Umuhoza v. Rwanda* (reparations), *supra*, § 59; *Christopher Jonas v. United Republic of Tanzania* (reparations) (25 September 2020) 4 AfCLR 545, § 23.

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138. The Respondent State requests that the Application be dismissed as to form and substance.

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139. The Court recalls that in its judgment in *Brahim Belghith v. Republic of Tunisia*,<sup>26</sup> it ordered the Respondent State to operationalise its Constitutional Court within two years of the judgment. However, the time-limit of two years afforded the Respondent State has elapsed and, as at the time of the present judgment, there is no evidence that the Respondent State has implemented the said order.

140. Considering the potential of further violations owing to the non-implementation of the said order, the Court reiterates its decision in *Brahim Belghith v. Republic of Tunisia* on the need and urgency to operationalise the Constitutional Court. As such, this Court deems it fit to reiterate the order that the Constitutional Court should be operationalised immediately and without further delay.

141. Accordingly, the Court orders the Respondent State to take all measures to operationalise the Constitutional Court and to ensure its effective operation immediately without further delay.

## ii. Publication

142. The Parties do not make any submission on publication.

143. However, the Court considers that publishing this judgment is justified on grounds that are firmly established in its practice and by the particular

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<sup>26</sup> *Brahim Belghith v. Republic of Tunisia*, Application No. 017/2021, Judgment of 22 September 2022 (merits and reparations), § 100.

circumstances of this case.<sup>27</sup> Publication is particularly warranted in this Application given that, as found earlier in this judgment, there is no evidence that the Respondent State has taken steps to operationalise the Constitutional Court as previously ordered by this Court. The Court therefore finds it appropriate to order the publication of this judgment on the official website of the Ministry of Justice.

144. Accordingly, the Court orders the Respondent State, within six-month of receipt of this judgment, to publish in Arabic the present judgment together with the summary provided by the Registry, on the official website of the Government and to ensure that it remains available online for at least one year.

### **iii. Implementation and reporting**

145. The Parties do not make any submission on implementation and reporting.

146. With regard to reporting on the implementation of this judgment, the Court considers that this is required as a matter of applicable law and its judicial practice. In this case, and given the above findings in respect of guarantees of non-repetition, the Court considers it appropriate to order the Respondent State to file a report on implementation within six months from the date of notification of this judgment.

## **IX. COSTS**

147. The Applicant prays the Court to order the Respondent State to pay costs.

148. The Respondent State prays that the Applicant's request be dismissed.

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<sup>27</sup> *Legal and Human Rights Centre and Another c. United Republic of Tanzania*, AfCHPR, Application No. 039/2020, Judgment of 13 June 2023, § 180.

149. The Court notes that Rule 32(2) of the Rules provides: “Unless otherwise decided by the Court, each party shall bear its own costs, if any”.<sup>28</sup>

150. The Court notes that proceedings before it are free of charge. The Court also notes that while she prays that the Respondent State should be ordered to pay costs, the Applicant does not demonstrate how she incurred cost in this Application.

151. In these circumstances, the Court sees no reason to depart from the aforementioned rule and therefore orders each Party to bear its own costs.

## **X. OPERATIVE PART**

152. For these reasons:

The COURT,

*Unanimously,*

*On jurisdiction*

- i. *Dismisses* the Respondent State’s objections to material jurisdiction;
- ii. *Declares* that it has jurisdiction.

*On admissibility*

- iii. *Dismisses* the Respondent State’s objection based on non-exhaustion of local remedies relative to the divorce case and to

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<sup>28</sup> Rule 30(2) of the Rules of Court of 2 June 2010.

the procedure on the constitutionality of Article 236 of the Penal Code;

- iv. *Upholds* the Respondent State's objection based on non-exhaustion of local remedies in respect of the proceedings related to the adultery case and to the complaint against the officials who signed the forensic report;
- v. *Declares* the Application admissible only with regard to the divorce procedure and inability to challenge the constitutionality of Article 236 of the Penal Code.

#### *On merits*

- vi. *Holds* that the Respondent State did not violate the Applicant's right to divorce and termination of marriage, protected by Articles 1(f)(g) and 7 of the Maputo Protocol as read jointly with Article 12 of the UDHR;
- vii. *Holds* that the Respondent State violated the Applicant's right to a fair trial, protected by Article 7(1)(a) of the Charter as read jointly with Article 14(1) of the ICCPR.

#### *On reparations*

##### *On pecuniary reparations*

##### *Material prejudice*

- viii. *Dismisses* the request for reparation for material prejudice.

##### *Moral prejudice*

- ix. *Orders* the Respondent State to pay the Applicant the sum of Tunisian Dinars One Thousand (TND 1,000) as reparation for moral prejudice;

- x. *Orders* the Respondent State to pay the sum awarded under (ix) above, free from tax as fair compensation to be made within six months from the date of notification of this Judgment, failing which, it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tunisia throughout the period of delayed payment until the amount is fully paid.

*On non-pecuniary reparation*

*Guarantees of non-repetition*

- xi. *Orders* the Respondent State to operationalise its Constitutional Court immediately and without further delay.

*Publication*

- xii. *Orders* the Respondent State to publish the judgment, within six months of the notification of this judgment, together with its summary provided by the Registry of the Court, in Arabic, on the official website of the Ministry of Justice and to ensure that it remains available for at least one year.

*Implementation and reporting*

- xiii. *Orders* the Respondent State to submit, within six months of the notification of the present judgment, a report on steps taken to implement the orders herein made.

*On costs*

- xiv. *Orders each Party to bear its own costs.*

**Signed by:**

Modibo SACKO, President; 

Chafika BENSAOULA, Vice-president; 

Suzanne MENGUE, Judge; 

Tujilane R. CHIZUMILA, Judge; 

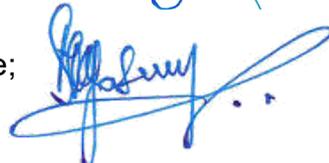
Blaise TCHIKAYA, Judge; 

Stella I. ANUKAM, Judge; 

Imani D. Aboud, Judge; 

Dumisa B. NTSEBEZA, Judge; 

Dennis D. ADJEI, Judge; 

Duncan GASWAGA, Judge; 

and Grace W. KAKAI, Deputy Registrar. 

Done at Arusha on this Fourth Day of the Month of December in the Year Twenty  
Twenty-Five, in Arabic, English and French, the Arabic text being authoritative.

