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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

PETER JOSEPH CHACHA

V

THE UNITED REPUBLIC OF TANZANIA

APPLICATION NO.003/2012

RULING

The Court composed of: Sophia A. B. AKUFFO, President; Bernard M. NGOEPE, Vice President; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Duncan TAMBALA, Elsie N. THOMPSON, Sylvain ORÉ, El Hadji GUISSE, Ben KIOKO and Kimelabalou ABA, Judges; and Robert ENO, Registrar.

In accordance with 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 8 (2) of the Rules of Court ("hereinafter referred to as the Rules"), Judge Augustino S. L. Ramadhani, Member of the Court and a national of Tanzania, did not hear the Application.

In the matter of:

Peter Joseph Chacha

represented by:

- Pan African Lawyers' Union

v.

the United Republic of Tanzania,

represented by:

- Ms. Irene Kasyanju

Ambassador and Director of Legal Affairs
Ministry of Foreign Affairs and International Cooperation

- Ms. Sarah D. Mwaipopo,
  Principal State Attorney
  Division of Constitutional Affairs and Human Rights
  Attorney General's Chambers

- Mrs. Alesia Mbuya
  Principal State Attorney
  Attorney General's Chambers

- Ms. Nkasori Sarakikya,
  Principal State Attorney Attorney General's Chambers

- Mr. Edson Mweyunge
  Senior State Attorney
  Attorney General's Chambers

- Mr. Zacharia Elisaria
  Senior State Attorney
  Attorney General's Chambers

- Mr. Mark Mulwambo
  Senior State Attorney
  Attorney General's Chambers

- Mr. Benedict Msuya
  Second Secretary Legal Officer
  Ministry of Foreign Affairs and International Cooperation

After deliberation,

delivers the following majority judgment:

The Parties

1. The Applicant, Peter Joseph Chacha is a citizen of the United Republic of Tanzania ("hereinafter referred to as the Respondent"), who at the time of filing his application was in remand at Arusha Central Prison with the Remand Number 3502/2007.

2. The Applicant filed his application against two Respondents; the First Respondent being the Attorney General of the United Republic of Tanzania, the Principal Legal Adviser to the Government of the United Republic of Tanzania and the Second Respondent being the Minister of Home Affairs of the United Republic of Tanzania. It is assumed that the two Respondents are being sued on behalf of the Government of Tanzania therefore the Respondent is the United Republic of Tanzania.

Nature of the Application

3. The Applicant filed the Application on the basis of Criminal Cases Nos. 915/2007, 931/2007, 933/2007, 1027/2007, 1029/2007, 883/2008, 712/2009 and 716/2009 that were on-going against him in the District Court of Arusha ("hereinafter referred to as the Criminal Cases") alleging that he was unlawfully arrested, interrogated, detained, charged and imprisoned contrary to Sections 13(1)(a) and (b), 3(a), (b) and (c), 32(1), (2) and (3), 33, 38 (1), (2) and (3), 50 (1) and 52(1), (2) and (3) of the Criminal Procedure Act, Chapter 20 of the Laws of Tanzania, Revised Edition 2002 ("hereinafter referred to as the Criminal Procedure Act"). The Applicant alleges that his arrest, detention, charging and imprisonment in connection with the Criminal Cases were unlawful and therefore violated his right under Article 15(1) and (2) (a) of the Constitution of the United Republic of Tanzania, to freedom, as well as the guarantee that such freedom shall only be deprived under circumstances, and in accordance, with procedures prescribed by law. The Applicant also alleges that the seizure of his property, allegedly in connection with the Criminal Cases, is in contravention of his right to property as set out in Article 24(1) and (2) of the Constitution of the United Republic of Tanzania, and therefore unlawful.

4. The Applicant also alleges that the Police of the United Republic of Tanzania contravened the procedure for the search and seizure of property as set out in the Criminal Procedure Act in relation to his property. The Applicant alleges the violation of his right to own property, of the protection of his property held in

accordance with the law, and the right not to be unlawfully deprived of his property, as provided for in Articles 24(1) and (2) of the Constitution of the United Republic of Tanzania.

Procedure

5. The Application was received at the Registry on 30 September 2011. Annexed to the Application was a list of property that the Applicant alleges was illegally seized by the Police.

6. By a letter dated 4 October 2011, the Registrar acknowledged receipt of the Application and advised the Applicant to ensure compliance with Rule 34 of the Rules.

7. By a letter dated 20 February 2012, the Applicant responded to the Registrar's letter of 13 February 2012, alleging that despite his efforts, through correspondence to various Ministries and the Commission on Human Rights and Good Governance, to have his complaints addressed, nothing has happened, resulting in an inordinate delay in accessing local remedies to resolve the matters that are the basis of his application. He stated that he has also brought an action, *Criminal Application Number 16 of 2011* filed at the High Court of Tanzania at Arusha on 19 May 2011 under certificate of urgency alleging violation of his constitutional rights. He stated that the case has not been heard due to the lack of *coram* of three Judges as required by the Basic Rights and Duties Enforcement Act. He stated that such a delay in determining this petition is unduly prolonged and is contrary to Article 7 of the

African Charter on Human and Peoples' Rights ("hereinafter referred to as the Charter").

8. By a letter dated 27 February 2012 the Registrar acknowledged receipt of the Applicant's letter dated 20 February 2012 and advised him that his Application has been registered as *Application Number 003/2012 Peter Joseph Chacha v The United Republic of Tanzania*.

9. By a letter dated 1 March 2012, the Applicant informed the Registrar that he would like a request for reparation pursuant to Rule 34 (5) of the Rules to be included in his Application.

10. By a letter dated 25 April 2012, the Registrar requested the Applicant to provide it with copies of the letters he intends to adduce as evidence and any other evidence that would demonstrate exhaustion of local remedies, including Court judgments, and to do so within thirty (30) days of receipt of the letter.

11. In response to the request by the Registrar, by a letter dated 25 May 2012 and received at the Registry on 30 May 2012, the Applicant submitted copies of the following:

i. Letter dated 19 February 2008 to the Minister of Home Affairs and copied to the Commission on Human Rights and Good Governance. In this letter the Applicant wrote to the Minister of Home Affairs regarding the misconduct of the Officer Commanding the Criminal Investigations Division (OCCID) in

Arusha District, Ramadhani Mungi. The Applicant alleged that Mr. Mungi abused his office and illegally seized his vehicle, audio and video equipment and equipment for running a radio station, on the pretext that this equipment was stolen. The Applicant attached a list of the equipment to the letter. The Applicant also stated that Mr. Mungi falsely charged him with one count of murder and four counts of armed robbery in Criminal Cases Nos. 915/2007, 931/2007, 933/2007, 1027/2007 and 1029/2007, respectively. It is on the basis of Mr. Mungi's unlawful actions that he wrote to the Minister for Home Affairs reporting the misconduct of Mr. Mungi and the violation of his constitutional rights to have his liberty, person and property protected and for due process to be followed whenever Police are investigating and charging one with an offence and in the respect of his constitutional rights.

ii. Letter dated 22 December 2008 to the Minister of Justice and Constitutional Affairs requesting the Minister's assistance in resolving his complaints. The Applicant attached the copies of the letters he had written to various Ministries and institutions in this regard.

iii. Letter dated 18 September 2009 to the Minister for Home Affairs referring to the Ministry's acknowledgement of receipt by its letter dated 27 February 2008, of the Applicant's letter dated 19 February 2008 and advising the Applicants that the complaints he has filed against OCCID Ramadhani Mungi are under study. In the letter of 18 September 2009, the Applicant informs the Minister that since he has not received a response from the Ministry regarding his complaints, he is

proceeding to seek the intervention of the Courts. He also urges the Minister to refer to the Criminal Record Office for Arusha and Arumeru Districts of 2007 which he states do not contain any reports of crimes he allegedly committed or any reports related to his property. The Applicant states that the officer he has complained against is abusing his office to keep him in remand and to unlawfully hold his property.

iv. Letter dated 8 February 2010 to the Attorney General's Chambers, Public Prosecutions Division. In this letter, the Applicant recalls that the Criminal Cases No 915/2007, 931/2007, 933/2007, 1027/2007, 1029/2007 and later, 883/2008 against him have been pending since 2007. He states that the cases against him were filed despite there not being any First Report and credible evidence, therefore the prosecutions are false. He stated that, in addition, the State opened two new prosecutions against him in Criminal Cases No 712/2009 and 716/2009 despite his absence in Court. The Applicant indicated that he had decided to file an Application at the High Court of Tanzania at Arusha based on Section 90(1) c (4) of the Criminal Procedure Act so that the Director of Public Prosecutions can explain why the Applicant has been charged with the Criminal Cases despite the lack of the First Report and evidence to support the charges, and for the charges against him to be withdrawn. A list of his allegedly unlawfully seized property was attached to this letter.

v. A copy of an Order dated 16 October 2010 striking out Criminal Application No. 6 of 2010 originating from the Criminal Cases. This is the application the Applicant filed at

the High Court of Tanzania at Arusha and in respect of which he had advised the Director of Public Prosecutions he would file, vide his letter dated 8 February 2010. This application was found incompetent since, the section under which it was brought, Section 90(1) c (4) of the CPA, had by then, been repealed.

vi. A copy of the Attorney General's Notice of Preliminary Objection, Reply to the Applicant's petition and Counter Affidavit in respect of Criminal Application No. 16 of 2011 at the High Court of Tanzania at Arusha.

12. In his letter dated 25 May 2012 to the Registrar, the Applicant maintained that his claim in the applications before the High Court at Arusha and before the African Court is against the Attorney General as principal legal advisor to the Government of the United Republic of Tanzania, as the person responsible for acts done by officers and agents in his office and in his personal capacity. The Applicant also alleges that the Minister for Home Affairs is 'responsible for abuse of office'. By a letter dated 6 June 2012, the Registrar acknowledged receipt of this letter and the additional letters he provided as requested, and advised him that the Charter and the Protocol only envisage applications against States thus the registration of his application against the United Republic of Tanzania.

13. By a letter dated 27 June 2012, the Registrar notified the Respondent of the Application.

14. By a letter also dated 27 June 2012, the Registrar notified

the Chairperson of the African Union Commission and through him, the States Parties to the Protocol and the Executive Council of the African Union, of the Application. The letter also advised that should any State Party to the Protocol wish to intervene in the proceedings, it should do so as soon as possible, and before the closure of written proceedings.

15. By a letter dated 27 June 2012, the Registrar, at the direction of the Court, wrote to the Pan African Lawyers' Union (PALU) to enquire whether it can consider assisting the Applicant in the matter.

16. By a letter dated 16 July 2012 and received at the Registry on 17 July 2012, PALU wrote to the Registrar indicating its willingness to assist the Applicant in the matter. In the said letter, PALU requested copies of the Application and other filings or documents related thereto. They also requested assistance in securing authorisation towards arranging a meeting with the Applicant.

17. By a Note Verbale dated 30 July 2012, the Respondent communicated the names and addresses of its representatives in respect of the Application.

18. By a letter dated 1 August 2012, the Registrar sent a copy of the Application and all other documents filed by the Applicant thus far, to PALU.

19. By a letter dated 1 August 2012, the Registrar informed the

Respondent that, PALU will be representing the Applicant in the matter. Also by a letter dated 1 August 2012, the Registrar forwarded to PALU, the names and address of the Respondent's representatives in the Application.

20. By a Note Verbale dated 31 August 2012 and received at the Registry by electronic mail on the same date and in hard copy on 3 September 2012, the Respondent forwarded its Response to the Application.

21. By a letter dated 4 September 2012, the Registrar forwarded to the Applicant, the Respondent's response to the Application and advised him that he has thirty (30) days running from 3 September 2012, the date when the Response was received at the Registry, to reply to the Response.

22. At its 26th Ordinary Session, the Court decided that PALU be formally served with the Respondent's Response and be granted thirty (30) days from 14 September 2012 to reply to the Respondent's Response and that this communication be copied to the Applicant and the Respondent.

23. By a letter dated 28 September 2012, the Registrar served the Respondent's Response to the Application to PALU and advised that PALU has thirty (30) days from 14 September 2012 to reply to the Response. This letter was copied to the Applicant and the Respondent.

24. By a letter dated 3 October 2012, the Registrar advised the Applicant of the Court's decision taken at its 26th Ordinary Session, that, where Parties have appointed representatives, all correspondence on the Application will be addressed to these representatives with a copy to the Parties and in the Applicant's case, since PALU is representing him, the relevant correspondence will be addressed to PALU with a copy to him for information.

25. On 18 October 2012, the Registry received a letter dated 17 October 2012, from PALU, requesting for an extension of time by thirty (30) days for it to file a Reply to the Respondent's Response to the Application. By a letter dated 18 October 2012, the Registrar served PALU's request for extension of time to the Respondent.

26. By a Note Verbale dated 8 October 2012 and received at the Registry on 9 November 2012, the Respondent acknowledged receipt of PALU's request of 17 October 2012 for an extension of time to file a Reply to the Response and indicated that it has no objection to the request and further, that the Officer In Charge of Arusha Prison has been ordered to facilitate the consultation meeting between the Applicant and PALU.

27. A letter from the Respondent dated 7 November 2012 and received at the Registry on 7 December 2012 informed the Registrar that the Respondent had no objection to PALU's request of 17 October 2012 for extension of time to file the Reply to the Response. In the meantime, by an Order dated 5 December 2012,

the Court granted PALU's request for an extension of time to file the Reply and required PALU to file the response within fifteen (15) days from 6 December 2012. The Registry sent the Order to PALU by electronic mail on 12 December 2012 then served PALU with the Order by a letter dated 13 December 2012.

28. On 16 May 2013, PALU filed the Applicant's Rejoinder to the Response, dated 15 May 2013. By a letter dated 17 May 2013, the Registrar served the Rejoinder on the Respondent.

29. On 13 June 2013, the Registry received a Note Verbale from the Respondent dated 12 June 2013 in which the Respondent stated that the Applicant's Rejoinder was filed out of time and contrary to the Order of the Court of 5 December 2012 since it had been filed after the fifteen (15) days granted for the same commencing 6 December 2012 and without any support from the Rules. The Respondent pleaded for the Rejoinder to be dismissed or that it would counter the Rejoinder accordingly.

30. By a letter dated 24 June 2013, the Respondent was informed that at its 29th Ordinary Session, the Court decided that the Applicant's Rejoinder had been properly filed and that the Respondent was further requested to respond thereto within thirty (30) days, if it so wished

31. By a letter dated 23 July 2013, the Registrar notified the Parties of the hearing of the Application on 26 and 27 September 2013 and provided them with the issues that they would be expected to make submissions on, as well as Guidelines for

Persons Appearing at the Hearing on 24 to 27 September 2013. The Parties were also required to indicate the number of witnesses they intended to call as well as the time they will require for their evidence in chief.

32. On 2 August 2013, the Registry received the Respondent's Response to the Applicant's Rejoinder. This Response was dated 25 July 2013.

33. By a letter to the Parties dated 12 August 2013, the Registrar requested that they indicate their availability for the hearing by 31 August 2013.

34. By a letter dated 22 August 2013, the Respondent advised the Registry that it will send the list of witnesses it intends to call in due course and also tendered the correct names of its representatives.

35. By separate letters dated 3 September 2013, the Parties were reminded to send their lists of witnesses and/or experts by 9 September 2013.

36. Counsel for the Applicant, PALU sent the Applicant's list of witnesses by a letter dated 9 September 2013 and the Respondent sent its list of witnesses by a letter dated 10 September 2013.

37. By two notices dated 18 and 19 September 2013, the Registrar notified the parties of the hearing of the application on 25 to 27 September 2013.

38. By a letter dated 19 September 2013, the Respondent informed the Registrar that it, being guided by the letter of the Registrar of 23 July 2013, had set aside 26 and 27 September 2013 for the hearing. The Respondent proposed that the scheduled hearing be only on the preliminary objections and that the hearing on the merits be set down for March 2014. By a letter dated 20 September 2013 and copied to the Applicant, the Registrar replied to this letter clarifying that despite the guidance provided by the letter dated 23 July 2013 and its attachments notifying the parties of the hearing being for 24-27 and 26 to 27 September 2013, respectively, the prevailing interpretation was that the hearing was for 24-27 September 2013 and that in any event, there would be no problem posed regarding the Respondent's witnesses' attendance at the hearing since their testimony was scheduled for 26 and 27 September 2013.

39. On 23 September 2013, the Applicant informed the Registrar of the substitution of his expert witness with another expert witness.

40. Also on 23 September 2013, the Respondent informed the Court of the death of Mr. Dixon N Ntimbwa who was the Lead Counsel for the Respondent in preparing the defence to the Application. By a letter of the same date, the Registrar acknowledged receipt of the Respondent's letter and by copy

thereto, forwarded it to PALU. This letter informed the parties that, in view of this, the Court had decided that the matter be adjourned until further notice.

41. On 24 September 2013, the Applicant's representative sent an electronic mail acknowledging receipt of the letter of the Registry dated 23 September 2013 regarding the death of Mr. Ntimbwa and that the hearing has been postponed until further notice.

42. By a notice dated 11 October 2013, the Registrar informed the Parties that the hearing was set down for 2 to 4 December 2013.

43. By separate letters dated 17 October 2013, the Registrar requested the Parties to confirm whether they will maintain the same list of witnesses and to indicate the issues in respect of which each witnesses' testimony will cover, bearing in mind the issues that the Court had directed, through the Registrar's letter dated 23 July 2013, it wishes to hear testimony on.

44. By a letter dated 5 November, PALU informed the Registry that it wished to maintain the Applicant and Professor Leonard P. Shaidi as witnesses. The Applicant would render testimony in relation to the facts and circumstances surrounding his arrest, interrogation, detention and search and seizure of his property and Professor Leonard P. Shaidi would be on hand to testify and assist the Court to understand the obtaining criminal law and procedure

of the Respondent State, which should apply or should have been applicable to the Applicant.

45. By a letter dated 18 November 2013, the Respondent submitted a new list of witnesses. The Respondent also sought directions from the Court on the whether the Court issues summons only to witnesses, experts or other persons it intends to hear or also to witnesses that the Parties intend to call. The Respondent also sought directions on the appropriate time to challenge the competence of the Applicant's expert witness, the criteria for qualification of an expert witness, the grounds for disqualification of an expert witness and the procedure provided by the Court to obtain the credentials and Curriculum Vitae of the Applicant's expert witness. The Respondent also sought the leave of the Court to produce relevant documents in respect of the Criminal Cases that the Applicant is basing the Application on.

46. By a letter dated 26 November 2013, the Registrar responded to the Respondent's letter of 18 November 2013 on the issues raised by the Respondent and also attaching the programme for the hearing. This letter was copied to the Applicant.

47. By a letter dated 26 November 2013, the Respondent submitted a list of its representatives during the hearing.

48. A public hearing was held, at the seat of the Court in Arusha, Tanzania, on 2, 3 and 4 December 2013, during which oral

arguments were heard on both the preliminary objections and the merits. The appearances were as follows:

For the Applicant:

- Mr. Donald Deya, Advocate
- Mr. Rashid Rashid, Advocate Mr. Selemani Kinyunyu, Advocate

For the Respondent:

- Ms. Sarah D. Mwaipopo
  Acting Director-Principal State Attorney
  Division of Constitutional Affairs and Human Rights
  Attorney General's Chambers

- Mr. Edson Mweyunge
  Assistant Director-Principal State Attorney
  Division of Contracts and Treaties
  Attorney General's Chambers

- Mr. Michael Luena
  Principal State Attorney
  Division of Litigation and Arbitration
  Attorney General's Chambers

- Ms. Nkasori Sarakikya
  Principal State Attorney
  Division of Constitutional Affairs and Human Rights
  Attorney General's Chambers

- Mr. Mark Mulwambo
  Senior State Attorney
  Division of Constitutional Affairs and Human Rights
  Attorney General's Chambers

- Ms. Eliainenyi Njiro
  State Attorney
  Attorney General's Chambers

49. The Court also heard the following witnesses:

For the Applicant:

- The Applicant, Mr. Peter Joseph Chacha

For the Respondent:

- Mr. Ramadhani Athumani Mungi, currently the Regional Police Commander in Iringa, who was the Officer Commanding the Criminal Investigation Department (OCCID) in Arusha at the time the events forming the basis of the Applicant's complaints allegedly occurred.

- Mr. Salvas Viatory Makweli, currently a Police Officer in Muleba District, and Assistant Superintendent of Police, who was an Inspector of Police in Arusha at the time the events forming the basis of the Applicant's complaints allegedly occurred, and who was in charge of the search conducted in the Applicant's house on 12 September 2007.

- Mr. John Mathias Maro, currently the (OCCID) in Shinyanga District and Assistant Superintendent of Police, who was an officer on the Criminal Investigation Department in Arusha of the rank of Assistant Inspector at the time the events forming the basis of the application occurred.

- Mr. Leonard Paul, currently an Assistant Commissioner of Police and the Regional Police Commander of Geita Region, who had the rank of Superintendent of Police in Arusha and was a Regional Criminal Officer at the time the events forming the basis of the Application occurred.

- Mr. Wilson Mushida an Assistant Superintendent of Prisons at the Central Prison of Arusha who, at the time the events forming the basis of the Applicant's complaints allegedly occurred, was an Assistant Inspector of Prisons working at the Reception Department of the Central Prison of Arusha.

50. At the hearing, following oral submissions by the Parties, the Court ruled, by a majority of six to four, that it would not hear the Applicant's expert witness. In respect of the Parties' witnesses, questions were also put by Members of the Court to which replies were given orally. In respect of the Parties' representatives, their submissions and replies to questions from Judges were given orally and in writing.

51. By separate letters dated 12 December 2013 the Registrar forwarded to the Parties copies of the verbatim record of the public hearings and informed them that their comments on the same, if

any, had to be sent within thirty (30) days. None of the Parties sent any observations on the verbatim record.

Historical and factual background to the Application

52. On 12 September 2007, the Applicant's wife, Nakuhoja Moses Miyombo, who was expectant at the time, was detained by the Police in connection with an alleged robbery which had occurred in Arusha on the same day. The Applicant alleges that his properties were also seized by the Police on the same date, without a certificate of seizure or a search warrant. All these happened in his absence. On his return to Arusha on 26 October, 2007, the Applicant went to the Police Station to find out why his wife was being held by the Police and why his property had been seized. He was then detained by the Police from that day until 8 November 2007 when he was, for the first time, brought before Court. Thereafter he remained in custody pending trial until his release on 3 May 2013.

53. The Applicant was charged with several counts of conspiracy, robbery, murder, armed robbery, rape and kidnapping as follows:

i. Criminal Case No. 915/2007 dated 8 November 2007 wherein the Applicant was jointly charged with Akida Mohamed, with conspiracy to commit an offence and stealing. This case eventually became Criminal Case No. 712/2009.

ii. Criminal Case No. 931/2007 dated 30 November 2007 wherein the Applicant was charged jointly with Hamisi Jumanne and Rajabu Hamisi, with armed robbery. On 19 February 2008, he was charged alone in Criminal case No. 931/2007, with armed robbery.

iii. Criminal Case No. 933/2007 dated 8 November 2007 wherein the Applicant was charged with murder. This Case eventually became Criminal Case No. 3 of 2009 dated 7 February 2009.

iv. Criminal Case No.1027/2007 dated 16 April 2008 and the charge was armed robbery. This case was withdrawn and eventually the case became Criminal Case No.883/2008 dated 2 December 2008 wherein the Applicant was charged with armed robbery and rape.

v. Criminal Case No. 1029/2007 which eventually became Criminal Case No. 712/2009 dated 21 December 2009 wherein the Applicant was charged with armed robbery. The original charge sheet indicated that the alleged incident of armed robbery occurred on 12 September 2009 yet the Applicant was already in custody at the time the alleged offence occurred. In the course of the hearing of this case, the Applicant alerted the Magistrate's Court to the Prosecution's substitution of the charge on 13 November 2012, to reflect the alleged incident of armed robbery as having occurred on 12 September 2007.

vi. Criminal Case No. 716/2009 dated 23 December 2009 wherein the Applicant was charged with armed robbery, kidnapping with intent to do harm and rape, though he was not present in Court.

54. The Applicant's wife was charged with robbery and possession of stolen items under Criminal Case No. 799 of 2007. She was in remand from 12 September 2007 until her release on 25 October 2007.

55. There being no progress in the prosecutions against him, the Applicant corresponded severally with the Ministry of Home Affairs, the Ministry of Justice and Constitutional Affairs, the Attorney General's Chambers', Public Prosecution Division and the Commission on Human Rights and Good Governance, seeking their intervention in ensuring the prosecutions against him either proceeded or were withdrawn for lack of evidence and that his seized property be restored to him.

56. Having received no resolution of the issues he raised with the said authorities and institutions, the Applicant informed the Director of the Attorney General's Chambers' Public Prosecution Division and the Minister of Home Affairs that he would move to the High Court to have these issues resolved.

57. In 2007, the Applicant filed Miscellaneous Criminal Application No. 7 of 2007, Originating from Criminal Case No. 933 of 2007, in the High Court of Tanzania at Arusha, under Section 357(a) of the Criminal Procedure Act, against the Attorney

General of the Respondent. He sought orders for restitution of his property seized on 12 September 2007 while he was in Dar es Salaam, Tanzania and for any order the Court deemed fit to grant. At the hearing of the Applicant's application, the Respondent therein contended that the High Court lacked jurisdiction to order the restitution of the Applicant's property as the right Court to issue such an order was the District Court where the Applicant was facing prosecution on a murder charge. The Applicant argued that there was no connection between the murder charge he was facing and the property that the Police had seized. The High Court stated that as the High Court had jurisdiction over murder cases, it followed that the High Court had jurisdiction to order restitution of property in murder cases. However, in the instant case, because there was no connection between the property seized by the Police and the murder charge which the Applicant was facing, the High Court's jurisdiction to order the restitution of the property was ousted and the only avenue open to him was to approach the District Court where he was charged, to seek orders for restitution of his property. The Court also stated that though the Applicant could have applied for prerogative orders from the High Court, being the only court vested with jurisdiction to issue such orders, such orders could only be granted if they would in no way prejudice the interests of justice in respect of the murder charge the Applicant faced. In this regard therefore, the High Court stated that since the murder charge the Applicant was facing in Criminal Case No. 933 of 2007 was pending, the Applicant's application to the High Court was premature and that it had to be stayed until final determination of the pending murder charge unless the seized properties had no connection with the charge he faced.

58. In addition, by the time the High Court heard the Application, the charges in the rest of the Criminal Cases had been filed against the Applicant and the fact that there were additional criminal charges filed against him was a reason for the High Court to decline jurisdiction, and to refer the Applicant back to the District Court as the proper forum for adjudicating whether the property in dispute had a connection with the Criminal Cases the Applicant was facing. The High Court stated that, indeed, the Applicant's property had been seized and that the authorities were required to keep it in safe custody pending determination of the Criminal Cases the Applicant was facing. For these reasons, on 14 December 2010, the High Court of Tanzania at Arusha dismissed the application for the release of property, as being premature.

59. In the High Court of Tanzania at Arusha, in 2009, the Applicant filed Miscellaneous Criminal Application No. 54 of 2009 originating from Criminal Case No. 933 of 2007 under Section 91 of the Criminal Procedure Act for the charges preferred against him to be discharged. On 11 August 2010, The application was struck out as it did not specify the subsection of Section 91 of the Criminal Procedure Act under which it was made and that the Applicant's prayers were stated in the affidavit in support of the application rather than in the Chamber Summons.

60. Again, in 2010, the Applicant filed, in the High Court of Tanzania at Arusha, Miscellaneous Criminal Application No. 6 of 2010 in accordance with Section 90 (1) (c) (4) of the Criminal

Procedure Act requesting a discontinuance of the Criminal Cases under Section 90(1)(c) of the Criminal Procedure Act as the actions that the Police had taken were contrary to Sections 32, 33, 50(1) , 51(1) and 52(1), (2) and (3) thereof. The application was against the Attorney General of the Respondent. On 16 November 2010, the application was struck out for being incompetent as it was filed under a repealed section of the law, that is Section 90 (1) (c) (4) of the Criminal Procedure Act, which was repealed by Section 31 of the National Prosecution Act No.27 of 2008 which had come into effect on 9 June 2008.

61. The Applicant also filed, in 2010, in the High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 47 of 2010, originating from the Criminal Cases, against the Respondent. The application was on the basis of Articles 13(1), 15(1), (2) (a) and 30 (3) of the Constitution of the United Republic of Tanzania guaranteeing equality before the law and the right not to be arbitrarily deprived of one's freedom. On 14 December 2010, the High Court struck out the application as it was not properly made since it had been filed by way of Chamber Summons and supporting affidavit. According to the High Court, the matter should have been brought in accordance with Section 5 of the Basic Rights and Duties Enforcement Act, which sets out the appropriate procedure, namely, that the case be filed by way of a Petition and Originating Summons. In addition, such an application must be determined by a three–Judge Bench and not a single Judge, as was in the instant case.

62. On 8 December 2010, the Applicant filed, in the High Court of Tanzania at Arusha, Miscellaneous Criminal Application No. 78 of 2010, originating from the Criminal Cases, against the Attorney General of the Respondent, as First Respondent, and the Police Officer in Charge of Arusha, as Second Respondent, on the basis of Articles 13(1), 15(1), (2) (a) and 30 (3) of the Constitution of the United Republic of Tanzania. These provisions guarantee equality before the law and the right not to be arbitrarily deprived of one's freedom. In the application, the Applicant alleged violation of his right to freedom and to live as a free person. The Applicant alleged that the Second Respondent had arrested, detained and interrogated him in respect of what would be the Criminal Cases, contrary to the provisions of the Criminal Procedure Act and that therefore the actions of the Second Respondent in that regard were vitiated by these irregularities. The Applicant sought a decree under Part III of Chapter One of the Constitution of the United Republic of Tanzania to this effect. On 18 May 2011, the High Court issued an order that the application was withdrawn at the Applicant's instance.

63. On 29 December 2010, the Applicant filed, in the High Court of Tanzania in Arusha, Miscellaneous Criminal Application No. 80 of 2010, alleging violation of his basic rights and freedoms guaranteed under Part III of Chapter One of the Constitution of the United Republic of Tanzania, specifically of Articles 24(1), (2) and 30(3) thereof on the right to own property. The application was against the Attorney General of the Respondent and the Police Officer in Charge of Arusha. The applicant prayed the Court to order the Respondents in that application to restore his properties

and any other relief it deemed fit. On 18 May 2011, the High Court issued an Order that the application was withdrawn at the instance of the Applicant.

64. On 19 May 2011 the Applicant filed, in the High Court of Tanzania at Arusha, Miscellaneous Criminal Application No. 16 of 2011, originating from the Criminal Cases, against the Attorney General of the Respondent on the basis of Articles 13(1), 15(1) and 15(2) (a) and 30(3) of the Constitution of the United Republic of Tanzania. He alleged that the provisions and laws governing his rights under Section 13(1)(a), (b), 13 (3) (a), (b) and (c), 32(1), (2) and (3), 33, 50(1), 52(1) and 52 (2) of the Criminal Procedure Act and Articles 14(1) and 15(1), and 15(2)(a) of the Constitution of the United Republic of Tanzania were violated by the Police. He sought a decree under Part III of Chapter One of the Constitution. The Respondent in the matter filed the response on 5 October 2011. The Applicant repeatedly urged the empanelling of the three - Judge Bench of the High Court to hear this application. On 29 June 2011, the Applicant wrote to the Judge in Charge of the High Court of Tanzania at Arusha, requesting that the three - Judge Bench be constituted to hear the application. He wrote again in this regard on 14 November 2011 to the District Registrar of the High Court at Arusha. On 26 March 2012, this Application was withdrawn in the absence of the Applicant. The Order, which was filed by the Respondent as an annexure to its Response to the Application, shows that the Applicant was not in Court yet the text of the record shows, that the application was withdrawn at his instance. At the hearing before us, the Respondent sought to introduce another record indicating that the Applicant was present

during that hearing. In its written submissions, the Respondent sought to explain this discrepancy. The Respondent requested the Court to accept its document and then conduct a further enquiry as to the veracity of the second document it presented during the hearing. The Applicant objected to the introduction of the Respondent's document. The Court sustained the Applicant's objection and expressed its disapproval of the Respondent's conduct.

65. Some of the Criminal Cases against the Applicant were discharged under Section 91(1), 98(a) and 225(5) of the Criminal Procedure Act. The Applicant was acquitted in Criminal Case No. 915 of 2007, Criminal Case No. 933 of 2009 and Criminal Case No. 712 of 2009. The Respondent has lodged a notice of intention to appeal in Criminal Case No. 712 of 2009. There were also two other cases against the Applicant that were dismissed under Section 225(5) of the Criminal Procedure Act, being Criminal Case No. 1027 of 2007 and Criminal Case No. 716 of 2009. Criminal Case No. 883 of 2008 was withdrawn under Section 91(1) of the Criminal Procedure Act and Criminal Case No 1029 of 2007 was withdrawn under Section 98(a) of the Criminal Procedure Act.

The Applicant's Prayers

66. **In his Application dated 30 September 2011:**

1. The Applicant seeks a declaration that the Respondent deprived him of his right to freedom and to live as a free person.

2. The Applicant asks that his property be restored and he be adequately compensated for damage and loss.
3. The Applicant seeks reparation.
4. The Applicant seeks any order the Court may deem fit to grant.

67. In the reply dated 15 May 2013 filed by the Applicant's representatives, PALU, to the Respondent's Response the prayers are that: :

"*The Applicant states that he seeks the following reliefs from this Honourable Court: -*

a. *A declaration that the Respondent was in violation of Articles 3, 5, 6, 7(1), 14 and 26 of the African Charter on Human and Peoples' Rights;*
b. *An order for reparations and compensation including for being deprived of his property; and*
c. *Any other Order the Court deems fit to make.*"

The Respondent's Prayers

68. **In the Reply to the Application dated 30 August 2012**:

"*The Respondent prays the Court to give/grant the following orders with respect to the admissibility of the Application:*

i. That the Application should be dismissed as it has not met the admissibility requirements under Rule 40 of the Rules of

Court, Article 56 of the Charter and Article 6(2) of the Protocol

ii. *That the Application be dismissed in accordance with Rule 38 of the Rules of Court*

iii. *That the Application has not invoked the jurisdiction of the Court*

iv. *That the costs of the Application be borne by the Applicant*

With respect to the merits of the Application, the prayers are:

i. *That the Government of the United Republic of Tanzania has not violated the Applicant's right to own property*

ii. *That the Government of the United Republic of Tanzania has not violated the Applicant's right to personal freedom*

iii. *That the investigation of all the cases facing the Applicant in the municipal courts was in accordance with the law*

iv. *That the costs of the Application be borne by the Applicant*"

69. In the Reply to the Applicant's Reply to the Respondent's Response to the Application dated 23 July 2013,

"*The Respondent prays that the Court grant the following orders:*

a) *That the Respondent has not violated the new Articles 3, 5, 6, 7(1),14 and 26 of the African Charter cited by the Applicant in their Rejoinder.*

b) *That the Applicant is not entitled to the reliefs, reparations and compensation claimed as none of his rights have been infringed by the Respondent.*

c) *That the investigation and subsequent prosecution of all cases facing the Applicant in the Municipal Courts was/is being done in accordance with the laws.*

d) *That the Applicant has not invoked the jurisdiction of the Court as per Rule 26(1) (a) of the Rules of Court and Article 3(1) of the Protocol Establishing the Court.*

e) *That the Applicant has not met the requirements of Article 40 of the Rules of the Court, Article 56 of the Charter and Article 6(2) of the Protocol.*

f) *That the Application be dismissed in accordance with Rule 38 of the Rules of Court.*

g) *That the costs of this Application be borne by the Applicant.*

h) *That this Application has no merit.*

i) *Any other orders or relief(s) the Court may deem fit."*

Respondent's objection to tendering of evidence by the Applicant's expert witness

70. By a letter dated 23 September 2013 and confirmed by a letter dated 5 November 2013, the Applicant notified the Registrar of Court (which letters were served on the Respondent) that he intended to call Professor Leonard P. Shaidi, a Professor of Law at the University of Dar es Salaam School of Law to "*testify and assist the Honourable Court to understand the obtaining criminal law and procedure of the Respondent State, which should apply or should have been applicable to the Applicant.*"

71. During the public hearing, the Respondent objected to the calling of the expert witness. The Parties made submissions on this issue.

The Position of the Respondent

72. The Respondent stated that expert witnesses should only be allowed if they are called by the Court, and that the Court does not need an expert opinion on the Criminal Procedure applicable in Tanzania as these are common statutes that can be easily interpreted. The Respondent stated that, furthermore, Counsel for both Parties are Officers of the Court who ought to assist the Court to come to a just decision without resorting to experts.

73. The Respondent maintained that the interpretation of statues is the preserve of Courts and not of experts. The Respondent cited the decision of the Court of Appeal of Tanzania, in the Case of *Director of Public Prosecutions v Shida Manyama and Selemani Mabuba*, App No. 81 of 2012 (Unreported), wherein the Court (per Rutakangwa, JA) quoted the opinion *of the Supreme Court of India in Alamgir V State of Delhi (2003)* ISCC 21:

"We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now settled law that expert opinion must always be received with great caution".

74. In the same case, the Court of Appeal of Tanzania also quoted the decision of the Indian Supreme Court in the case of *Romesh Chandra Aggaraval v Regency Hospital Ltd* (2009) 9

SCC 709 which set out three requirements for the admission of an expert witness as follows:

i. An expert witness must be within a recognized field of expertise;
ii. Evidence must be based on reliable principles;
iii. The expert witness must be qualified in the discipline.

75. The Respondent argued that the expert witness the Applicant intended to call does not meet these three requirements as he was not an expert in any field of law, let alone criminal procedure, with renowned writings that have given substantial contribution to the knowledge of criminal law in Tanzania.

76. On this basis, the Respondent called on the Court to exercise caution and disqualify the witness as an expert.

The Position of the Applicant

77. The Applicant opposed the Respondent's preliminary objection on three grounds.

78. The first ground is that the Respondent's objection to the expert witness is not in good faith as it has been done very late in the proceedings, despite the Respondent being aware as far back as 23 September 2013 that the Applicant intended to call the expert witness.

79. The Respondent, in support of the objection, cited Rule 53(2) and Article 19(1) of the Rules of Procedure and the Statute of the Inter-American Court of Human Rights, respectively, which provide for disqualification of experts on the basis that they have a direct interest in the matter. The Applicant maintained that the Respondent did not put forward any evidence to show what, if any, relationship exists between the expert and the matter currently before the Court. Unlike the Inter-American Court of Human Rights, this Court's Rules of Procedure do not contain any explicit provisions on disqualifications of experts. In view of this *lacuna*, the Applicant urged the Court, as a human rights court to adopt a liberal and victim-centred approach to this issue towards ensuring that truth and justice is achieved.

80. The second ground argued by the Applicant was that the expert witness was competent and credible. He is a Professor of Law at the Faculty of Law of the University of Dar es Salaam with relevant scholarly research and professional expertise. The Applicant also called on the Court to apply Rule 45(1) of the Rules which empowers the Court to call for "*any evidence which in its opinion may provide clarification of the facts of a case or which in its view is likely to assist it in carrying out its task*" to admit the oral evidence of the expert as well as the particulars of his qualification including his Curriculum Vitae.

81. The third ground on which the Applicant based his argument, was that the testimony of the expert was intended to be limited in scope to issues of domestic law which would assist the Court in reaching a fair and just decision on the same. This would

therefore not be prejudicial to the Respondent. In addition, According to the Applicant, the Court may order that the expert testimony be limited to specific areas of competence. This would be in line with the approach adopted by various international courts and tribunals such as in the case of Prosecutor *v Bagasora* et al, ICTR Case Number 98/41T, Decision of 20 September 2004.

82. On these grounds, the Applicant pleaded for the admission of Professor Leonard P. Shaidi as an expert witness in this case.

The Court's Ruling on the objection to the expert witness

83. Pursuant to Rule 46(5) of the Rules, which provides that the "*Court shall rule on any challenge arising from an objection to a witness or an expert*", the Court begins by ruling on the objection raised by the Respondent State regarding the admissibility of the testimony of the expert witness proposed by the Applicant.

84. Firstly, the Court notes that the Rules do not contain any special provision, and no conditions or time limits have been laid down, for objecting to a witness or an expert.

85. Under such circumstances as far as the present case is concerned the Respondent was entitled to raise an objection at any stage of the proceedings

86. As a consequence, the Respondent State in this case had the possibility to challenge the Applicant's expert witness prior to his testimony.

87. The Court notes that the appointment of an expert, falls squarely within the discretion of the Court. Indeed, under Rule 45(1) of the Rules, the Court may, "*of its own accord, or at the request of a party, or the representatives of the Commission, where applicable, obtain any evidence which in its opinion may provide clarification of the facts of a case. The Court may, inter alia, decide to hear as a witness or an expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task*".

88. Therefore the main qualities the Court expects of an expert in this case would include sufficient knowledge of the subject matter, independence and impartiality towards the Parties in carrying out his or her duties.

89. The Court declares that, in this matter, it does not consider to be relevant the procedural criminal law of the Respondent State, which is not the applicable law in this matter.

90. In the view of the Court, since the expert was called by one party and the other objected, in circumstances where the Court had not felt the need for an expert of its own accord, and was under no obligation to accept the expert witness, then the Court decided to dispense with the expert.

The Respondent's preliminary objections

91. The Respondent raises preliminary objections on both admissibility and jurisdiction.

Preliminary objection on jurisdiction

92. The Respondent raises a preliminary objection regarding the Court's jurisdiction *ratione materiae*.

93. The Respondent contends that the subject matter of the Application does not relate to the application and interpretation of the Charter, the Protocol or any other relevant human rights instrument ratified by the Respondent as required by Article 3 (1) of the Protocol and Rule 26 of the Rules, rather, that the Application is based on the Constitution of the Respondent as well as national legislation, specifically, the Criminal Procedure Act, on which the Court cannot adjudicate. The Respondent contends that, should the Court adjudicate on the matter, it will usurp the powers of municipal courts.

Preliminary objection on admissibility

94. In the alternative, the Respondent is challenging the admissibility of the Application on the grounds that it is not compatible with the Charter of the Organisation of African Unity, now the Constitutive Act of the African Union, or the Charter as required by Rule 40(2) of the Rules.

95. The Respondent contends that the Applicant has not identified the provisions of the Charter and the Charter of the Organisation of African Unity that are alleged to have been violated and that he has only alleged violation of the Constitution of the United Republic of Tanzania and national legislation.

Non-exhaustion of local remedies

96. The Respondent states that "*Criminal Sessions Case No. 3 of 2009, Criminal Case No. 716 of 2009 and Criminal Case No. 712 of 2009 instituted in the Resident Magistrate's Court of Arusha which form the basis of this Application, are being handled by the national adjudication machinery. The Applicant's cases are ongoing and are yet to be finalised*".

97. The Respondent maintains that the Applicant has filed several petitions in the High Court of Tanzania at Arusha alleging violations of his right to personal freedom and to property. Miscellaneous Criminal Application No. 7 of 2007 was dismissed for being premature and the Applicant did not appeal this decision. Miscellaneous Civil Application No. 47 of 2010 was struck out for being improperly filed. The Applicant did not either reinstitute the matter under the correct procedure or appeal against the Court's decision to strike out the petition. The Applicant withdrew Miscellaneous Criminal Application No. 78 of 2010 and Miscellaneous Civil Application No. 80 of 2010 on 18 May 2011 and has not reinstituted them. The Respondent also alleges that

the Applicant withdrew Criminal Application No. 16 of 2011 on 26 March 2012 and has not reinstated it.

98. The Respondent alleges that it is after the dismissals and striking out of his petitions as well as his withdrawal of some of them that the Applicant decided to file the application to the African Court. The Respondent states that the subject matter of the Application before this Court is the same as that of Applicant's petitions to the High Court of Tanzania at Arusha, which he has withdrawn. That, it should therefore be inferred that if the Applicant felt that he had no cause of action at the municipal level, he cannot assert that this Court is the appropriate forum to address his grievances.

99. The Respondent contends that the criminal cases instituted against the Applicant are pending before the national courts and even after they are concluded, there are appeals procedures which the Applicant must exhaust; therefore, the Court should not consider the Application.

The Application has not been filed within a reasonable time from the time local remedies were exhausted

100. Alternatively and without prejudice to the contention of inadmissibility of the Application for non-exhaustion of local remedies, the Respondent argues that the application has not been filed within a reasonable time from the period when local remedies were exhausted vis-à-vis Applicant's petitions to the High Court. Two of the petitions were dismissed and struck out

nine months and sixteen days, respectively, before the Application was filed with the Court; also, the Applicant withdrew two petitions four months and twelve days and three months, respectively before filing the Application, The Respondent submits that the 'reasonable period' specified in the Charter for filing applications after exhaustion of local remedies should be set at six months and considering this, the Applicant filed his Application too late.

101. In the Reply to the Applicant's Reply referred to earlier, filed by PALU, the Respondent reiterated that the Applicant filed his Reply to the Respondent's Response out of time without requesting for an extension of time from the Court; therefore the Applicant's Reply should be considered as not having been filed, in accordance with the Court's Practice Direction Number 41.

The Applicants' response to the preliminary objections

Preliminary objection on jurisdiction

102. The Applicant maintains that the Application complies with Rule 34 of the Rules and has specified the Charter rights that have been violated.

103. The Applicant states that, the fact that the Criminal Cases against him are pending does not preclude the Applicant from enforcing his constitutional rights and his Charter rights through filing an application with the Court.

104. In the Reply filed by the Applicant's representative, PALU, to the Respondent's Response to the Application, it is contended that the Court has jurisdiction to deal with the matter since there have been violations of the Applicant's fundamental rights as provided for in the Constitution of the United Republic of Tanzania and the Charter, to which the Respondent is a State Party as well as to the Protocol and, furthermore, having made the declaration required under Article 34(6) thereto.

105. PALU reiterated the Applicant's pleadings and that there have been violations of his rights as guaranteed under the Constitution of the United Republic of Tanzania and also as enshrined in Articles 3, 5, 6, 7(1), 14 and 26 of the Charter.

Preliminary objection on admissibility

106. The Applicant states that Criminal Cases No. 712/2009, 716/2009 and 933/2007 (now Session No.3/2009) were instituted in the Arusha District Court in violation of the procedures of the Criminal Procedure Act and that Criminal Case Number 716/2009 is not at the hearing stage as alleged by the Respondent. Further, the Applicant states, that the Respondent has not responded to the Applicant's allegations in respect of Criminal Cases No. 915/2007, 931/2007, 1027/2007, 1029/2007 and 883 of 2008 with which the Applicant has been charged and in connection with which the Applicant's property has been seized, contrary to Section 38 of the Criminal Procedure Act and Article 24(1) and (2) of the Constitution of the United Republic of Tanzania.

107. It is further argued that the Applicant has been charged in the Criminal Cases unprocedurally, contrary to Section 38(1) and (2) of the Criminal Procedure Act; therefore, the charges against him are incurably defective and in violation of his human rights and which violation cannot be determined by the Resident Magistrate's Court of Arusha.

108. The Applicant maintains that he was not arrested on 12 September 2007 but on 26 October 2007 and that Session No. 3/2009 is pending trial at the High Court at Arusha for almost three years.

109. The Applicant states that the High Court at Arusha determined that Miscellaneous Criminal Application No. 7 of 2007 was premature; therefore it was unnecessary to appeal this decision. This Application to the High Court was for the Police to produce a document acknowledging seizure of the Applicant's property following the failure of the Regional Crime Officer to produce the said document.

110. The Applicant maintains that he did not withdraw Miscellaneous Criminal Application No.16 of 2011; rather, he wrote requesting for the *coram* of three Judges to be constituted to hear the case. Thereafter, the High Court at Arusha withdrew the case in the absence of the Applicant. These circumstances constitute the exhaustion of local remedies.

111. The Applicant contends that the local remedies which the Respondent alleges he has not exhausted have been unavailable, inordinate and unduly prolonged.

The Court's Ruling on the preliminary objection on jurisdiction

112. The Respondent's contention that the Court lacks jurisdiction *ratione materiae* since the Application is based only on the provisions of the Constitution of the United Republic of Tanzania and the Criminal Procedure Act upon whose adjudication is the sole preserve of the national courts of the Respondent cannot be upheld. This would be tantamount to stating that the Court has no jurisdiction to examine the compatibility of national legislation, including Constitutions, with the Charter; that is, as long as national Constitutions and national legislation form the basis of an application, the Court would not have jurisdiction.

113. The Court rejected the above contention in *Application 009/2011 Tanganyika Law Society and The Legal and Human Rights Centre v the United Republic of Tanzania and Application 011/2011 Reverend Christopher Mtikila v the United Republic of Tanzania (Consolidated Applications)*. In that matter, the Court considered the provisions of the Constitution of the United Republic of Tanzania, and found them to be incompatible with the provisions of the Charter. This is because where only national law or constitution has been cited and relied upon in an application,

the Court will look for corresponding articles in the Charter or any other human rights instrument, and base its decision thereon.

114. As long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter. In the instant case, the Applicant alleges violation of his right to equal protection of the law and equality before the law, the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, the right to liberty and security of the person and not to be arbitrarily arrested or detained , the right to a fair trial, the right to property and the right to the independence of the Courts and the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter.

115. The rights alleged to have been violated are protected under the Charter. The Court therefore finds that it has jurisdiction *ratione materiae* over the Application.

116. Article 56 of the Charter also comes into consideration in this regard. Article 56 of the Charter provides that:

"Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

...

2. Are compatible with the Charter of the Organization of African Unity or with the present Charter ..."

117. The introductory sentence of Article 56, speaks of "*Communications relating to Human and Peoples' Rights.*" None of these provisions require that the communication should state that it is based on the Charter; rather, the communication must merely relate to "*human and peoples' rights*", and be compatible with the Charter.

118. In line with jurisprudence on this matter, the Court's position is that the substance of the complaint must relate to rights guaranteed by the Charter or any other human rights instrument ratified by the State concerned, without necessarily requiring that the specific rights alleged to have been violated be specified in the Application.

119. The African Commission on Human and Peoples' Rights has taken a similar position, as stated in Communication Number 333/06 *Southern African Human Rights NGO Network and Others v. Tanzania*[1]. In that Communication, the Commission stated that *"one of its primary considerations under Article 56(2) is whether there has been* prima facie *violation of human rights guaranteed by the African Charter. Furthermore ... the Commission is only concerned with whether there is preliminary proof that a violation occurred. Therefore, in principle, it is not mandatory for the*

[1] Twenty Eighth Activity Report November 2009 – May 2010.

Complainant to mention specific provisions of the African Charter that have been violated."[2]

120. The jurisprudence of the European Court of Human Rights on what qualifies as a complaint is defined as the purpose or legal basis of the claim. The complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on[3].

121. In the *Hilaire v. Trinidad and Tobago Case*[4], the Inter-American Court of Human Rights specified that *"Article 32(c) of the Commission's Rules of Procedure, in effect when the complaint was lodged before it, expressly allows for the possibility that no specific reference [need be] made to the article(s) alleged to have been violated" in order for a complaint to be processed before it."*

122. Failure to cite any specific articles of the Charter or any other human rights instrument ratified by the Respondent is no reason to oust the jurisdiction of the Court.

123. The Court finds that the Applicant's Application stated facts which revealed a *prima facie* violation of his rights; furthermore, the Court finds that the Application relates to human and peoples' rights protected under the Charter, therefore, the requirements of

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[2] Paragraph 51.
[3] *Guerra and Others v Italy*, § 44; *Scoppola v. Italy* (No. 2) [GC], § 54; and *Previti v Italy* (Dec.), § 293.
[4] Inter-American Court of Human Rights, Judgment of 1 September 2001, paragraph 42.

Article 3(1) of the Protocol and Article 56(2) of the Charter have been met.

124. Regarding the Respondent's objection to the Application on the grounds of the incompatibility of the Application with the Charter of the Organisation of African Unity, now the Constitutive Act of the African Union, the Court finds that this argument does not stand. The Constitutive Act of the African Union provides that one of the objectives of the African Union shall be to promote and protect human and peoples' rights in accordance with the Charter and other relevant human rights instruments. Therefore the present Application is in line with the objectives of the African Union as it requires the Court, as an organ of the African Union, to consider whether or not human and peoples' rights are being protected by the Respondent, a Member State of the Union, in line with the Charter.

The Court's jurisdiction *ratione personae*

125. The Applicant, Peter Joseph Chacha, is a national of the United Republic of Tanzania. He brings his Application in his personal capacity, as a national of the Republic which has made a declaration in terms of Article 34(6) of the Protocol, accepting to be cited before this Court by an individual. The Respondent ratified the Protocol on 10 February 2006 and made the declaration required under Article 34(6) thereof on 29 March 2010. The Court therefore has jurisdiction *ratione personae* over the Application.

The Court's jurisdiction *ratione temporis*

126. The rights alleged to be violated are protected by the Charter. By the time of the alleged violation, the Respondent had already ratified the Charter, having done so on 9 March 1984, and was therefore bound by it. The Charter was operational in respect of the Respondent, and there was therefore already a duty on it as at the time of the alleged violation to protect those rights. The Respondent ratified the Protocol on 10 February 2006 and the alleged violations occurred thereafter. The Respondent made the declaration required under Article 34(6) of the Protocol on 29 March 2010. Though the Respondent made the declaration after the alleged violations occurred, the alleged violations of the Applicant's following rights continued: the right to equal protection of the law and equality before the law, the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, the right to liberty and security of the person and not to be arbitrarily arrested or detained, the right to a fair trial, the right to property. The Court therefore finds that it has jurisdiction *ratione temporis* over the Application.

The Court's Ruling on the preliminary objection on admissibility

Compatibility of the rights alleged to have been violated with the Charter of the Organisation of African Unity, now the Constitutive Act of the African Union and the African Charter on Human and Peoples' Rights

127. The Respondent contends that the Application should be declared inadmissible as it is not in compliance with Article 56 of the Charter and Rule 34(4) of the Rules since the Application does not indicate which articles of the Charter the Respondent is alleged to have violated.

128. This preliminary objection based on the inadmissibility of the Application due to incompatibility of the rights alleged to have been violated with the Charter of the Organisation of African Unity, now the Constitutive Act of the African Union, and the Charter is interlinked with the preliminary objection on the lack of the Court's jurisdiction *ratione materiae*. As the Court has already addressed the issue of incompatibility of the Application with the Constitutive Act of the African Union and the Charter when dealing with the issue of its jurisdiction *ratione materiae*, it does not find it necessary to address this issue again.

Non-exhaustion of local remedies

129. The Applicant's Application before this Court is connected with the Miscellaneous Criminal and Civil Applications that he filed

in connection with the Criminal Cases that he was charged. In these Miscellaneous Applications, the Applicant prayed the restitution of his property and the withdrawal of the allegedly unlawful charges that he faced following his alleged unlawful detention and interrogation.

130. All the Miscellaneous Applications were filed at the High Court of Tanzania at Arusha.

131. Miscellaneous Criminal Application No. 7 of 2007 Originating from Criminal Case No. 933 of 2007 was struck out for being premature. In that application, the High Court, held that because there was no connection between the property seized by the Police and the murder charge that the Applicant was then facing, the Court's jurisdiction to order the restitution of the property was ousted and the only avenue open to him was to approach the District Court before which he was charged, to seek orders for restitution of his property. The learned High Court Judge added that since the murder charge he was facing in Criminal Case No. 933 of 2007 was pending, the Applicant's application to the High Court was premature and that it would have to be stayed until final determination of the pending murder charge, unless the seized properties had no connection with the charges he faced. Furthermore, the High Court also declined jurisdiction in the application on the ground that there were additional criminal charges against the Applicant in the District Court. The application was therefore not heard on merits and the High Court referred the Applicant back to the District Court, as it considered it the proper forum for adjudicating whether the property in dispute

had a connection with the Criminal Cases the Applicant was facing. The Applicant did not resort to the District Court to seek restitution of his property, nor did he appeal the decision of the High Court.

132. The Applicant filed Miscellaneous Criminal Application No. 54 of 2009 originating from Criminal Case No. 933 of 2007, under Section 91 of the Criminal Procedure Act for the charges preferred against him to be discharged. On 11 August 2010, the application was struck off as it did not specify the subsection of Section 91 of the Criminal Procedure Act under which it was made and that the Applicant's prayers were stated in the Affidavit in support of the application rather than in the Chamber Summons.

133. The Applicant also filed Miscellaneous Criminal Application No. 6 of 2010, citing Section 90 (1) (c) (4) of the Criminal Procedure Act, for a discontinuance of Criminal Cases Nos. 915/2007, 931 of 2007, 1027/2007, 1029 of 2007, 883 of 2008, 712 of 2009 and 716 of 2009 in the District Court of Arusha on the grounds that the actions that the Police had taken were contrary to Sections 32, 33, 50(1) , 51(1) and 52(1), (2) and (3) of the Criminal Procedure Act. On 16 November 2010, the application was struck out for being incompetent as it was filed under a repealed section of the law, that is, Section 90 (1) (c) (4) of the Criminal Procedure Act which had been previously repealed by Section 31 of the National Prosecution Act No.27 of 2008 which came into effect on 9 June 2008.

134. The Applicant then filed, Miscellaneous Civil Application No. 47 of 2010. The application originated from the Criminal Cases Nos. 915/2007, 931 of 2007, 1027/2007, 1029 of 2007, 883 of 2008, 712 of 2009 and 716 of 2009 in the District Court of Arusha. The application was grounded on Articles 13(1), 15(1), (2) (a) and 30 (3) of the Constitution of the United Republic of Tanzania guaranteeing equality before the law and dealing with the right not to be arbitrarily deprived of one's freedom. On 14 December 2010, this application was struck out for the reason that it had not been properly made since the Applicant brought it by way of Chamber Summons and Supporting Affidavit, whereas Section 5 of the Basic Rights and Duties Enforcement Act, which governs the procedure for filing and determining applications under Part III of Chapter One of the Constitution, required that such application be brought by way of a Petition and Originating Summons. In addition, according to the High Court, the aforesaid Act required that such an application be determined by a three – Judge Bench and not a single Judge.

135. The Applicant filed against the Attorney General of the Respondent and the Police Officer in Charge of Arusha Miscellaneous Criminal Application No.78 of 2010, in the High Court of Tanzania at Arusha, originating from the Criminal Cases, on the basis of Articles 13(1), 15(1), (2) (a) and 30 (3) of the Constitution of the United Republic of Tanzania. In support of the application, he alleged violation of his right to freedom and to live as a free person since the Second Respondent in that application had arrested, detained and interrogated him contrary to the provisions of the Criminal Procedure Act and that therefore, the

Criminal Cases against him were vitiated by these illegalities. The Applicant sought a decree under Part III of Chapter One of the Constitution of the United Republic of Tanzania to this effect. On 18 May 2011, the High Court issued an order that the application was withdrawn at the Applicant's instance. There is no record of the reasons for the withdrawal of the application.

136. The Applicant filed Miscellaneous Criminal Application No. 80 of 2010, originating from the Criminal Cases, in the High Court of Tanzania in Arusha, alleging violation of his basic rights and freedoms guaranteed under Part III of Chapter One of the Constitution of the United Republic of Tanzania, specifically of Articles 24(1), (2) and 30(3) thereof on the right to own property. The application was against the Attorney General of the Respondent and the Police Officer in Charge of Arusha. The Applicant prayed the Court to order the Respondents in that application to restore his properties and any other relief it wished to grant. On 18 May 2011, the High Court issued an Order that the application was withdrawn at the instance of the Applicant. There is no record of the reasons for the withdrawal of the application.

137. Finally, the Applicant filed against the Attorney General of the Respondent, Miscellaneous Criminal Application No. 16 of 2011, Originating from the Criminal Cases on the basis of Articles 13(1), 15(1) and 15(2) (a) and 30(3) of the Constitution of the United Republic of Tanzania. In that application, the Applicant alleged that the provisions and laws concerning his rights under Section 13(1)(a), (b), 13 (3) (a), (b) and (c), 32(1), (2) and (3), 33, 50(1), 52(1) and 52 (2) of the Criminal Procedure Act and Articles

14(1) and 15(1), and 15(2)(a) of the Constitution of the United Republic of Tanzania were violated by the Police. He therefore sought a decree under Part III of Chapter One of the Constitution of the United Republic of Tanzania. The Respondent therein filed its response on 5 October 2011. The Applicant repeatedly urged for the empanelling of a three - Judge Bench of the High Court to hear this application. On 29 June 2011, the Applicant wrote to the Registrar of the High Court of Tanzania at Arusha requesting that the three - Judge Bench be constituted to hear the application. He wrote again in this regard on 14 November 2011. On 26 March 2012, the application was recorded at the High Court as withdrawn, even though the same record indicates that the Applicant was absent from Court.

138. The Application filed in this Court is almost identical with the numerous Miscellaneous Criminal and Civil applications which the Applicant filed in the High Court in Arusha, in connection with the Criminal Cases. In the Miscellaneous Applications, the Applicant sought restitution of property which the Police seized from his house during his absence. In that regard, he also sought relief against violation of his basic right to own property and not to be unlawfully deprived of such property. Further, he sought withdrawal or dismissal of the Criminal Cases. These are basically the same claims and reliefs he is seeking from this Court.

139. The Court observes that some of the applications were dismissed by the High Court. For instance, Miscellaneous Criminal Application No. 7 of 2007, in which the Applicant claims the restitution of his property which was allegedly seized by the Police

unlawfully, was struck out for being premature. Miscellaneous Civil Application No. 54 of 2009 which sought the discharge or dismissal of criminal charges brought against the Applicant, was struck out by the High Court on the ground of procedural irregularity. Again, Miscellaneous Criminal Application No. 6 of 2010 in which the Applicant sought the discontinuance of certain criminal cases commenced against him, was struck out for incompetence as it was brought under a repealed statute.

140. Then, in Miscellaneous Criminal Application No. 78 of 2010, in which the Applicant contended that he was unlawfully arrested, detained and interrogated and sought a decree to that effect under Part III of Chapter One of the Respondent's Constitution, was withdrawn by the Applicant. Similarly, Miscellaneous Criminal Application No. 80 of 2010, in which the Applicant claimed violation of his basic rights and freedoms guaranteed in Part III of Chapter One of the Constitution of the Respondent and claimed restoration of his property allegedly seized by the Police unlawfully, was withdrawn by the Applicant. The withdrawal of the two applications by the Applicant has not been disputed by the Applicant. He disputes the withdrawal of another application, Miscellaneous Criminal Application No. 16 of 2011. The view of the Court is, therefore, that the Applicant withdrew these applications freely and voluntarily.

141. Now, according to the law and practice in Tanzania, an Applicant who is dissatisfied with a dismissal or a striking out of an application has the liberty to appeal to the Court of Appeal of the United Republic of Tanzania. There is no evidence that even in

instances where he could have done so, the Applicant seized the Court of Appeal. Again, an application which is withdrawn can be reinstituted in the High Court. According to the Application before this Court, the Applicant neither appealed to the Court of Appeal the cases which were struck out, nor reinstituted in the High Court some of the applications which were withdrawn. In these circumstances, the Court finds any claim that the Applicant has exhausted local remedies in respect of the applications which were dismissed, struck out or withdrawn, to be incorrect.

142. Exhaustion of local remedies by an Applicant is not a matter of choice. It is a legal requirement in international law. Therefore this Court in the matter of *Application No 003/2011 Urban Mkandawire v Republic of Malawi* affirmed the importance of this requirement; it dismissed the application on the basis that the Applicant in that matter had not exhausted local judicial remedies.

143. In *Communication 263/02 Kenyan Section of the International Commission of Jurists, Law Society of Kenya and Kituo Cha Sheria v Kenya* the African Commission on Human and Peoples' Rights stated that:

"The African Commission is of the view that it is incumbent on the Complainants to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the

Complainants to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences."[5]

144. The Commission reiterated this position in *Communication 299/05 Anuak Justice Council v Ethiopia* in which it stated that:

"Apart from casting aspersions on the effectiveness of local remedies, the Complainant has not provided concrete evidence or demonstrated sufficiently that these apprehensions are founded and may constituted [sic] a barrier to it attempting local remedies. In the view of this Commission, the Complainant is simply casting doubts about the effectiveness of the domestic remedies. This Commission is of the view that it is incumbent on every complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of, local remedies"[6]

145. In relation to the instant case, the Applicant stated that though he was aware of the existence of the Court of Appeal of the United Republic of Tanzania, he did not approach that Court as he was frustrated. The Court of Appeal of the United Republic of Tanzania was not given a chance to address the issues at hand, a situation that this Court will not countenance by admitting the Application.

[5] Eighteenth Activity Report: July 2004 to December 2004 paragraph 41.
[6] Twentieth Activity Report: January 2006 toJune 2006 paragraph 58.

Whether local remedies are unduly prolonged

146. In reply to the Respondent's response, the Applicant claims that the local remedies in the national courts were unduly prolonged and that he is therefore covered by the exception to the requirement to exhaust local remedies under Article 56 (5) of the Charter which makes it mandatory for Applicants to exhaust local remedies first before filing their applications in this Court, "*unless it is obvious that this procedure is unduly prolonged*".

147. To fully address the issue of undue prolongation of domestic remedies, it would be necessary to monitor the progress of the Miscellaneous Criminal and Civil applications through the national courts of the Respondent. Between 2007 and 2011, the Applicant was able to file a total of seven applications in the High Court at Arusha, as follows:

i. Miscellaneous Criminal Application No. 7 of 2007: It commenced after 26 October 2007 the day when he got detained. The application was dismissed on 14 December 2010. It was in the High Court for approximately two (2) years and two (2) months.
ii. Miscellaneous Criminal Application No. 54 of 2009: It commenced in 2009 and ended on 11 August 2010 when it was struck out. The application was in Court for about one (1) year and seven (7) months.
iii. Miscellaneous Criminal Application No. 6 of 2010: It commenced in 2010. It ended on 16 November 2010. It

was in the Court for about eleven (11) months, before it was struck out.

iv. Miscellaneous Civil Application No. 47 of 2010: It commenced in 2010 and ended on 14 December 2010, when it was struck out. It was in the High Court for a total of about one (1) year.

v. Miscellaneous Criminal Application No. 78 of 2010: It commenced in 2010 and ended on 18 May 2011, when it was withdrawn. The application remained in the High Court for about one (1) year and five (5) months.

vi. Miscellaneous Criminal Application No. 80 of 2010: It was commenced on 29 December 2010. It ended with a withdrawal on 18 May 2011. The application was in the High court for less than six (6) months.

vii. Miscellaneous Criminal Application No. 16 of 2011: The matter was commenced on 19 May 2011. The application was withdrawn on 26 March 2012. It was in the High Court of a total of less than nine (9) months.

148. The Court observes that the majority of the applications were pending in the High Court for periods of between less than six (6) months and one (1) year (about four (4) applications). The duration of the other three was two years and two months, in the case of Miscellaneous Criminal Application No. 7 of 2007 followed by Miscellaneous Criminal Application No. 54 of 2009 which lasted one (1) year and seven (7) months and lastly Miscellaneous Criminal Application No. 78 of 2010 which remained in Court for one (1) year and five (5) months. It must be borne in mind that in the year 2010 alone, the Applicant filed four (4) out of the seven

(7) applications and that had some effect on the progress of the Applicant's cases. The total time that all the applications, dealt with separately, took to conclude, was five (5) years. Given the number of applications the Applicant filed, being seven (7) in total, and the average duration each took to conclude, which did not exceed two (2) years and two (2) months, it is the opinion of the Court, that the proceedings were not unduly prolonged. It is therefore the view of this Court that the exception to the requirement of exhaustion of local remedies does not apply in the present case.

149. On the material before this Court, Miscellaneous Criminal Application No. 16 of 2011 required the empanelling of a High Court Bench of three Judges to hear the matter. There is evidence that on two occasions, on 29 June 2011 and 14 November 2011, the Applicant wrote to the Registrar of the High Court at Arusha to put in place the required three-Judge Bench to consider the application, but he received no response. The records at the Court show that the Application was withdrawn by the Applicant, which fact he disputes. He denies that he withdrew the request and contends that the failure by the Court to constitute a panel of three Judges to hear his application amounts to exhaustion of local remedies.

151. In terms of Rule 1(3), the Court of Appeal Rules, 2009, apply in the High Court. In this regard therefore, following the failure of the Registrar of the High Court at Arusha to empanel the three-Judge Bench, the Applicant ought to have applied to a Judge in

Chambers for a decision in that regard in accordance with Rule 14(10) of those Rules.

152. The Applicant has not stated anywhere that his attempt to access the special Court in the High Court was intended to give him access to the Court of Appeal. Both in his oral and written pleadings the Applicant does not express the desire to access the Court of Appeal. When asked, during cross-examination, why he did not make an attempt to access that Court, he stated that he did not do so because he thought that the result would be the same. There is no reason for this Court to say that the Court of Appeal of the United Republic of Tanzania, which has inherent powers to ensure justice, does not constitute an effective remedy; consequently, the applicant has failed to exhaust a local remedy which was at his disposal.

153. It is the conclusion of this Court that the Applicant did not exhaust local remedies before submitting his Application before this Court.

That the Application has not been filed within a reasonable time

154. The Respondent contended that, in the alternative, the Application is not admissible since it has not been filed within a reasonable time.

155. Since the Court has ruled that the application is not admissible for non-exhaustion of local remedies, the issue of whether or not it was filed within a reasonable time is moot and merits no further consideration, save to restate the position of this Court in the matter of *Application 009/2011 Tanganyika Law Society and The Legal and Human Rights Centre v the United Republic of Tanzania and Application 011/2011 Reverend Christopher Mtikila v the United Republic of Tanzania (Consolidated Applications)*. In that matter, this Court stated that there was no fixed period within which to seize it; each case would be decided according to its own facts and circumstances.

156. For the reasons stated above the Court finds that the Application is not admissible.

The Merits

157. As the Court has found that the application is not admissible, it is not necessary to deal with the merits of the case.

Costs

158. The Respondent prayed that the Court orders the Applicant to bear the costs of the application. The Court notes that Rule 30 of the Rules of Court states that "*[U]nless otherwise decided by the Court, each party shall bear its own costs.*" Taking into account all the circumstances of this case, the Court is of the view that there is no reason to depart from the provisions of this Rule.

159. For these reasons, the Court holds:

1. Unanimously that the preliminary objection on the lack of jurisdiction *ratione materiae* of the Court as required by Article 3(1) of the Protocol is overruled.
2. Unanimously, that the preliminary objection on the inadmissibility of the Application for incompatibility with the Charter of the Organisation of African Unity and the Charter as required by Article 6(2) of the Protocol read together with Article 56(2) of the Charter and Rule 40(2) of the Rules is overruled.
3. By a majority of six to four, that the preliminary objection on the inadmissibility of the Application for non-exhaustion of local remedies as required by Article 6(2) of the Protocol read together with Article 56(5) of the Charter and Rule 40(5) of the Rules is allowed.
4. By a majority of six to four, that the Application is therefore declared inadmissible.
5. Unanimously, that, in accordance with Rule 30 of the Rules of Court, each Party shall bear its own costs.

Done, at Arusha this Twenty Eighth Day of March 2014, in the English and French languages, the English text being authoritative.

159. For these reasons, the Court holds:

1. Unanimously that the preliminary objection on the lack of jurisdiction *ratione materiae* of the Court as required by Article 3(1) of the Protocol is overruled.
2. Unanimously, that the preliminary objection on the inadmissibility of the Application for incompatibility with the Charter of the Organisation of African Unity and the Charter as required by Article 6(2) of the Protocol read together with Article 56(2) of the Charter and Rule 40(2) of the Rules is overruled.
3. By a majority of six to four, that the preliminary objection on the inadmissibility of the Application for non-exhaustion of local remedies as required by Article 6(2) of the Protocol read together with Article 56(5) of the Charter and Rule 40(5) of the Rules is allowed.
4. By a majority of six to four, that the Application is therefore declared inadmissible.
5. Unanimously, that, in accordance with Rule 30 of the Rules of Court, each Party shall bear its own costs.

Done, at Arusha this Twenty Eighth Day of March 2014, in the English and French languages, the English text being authoritative.

Sophia A. B. AKUFFO, President

Bernard M. NGOEPE, Vice President

Gérard NIYUNGEKO, Judge

Fatsah OUGUERGOUZ, Judge

Duncan TAMBALA, Judge

Elsie N. THOMPSON, Judge

Sylvain ORÉ, Judge

El Hadji GUISSE, Judge

Ben KIOKO, Judge

and Kimelabalou ABA, Judge

and Robert ENO, Registrar

IN FAVOUR: Bernard M. NGOEPE - Vice President, Gérard NIYUNGEKO, Duncan TAMBALA, Sylvain ORÉ, El Hadji GUISSE and Kimelabalou ABA, Judges.

AGAINST: Sophia A. B. AKUFFO-President; Fatsah OUGUERGOUZ, Elsie N. THOMPSON and Ben KIOKO, Judges.

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the Separate Opinion of Bernard M. NGOEPE - Vice President, the Joint Dissenting Opinion of Sophia A. B. AKUFFO, President, Elsie N. THOMPSON and Ben KIOKO, Judges and the Individual Dissenting opinion of Fatsah OUGUERGOUZ, Judge, are appended to this Ruling.

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF PETER JOSEPH CHACHA

V

THE UNITED REPUBLIC OF TANZANIA

DISSENTING OPINION OF

SOPHIA A. B. AKUFFO, PRESIDENT;

ELSIE N. THOMPSON; AND

BEN KIOKO, JUDGES

(PRELIMINARY OBJECTIONS, EVIDENCE, MERITS, REPARATIONS AND COSTS)

Introduction

1. The background details of this matter have been sufficiently set out in the majority opinion herein. Therefore, in this Dissenting Opinion, we will only narrate such details as we deem necessary for providing a clear grounding for the position we have taken. Whilst agreeing with the conclusions made by the majority of the Court, in respect of the other issues raised in the Respondent's Preliminary objection, we, the undersigned, part company with them on their conclusions on the issue of whether or not the Applicant's Application herein is admissible on grounds of exhaustion of local remedies.

2. In our respectful view, the circumstances of this case clearly place the Application within the exception to the requirement to exhaust local remedies, created by Rule 34(4) of the Rules of Court. Therefore, the Court ought to have found the Application admissible. The said provision reads as follows:-

> *"The application shall specify the... evidence of exhaustion of local remedies or of the inordinate delay of such remedies ... ."*

Admissibility of the Application

3. As is patently clear from the facts of this matter, as set out in the majority opinion, after his incarceration by the Respondent, the Applicant made several attempts to cause his complaint, which forms the basis of this Application, to be addressed administratively and by the Courts of the Respondent State. These attempts were made against the background of a plethora of ever-changing criminal charges, which the Respondent repeatedly withdrew and preferred. At all material times, the

Applicant questioned the legality of his incarceration and seizure of his property, for various reasons, including the unlawfulness of the seizure and his arrest, as well as the uncertainty of what charges he was being required to answer.

4. It is worth listing, at this juncture, the various criminal cases that were mounted against the Applicant in the District Court of Arusha, even though they have been set out in detail in the majority opinion.

The Charges:

i. Criminal Case No. 915/2007 dated 8 November 2007 and wherein, he was jointly charged with Akida Mohamed, with conspiracy to commit an offence and stealing.

ii. Criminal Case No. 931/2007 dated 30 November 2007 wherein the Applicant was charged jointly with Hamisi Jumanne and Rajabu Hamisi, with armed robbery. On 19 February 2008, he was charged alone in Criminal Case No. 941 of 2007 with committing the offence of armed robbery. There is nothing on the record to show that the charge against Mr. Hamisi in the earlier charge was withdrawn.

iii. In Criminal Case No. 933/2007, dated 8 November 2007, the charge was murder. This case eventually became Criminal Case No. 3 of 2009 dated 7 February 2009.

iv. Criminal Case No. 1027/2007 was dated 16 April 2008 and the charge was armed robbery. This case was withdrawn and eventually the case was reinstituted as Criminal Case No. 883/2008 dated 2 December 2008 wherein the Applicant was charged with armed robbery and rape.

v. The Applicant was also charged in Criminal Case No. 1029/2007. Though both of the Parties refer to this Case, there is no record of when the Applicant was charged in this regard and what charges were preferred.

vi. In Criminal Case No. 712/2009 dated 21 December 2009 wherein the Applicant was charged with armed robbery, the alleged incident of armed robbery occurred on 12 September 2009 at which date the Applicant was already in remand. During the hearing of the case at the Magistrate's Court, the Applicant raised an objection to the Prosecution's substitution of the charge on 13 November 2012, to reflect the alleged incident of armed robbery as having occurred on 12 September 2007.

vii. Criminal Case No. 716/2009 dated 23 December 2009 which charged the Applicant with armed robbery, kidnapping with intent to do harm and rape.

The Applications

5. In 2007, the Applicant, filed Miscellaneous Criminal Application No. 7 of 2007, originating from Criminal Case No. 933 of 2007, under Section 357 (a) of the Criminal Procedure Act, in the High Court of Tanzania at Arusha, seeking orders against the Attorney General of the Respondent, for restitution of his properties that were seized by the Police on 12 September 2007, allegedly in connection with the murder charge he was facing. There is no record of when this Application was filed. The High Court, in that application, held that because there was no connection between the property seized by the Police and the murder charge that the Applicant was then facing, the Court's jurisdiction to order the restitution of the property was ousted and the only avenue

open to him was to approach the District Court before which he was charged, to seek orders for restitution of his property. The learned High Court Judge added that, since the murder charge he was facing in Criminal Case No. 933 of 2007 was pending, the Applicant's application to the High Court was premature and that it would have to be stayed until final determination of the pending murder charge, unless the seized properties had no connection with the charges he faced. Furthermore, the High Court declined jurisdiction in the application on the ground that there were additional criminal charges pending against the Applicant in the District Court. The application was, therefore, not heard on merits and the Applicant was "referred" back to the District Court as being the proper forum for determining whether the seized property had a connection with the Criminal Cases the Applicant was facing. The application was dismissed on 14 December 2010. Even though the record does not show when this application was filed, it would appear that it took at least three years for it to be determined.

6. In the High Court of Tanzania at Arusha, in 2009, the Applicant filed Miscellaneous Criminal Application No. 54 of 2009 originating from Criminal Case No. 933 of 2007 under Section 91 of the Criminal Procedure Act for the charges preferred against him to be discharged. On 11 August 2010, the Application was struck out on the grounds that it did not specify the subsection of Section 91 of the Criminal Procedure Act under which it was made and that the Applicant's prayers were stated in the affidavit in support of the application rather than in the Chamber Summons.

7. In 2010, the Applicant, filed, against the Attorney General, of the Respondent Miscellaneous Criminal Application No. 6 of 2010 in the

High Court of Tanzania at Arusha, citing Section 90 (1) (c) (4) of the Criminal Procedure Act, for discontinuance of the Criminal Cases on the grounds that the actions that the Police had taken against him were contrary to Sections 32, 33, 50(1), 51(1) and 52(1), (2) and (3) of the Criminal Procedure Act. On 16 November 2010, the Application was struck out for being incompetent as it was filed under Section 90 (1) (c) (4) of the Criminal Procedure Act, which had been previously repealed by Section 31 of the National Prosecution Act No.27 of 2008 which came into effect on 9 June 2008.

8. The Applicant also filed, on 19 August 2010, in the High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 47 of 2010, against the Respondent. That application originated from the Criminal Cases Nos. 915/2007, 931 of 2007, 1027/2007, 1029 of 2007, 883 of 2008, 712 of 2009 and 716 of 2009 in the District Court of Arusha ("hereinafter referred to as the Criminal Cases"). The Application was grounded on Articles 13(1), 15(1), (2) (a) and 30 (3) of the Constitution of the United Republic of Tanzania guaranteeing equality before the law and dealing with the right not to be arbitrarily deprived of one's freedom. On 14 December 2010, that application was struck out for the reason that it had not been properly made since the Applicant brought it by way of Chamber Summons and Supporting Affidavit, whereas Section 5 of the Basic Rights and Duties Enforcement Act (which governs the procedure for filing and determining applications grounded on Part III of Chapter One of the Constitution under which the above mentioned provisions fall), required that such application be brought by way of a Petition and Originating Summons. In addition, according to the High Court, the aforesaid Act required that such an application be determined by a three - Judge Bench and not a single Judge.

9. On 8 December 2010, the Applicant filed against the Attorney General of the Respondent and the Police Officer in Charge of Arusha, Miscellaneous Criminal Application No. 78 of 2010, in the High Court of Tanzania at Arusha, originating from the Criminal Cases, to enforce his rights under Articles 13(1), 15(1), (2) (a) and 30 (3) of the Constitution. In support of the application, he alleged violation of his right to freedom and to live as a free person. According to the Applicant, the Second Respondent in that application had arrested, detained and interrogated him contrary to the provisions of the Criminal Procedure Act and therefore, the Criminal Cases against him were vitiated by these illegalities. The Applicant consequently, sought a decree, in enforcement of Part III of Chapter One of the Constitution of the United Republic of Tanzania, to this effect. On 18 May 2011, the High Court issued an order to the effect that the Application was withdrawn at the Applicant's instance. It should be noted that, neither the Order nor the record do not indicate the basis for the withdrawal of the Application and merely indicates its withdrawal.

10. On 29 December 2010, the Applicant filed. in the High Court of Tanzania in Arusha, Miscellaneous Criminal Application No. 80 of 2010, originating from the Criminal Cases, alleging violation of his basic rights and freedoms guaranteed under Part III of Chapter 1 of the Constitution of the United Republic of Tanzania, specifically of Articles 24(1), (2) and 30(3) thereof on the right to own property. The Application was against the Attorney General of the Respondent and the Police Officer in Charge of Arusha. The Applicant prayed the High Court to order the Respondents in that application to restore his properties and any other relief it deemed fit to grant. On 18 May 2011, the High Court issued an Order that the application was withdrawn at the instance of the

Applicant. The record does not indicate why the application was withdrawn, only its withdrawal.

11. On 19 May 2011, the Applicant, in the High Court of Tanzania at Arusha, filed against the Attorney General of the Respondent Miscellaneous Criminal Application No. 16 of 2011, originating from the Criminal Cases on the basis of Articles 13(1), 15(1) and 15(2) (a) and 30(3) of the Constitution of the United Republic of Tanzania. In that application, the Applicant alleged that the provisions and laws concerning his rights under Section 13(1)(a), (b), 13 (3) (a), (b) and (c), 32(1), (2) and (3), 33, 50(1), 52(1) and 52 (2) of the Criminal Procedure Act and Articles 14(1) and 15(1), and 15(2)(a) of the Constitution of the United Republic of Tanzania were violated by the Police. He, therefore, sought a decree under Part III of Chapter One of the Constitution of the United Republic of Tanzania. The Respondent therein filed its response on 5 October 2011. The Applicant sought to cause the empanelling of a three-Judge Bench of the High Court to hear this Application (as hinted by the High Court Judge when striking out Miscellaneous Application No. 47 0f 2010). On 29 June 2011, the Applicant wrote to the Registrar of the High Court of Tanzania at Arusha requesting that the three-Judge bench be constituted to hear the Application. He wrote again in this regard on 14 November 2011; it is apparent that there was no formal reaction to this request. On 26 March 2012, the Application was recorded at the High Court as withdrawn, even though the same record indicates that the Applicant was absent from Court. It is in our view, quite baffling that an Application which was required to be heard by a three-Judge Bench was withdrawn on the order of a single Judge. If the Application was to have been withdrawn, it should have been done before the three - Judge Bench.

12. From all the foregoing it is quite evident that the Applicant made several applications to have his complaints determined, all of which proved futile. On closer examination, it is clear that he was caught in a vicious cycle of attempting to find resolution to his complaints and finding himself thwarted at practically every turn by procedural technicalities that effectively had nothing to do with the substance of his complaints. Hence, his complaints were either found premature, not properly made or incompetent. The complaints were also treated as intrinsically tied to the ever-changing and hardly moving criminal charges the Applicant was facing, in that the Courts concluded that they could not grant him the orders he sought to enforce his basic rights until the criminal charges against him were prosecuted to finality, whereas his complaints were essentially against the very legality of his continuing incarceration. The Courts never adverted to the crucial question of whether his detention, the criminal proceedings preferred against him and the seizure of his property allegedly in connection with these criminal charges, were in accordance with the laid down due process, yet this was the gist of his complaints and applications.

13. In all the Miscellaneous Criminal and Civil applications he filed, the Applicant sought to have his human rights respected within the multiple criminal proceedings he was facing, both procedurally and substantively, but because of the approach of undue regard to circular technicalities that the courts chose to take, this became impossible and delayed final determination of his complaints. A patent example of this unfortunate approach is the decision of 14 December 2010 in Miscellaneous Criminal Application No. 7 of 2007, wherein the High Court found that, although there was no connection between the Applicant's seized property and the murder charge he was facing,

nonetheless it could not order the release of his property as the criminal charges against him were still pending at the District Court, in which it was being alleged that the Applicant's property was connected to the Criminal Cases.

14. The statement made before this Court by Counsel for the Respondent, during the public hearing of this matter, is quite illustrative of the conundrum posed to the Applicant by the approach the Respondent's officials chose to take in the domestic courts:

"With regards to the question posed ... on whether the Applicant had a right to appeal before the finalisation of any criminal proceedings; we pray to submit that the right to appeal is available to anyone after the matter is finally heard by the Court and not at a stage where it is still being heard by the Court. However one can do so after the finalization of the proceedings if he or she believes there are reasonable grounds for doing so. Similarly at any stage of the proceedings, if one feels their right has been violated or threatened he or she can file a constitutional petition before the High Court for the enforcement of his basic rights and duties vide the Basic Rights and Duties Enforcement Act. It is important to note that the effect of doing this stays criminal proceedings in the Subordinate Court."

15. In the Applicant's case, when he first applied to the High Court to enforce his basic rights, contrary to the provisions of the Basic Rights and Duties Enforcement Act, the High Court ruled that it could not decide on the matter as the proceedings against him at the District Court were pending yet the effect of such an application is meant to be the stay of proceedings at the District Court. Most of the applications took a

long time to dispose of yet the Applicant's liberty depended on their finalisation.

16. As a result, if a person is challenging the legality of criminal charges against him, the effect of the said procedure for enforcement of one's basic rights forces one to choose between going through criminal proceedings that may have been brought unlawfully then appealing against the decision therefrom or challenging the legality of those proceedings under the Basic Rights and Duties Enforcement Act and having the criminal proceedings filed against one, stayed. One may have to choose the lesser of two evils in the circumstances, each of which may have the tendency to violate the rights of such a person.

17. In the instant case, the Applicant chose to apply for the respect of his basic rights by challenging the legality of the preferment of the criminal charges against him and his subsequent arrest and detention and the seizure of his property. However, most of his applications were dismissed due to technicalities. Indeed, Counsel for the Respondent stated during the public hearing that:

"... the Applicant was registering his complaints in the form of ordinary criminal applications rather than constitutional petitions vide Basic Rights and Duties Enforcement Act. Hence his applications were being handled by a single Judge."

18. Indeed, being an unrepresented litigant, rather than basing his applications on the Basic Rights and Duties Enforcement Act, the Applicant, in his apparent ignorance, was initially basing them on the Criminal Procedure Act. This was the case in the first two Miscellaneous Applications. Having followed the wrong procedure at the High Court, there would have been no chance of success of an appeal from the

decisions of the High Court, dismissing or striking out his applications, regardless of the submission by the Respondent during the public hearing, to the effect that the Respondent ought to have appealed against these decisions of the High Court. Rather, the Applicant chose to file new applications in which he thought he was following the correct procedure.

19. Though his third application cited the provisions of the Bill of Rights under the Constitution that he alleged were violated, it was dismissed for the reason that it was not filed through a petition and originating summons. Again, it is doubtful that he could have appealed a decision of the High Court that found that his application thereto was filed using the wrong procedure due to the apparently established jurisprudential orientation toward strict regard to technicalities.

20. The fourth and fifth applications also cited provisions of the Bill of Rights under the Constitution that were allegedly violated by the Police but these applications were withdrawn by the Applicant.

21. A day after he withdrew the aforesaid two applications, he filed his final application. This is the application in respect of which the empanelling of the statutory three-Judge Bench to hear it was delayed or denied. On two occasions, on 29 June 2011 and 14 November 2011, the Applicant requested the Registrar in Charge to empanel the Bench to hear his application but this did not happen. What recourse did he have regarding this situation? Logically, it is obvious that he could not have appealed to the Court of Appeal on the issue of empanelling of the three-Judge Bench as there was no judicial decision to appeal from, to the Court of Appeal. He was thus compelled to wait for the empanelling of the three-Judge Bench, and, lacking a mechanism to resolve this

delay in the national jurisdiction, he decided to file an application to this Court on the grounds that his attempts to access local remedies against his rights, were unduly prolonged and delayed. At no time could he have accessed the Court of Appeal as there were no decisions from which he could appeal thereto.

22. It is noteworthy to reiterate that at the point in time, when he filed the Application at this Court on 30 September 2011, the Applicant had been in prison custody for 3 years and 11 months without trial.

23. In this matter, from what point in time ought the consideration of whether or not there has been an undue delay in accessing the local remedies be reckoned? In our considered opinion, this should be reckoned from the time the Applicant filed his first application to the High Court, that is, in 2007. Right from that time, the effect of his application was for the enforcement of his human rights. Even though this and the second and third applications were not expressly based on the Basic Rights and Duties Enforcement Act, they were, in effect, applications for the enforcement of the Applicant's basic rights under the Constitution. A reading of section 4 and 8(2) of the Basic Rights and Duties Enforcement Act shows that matters in respect of which one may apply under the Act to the High Court for redress, might also be resolved through other legal procedures.

24. Section 4 of the Act provides that:

"If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress."

25. Section 8(2) of the same provides that:

"The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious."

26. These provisions indicate that basic rights provided for under section 12 to 29 of the Constitution of the United Republic of Tanzania need not be enforced only through this Act; thus, the Applicant's application for redress under the Criminal Procedure Act ought to have been properly considered as applications for enforcement of his basic rights, albeit not under the Basic Rights and Duties Enforcement Act. Therefore, the Applicant's actions for redress including seeking administrative remedies through the Ministry of Home Affairs, Ministry of Justice and Constitutional Affairs, the Directorate of Public Prosecutions of the Attorney General's Chambers and the Commission on Human Rights and Good Governance, which commenced in 2007 and continued until the time he applied to this Court for a remedy, were appropriate within the meaning of the Basic Rights and Duties Enforcement Act.

27. In these circumstances, we find, therefore, that the obstacles placed in the way of the Applicant's attempts to access the local remedies effectively rendered the remedies inaccessible and unduly prolonged. The principle established by the African Commission on Human and Peoples' Rights in Communications 147/95 and 149/96 (Consolidated) *Sir Dawda K. Jawara v The Gambia* in this regard is that:

"A remedy is considered available if the petitioner can pursue it without impediment. It is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."[1]

28. In the instant case, the Applicant's attempts to enforce his basic rights were fraught with impediments, which unduly prolonged the process of accessing local remedies. In this regard therefore, his Application herein is, in our view, admissible before this Court under the exception to the principle of exhaustion of local remedies, by virtue of the process of accessing local remedies being unduly prolonged.

29. In the circumstances we are also of the view that the Application was brought within a reasonable time.

Objection to the Expert Witness

30. By a letter dated 23 September 2013 and confirmed by a letter dated 5 November 2013, the Applicant notified the Registrar of Court (which notice was also served on the Respondent) that he intended to call one Professor Leonard P. Shaidi, a Professor of Law at the University of Dar es Salaam School of Law to "*testify and assist the Honourable Court to understand the obtaining criminal law and procedure of the Respondent State, which should apply or should have been applicable to the Applicant.*"

31. During the public hearing, the Respondent objected to the calling of the expert witness. The Parties made submissions on this issue.

[1] Thirteenth Activity Report, 1999 – 2000 paragraph 32.

The Position of the Respondent

32. The Respondent contended that three things are essential for one to be qualified as an expert witness, that is;

i. The expert should possess special knowledge;
ii. Special skill; and
iii. Experience or training in that particular field.

33. The Respondent maintained that expert witnesses should only be allowed if they are chosen by the Court, and that the Court does not need an expert opinion on the Criminal Procedure applicable in Tanzania as these are common statues that can be easily interpreted. Furthermore, Counsel for both parties are officers of the Court who ought to assist the Court to come to a just decision without resorting to experts

34. The Respondent maintained that the interpretation of statues is the preserve of Courts and not of experts. The Respondent cited the decision of the Court of Appeal of Tanzania, in the Case of *Director of Public Prosecutions v Shida Manyama and Selemani Mabuba*, App No. 81 of 2012 (Unreported), wherein the Court (per Rutakangwa, JA) quoted the opinion of the Supreme Court of India in *Alamgir v State of Delhi (2003)* ISCC 21 to the effect that:

"We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now settled law that expert opinion must always be received with great caution".

35. On this basis, the Respondent called on the Court to exercise caution and disqualify the witness as an expert.

36. According to the Respondent, in the same cited case (supra), the Court of Appeal of Tanzania also quoted the decision of the Indian Supreme Court in the case of *Romesh Chandra Aggaraval v Regency Hospital Ltd* (2009) 9 SCC 709 which set out three requirements for the admission of an expert witness as follows:

i. An expert witness must be within a recognized field of expertise;
ii. Evidence must be based on reliable principles;
iii. The expert witness must be qualified in the discipline.

37. The Respondent argued that the expert witness the Applicants intend to call does not meet these three requirements, as he is not an expert in any field of law, let alone Criminal Procedure, with renowned writings that have given substantial contribution to the knowledge of Criminal law in Tanzania. On this basis the Respondent prayed that its objection to the expert witness be sustained.

The Position of the Applicant

38. The Applicant opposed the Respondent's preliminary objection on three grounds.

39. The first ground is that the Respondent's objection to the expert witness is not in good faith as it has been done very late in the day despite the Respondent being aware as far back as 23 September 2013 that the Applicant intended to call the expert witness.

40. Further, according to the Applicant, the Respondent did not provide any basis for challenging the witness's qualification. Instead, the Respondent merely requested the Court to provide it with grounds for challenging this expert yet the Respondent's sole duty is to plead their case. They submitted that the Court is under no obligation to provide the Respondent or any of the Parties for that matter with grounds for argument or objection.

41. The Respondent, in support of the objection, had cited Rule 53(2) and Article 19(1) of the Rules of Court and the Statute, of the Inter-American Court of Human Rights respectively, which provides for disqualification of experts on the basis that they have a direct interest in the matter. The Applicant maintained that the Respondent did not put forward any evidence to show what, if any, relationship exists between the expert and the matter currently before the Court. The Applicant pointed out that, unlike the Inter-American Court of Human Rights, this Court's Rules of Procedure do not contain any explicit provisions on disqualifications of experts. In view of this, the Applicant urged the Court, as a human rights court to adopt a liberal and victim-centered approach to this issue towards ensuring truth and justice is achieved.

42. The second ground argued by the Applicant was that the expert witness is competent and credible because he is a Professor of Law at the Faculty of Law of the University of Dar es Salaam with relevant scholarly research and professional expertise. The Applicant also called on the Court to apply Rule 45(1) which empowers the Court to call for "*any evidence which in its opinion may provide clarification of the facts of a case or which in its view is likely to assist it in carrying out its task*" to

admit the oral evidence of the expert as well as the particulars of his qualification including his Curriculum Vitae.

43. The third ground on which Counsel for the Applicant based his argument, was that the testimony of the expert was intended to be limited in scope to issues of domestic law which would assist the Court in reaching a fair and just decision on the same. This, in the Applicant's view, would not be prejudicial to the Respondent. In addition, according to the Applicant, the Court may order that the expert testimony be limited to specific areas of competence. This would be in line with the approach adopted by various international courts and tribunals such as in the case of Prosecutor *v Bagasora* et al, ICTR Case Number 98/41T.[2] On these grounds, the Applicant pleaded for the admission of Professor Leonard P. Shaidi as an expert witness in this case.

Our Opinion

44. We observe that, the practice in international courts shows that they are "intolerant of any restrictive rules of evidence that might tend to confine the scope of a search after those facts. With certain exceptions, they do not hesitate to supplement, upon their own initiative, the evidence supplied by the parties if they regard it as inadequate."[3]

45. The Inter-American Court of Human Rights, for example, will admit testimony from a qualified expert when it is consistent with the

[2] Decision of 20 September 2004.

[3] Durward V Sandifer *Evidence Before International Tribunals* (Chicago: Foundation Press 1939) 3-4.

purpose for which it is proposed.[4] Experts may testify regarding a wide range of topics. They are often called to testify as to the domestic law in the Respondent State, as domestic law must be proven as a fact before international tribunals. Furthermore, any party can name expert witnesses and the Court may also appoint an expert.

46. Taking into account the scope of this case and having considered the corresponding arguments of the Parties, and, bearing in mind that it is essential to assure not only the determination of truth and the most complete presentation of facts and arguments from the Parties, we are of the view that, other than general assertions, the Respondent did not present any objective or cogent grounds for the disqualification of the expert witness and his alleged bias. Furthermore, the cases cited in support of the objection were irrelevant and immaterial to the objection, that is, the qualification of the proposed witness, not the quality of evidence to be given by him. Indeed, the Respondent asserted in Court that they did not know the exact nature of the evidence that the witness was going to adduce nor did they know whether he was an expert or not. The Respondent then went on to argue that the expert witness was not an "authority on criminal law and procedure of Tanzania." This is even though the objection was made before the witness had been sworn in and given the opportunity to highlight his qualifications and expertise. Thus it is rather unfortunate that the learned majority of this Court was taken in by such unfounded assertions on the part of the Respondent.

47. As regards the alleged concurrence of the expert's opinion with the position of the Applicant, we are of the view that, even when the statements of an expert witness would contain elements that support the

[4] *Painagua Morales v Guatemala* (Reparations, 2001) paragraph 71.

arguments of one of the parties, this does not, *per se*, amount to bias such as would disqualify the expert. In any event, as is the norm with all testimony, a Court would normally only admit expert witnesses' testimony that is in keeping with the purpose for which it is required and will evaluate it together with the body of evidence, taking into account the rules of sound judicial discretion. For these reasons, the Court should have admitted the testimony of the expert witness.

48. For these reasons, the Court ought to have admitted the testimony of the expert witness. In our respectful view, the reasons upon which the majority members of this Court refused to admit the Applicant's witness as an expert witness are unacceptable, particularly since the matters in respect of which the Applicant sought to call him were statutory law, to be treated as peculiar to the Respondent State and foreign to the Court, and the Court cannot arrogate to itself an omnipotent power to know and/or interpret the same. Moreover, the jurisdiction of the Court in terms of Article 3(1) of the Protocol does not extend to the interpretation of domestic law. We reject the rationales given for declining the expert witness. We also reject the purported interpretation of Rule 45(1) of the Rules of Court which is tantamount to the creation of a new rule outside the normal procedure of the Court.

49. Consequently, we maintain the view that Applicant's expert should have been heard, to help the Court decide whether or not the Applicant's arrest, detention and the seizure of his properties were in compliance with the national criminal law procedure, the crux of Applicant's case. Fortunately for the Applicant, the Respondent, apart from a little more than a mere bald assertion that the arrest, detention and the seizure of

his properties were in accordance with the law, offered nothing substantive to controvert the Applicant's systematic factual outline, with reference to the provisions of the Criminal Procedure Act, to buttress its case; as a result, no real contest ensued between the parties around this issue. That being the case, the Court was, mercifully, saved from an untoward situation where it would have needed the assistance of the evidence of an expert, something which could have happened had the Respondent offered a more diligent contrary case. In our view, a Court should not lightly, or as a matter of routine, bar a party from adducing expert evidence; it may not always and necessarily find itself in the fortunate situation in which we fortuitously found ourselves on this occasion.

The Evidence

50. Having concluded that the Application is admissible, we will proceed to express ourselves on the merits of the matter. Though it may appear to be an exercise in futility, because the case was heard on the merits, we will consider the merits of the Application.

51. The Applicant alleges that he was unlawfully arrested, interrogated, detained, charged and imprisoned contrary to the provisions of the Criminal Procedure Act. The Applicant also alleges violation of his rights under the Constitution of the United Republic of Tanzania and the African Charter on Human and Peoples' Rights ("hereinafter referred to as the Charter").

52. At the public hearing of this matter, the Court received testimonies as follows:

i. The Applicant testified to the events leading to his alleged unlawful arrest, detention, interrogation and preferment of charges of murder, kidnapping, armed robbery and rape and the alleged unlawful seizure of his property by the Police.

ii. Mr. Ramadhani Athumani Mungi, currently the Regional Police Commander in Iringa , who was the Officer Commanding the Criminal Investigation Department (OCCID) in Arusha at the time the events forming the basis of the Applicant's complaints allegedly occurred. He testified regarding the various criminal incidents of crime that had occurred between July and September 2007, in Arusha, as well as the particular incident leading to the Applicant's detention, interrogation and subsequent charging in Court.

iii. Mr. Salvas Viatory Makweli, currently a Police Officer in Muleba District, and Assistant Superintendent of Police who was an Inspector of Police in Arusha at the time the events forming the basis of the Applicant's complaints allegedly occurred, and who was in charge of the search conducted in the Applicant's house on 12 September 2007. He testified on the procedure that was followed following the seizure of the Applicant's property, allegedly in connection with the crimes with which the Applicant and his wife were eventually charged. According to him, he supervised the search process though he did not personally conduct it.

iv. Mr. John Mathias Maro, currently the OCCID in Shinyanga District and Assistant Superintendent of Police, was an officer on the Criminal Investigation Department in Arusha of the rank of Assistant Inspector at the time the events forming the basis of the application occurred.

He testified as to how he conducted the search of the Applicant's house and seized his property allegedly in connection with the crimes that the Applicant and his wife were eventually charged with.

v. Mr. Leonard Paul, currently an Assistant Commissioner of Police and the Regional Police Commander of Geita Region, who had the rank of Superintendent of Police in Arusha was a Regional Criminal Officer at the time the events forming the basis of the Application occurred. According to him, he was in charge of ensuring prevention of crimes and supervised the administration of the Department of Criminal Investigation. He testified that, in this capacity, he handled several police files involving the Applicant, particularly involving incidents of kidnapping, rape and armed robbery and armed robbery that occurred in Njiro, Arusha on 24 August 2007 and on 12 September 2007 respectively, with which the Applicant was charged and in respect of which he allegedly refused to attend the trial proceedings, leading to their withdrawal and reinstitution. He also testified to his handling of the Case No. 993/2007 where the Applicant was charged with murder and in respect of which the Applicant was acquitted to due to lack of evidence.

vi. Mr. Wilson Mushida an Assistant Superintendent of Prisons at the Central Prison of Arusha who, at the time the events forming the basis of the Applicant's complaints allegedly occurred, was an Assistant Inspector of Prisons working at the Reception Department of the Central Prison of Arusha. He testified to the handling of the Applicant while in remand at the Arusha Central Prison including the facilitation of his Court appearances and how the Applicant's alleged refusal to attend Court for his cases was addressed.

53. Additionally, we admit the evidentiary value of those documents, filed by the Parties at the appropriate procedural stage, that were not disputed or challenged and those that the Court ruled were admissible, as the case may be.

Assessment of the Evidence

54. Given that the Applicant has a direct interest in the case, his testimony is useful insofar as it provides more information on the alleged violations and their consequences. It is the well-established case law of the Inter-American Court of Human Rights that a person's interest in the outcome of a case is not sufficient, *per se*, to disqualify him or her as a witness.[5] In most cases, particularly those involving alleged violation of human rights, often the only witnesses who are willing to put themselves at risk to testify are those who have a personal interest in the case. Thus, the Inter-American Court of Human Rights has stated that the testimony of the victim has a 'unique import', as the victim may be the only person who can provide the necessary information.[6]

55. As to the testimony of the Respondent's witnesses, overall, it is our view, as well as apparent from the record, that they were self-serving and geared towards justifying their possibly illegal actions. It appears to us that their actions regarding the matters they testified to lean more towards an indication that, in their respective opinions it was a foregone conclusion that the Applicant should be the one held responsible for the

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[5] *Suarez Rosero v Ecuador* (Merits), Inter-American Court of Human Rights 12 November 1997 Ser C No 35 paragraph 32.

[6] *Loayza Tamayo v Peru* (Reparations, 1998) paragraph 73.

alleged incidents of crime that were happening in Arusha, and it was simply a matter of throwing at him, as many charges as possible in the expectation that some would eventually stick. Despite this concerted activity, there were contradictions in their testimony.

56. Witnesses Ramadhani Athumani Mungi and John Mathias Maro testified to the occurrence of several incidents of crime prior to 12 September 2007 when the incident in which the Applicant was allegedly involved occurred. According to Mr. Mungi, despite the fact that other suspects in respect of these criminal incidents had been identified, only the Applicant was ever charged in any of the Criminal Cases. Witness Leonard Paul, however, testified that other suspects were charged with these crimes and that the cases against them proceeded, but no concrete information was provided to the Court in relation to those other cases. There is no evidence showing that the cases against the other suspects with whom the Applicant was initially charged proceeded. Even the Respondent has not argued so.

57. Regarding the search, even assuming that Police Officers could conduct a search of the Applicant's property without a search order or search warrant, witnesses Ramadhani Athumani Mungi, Salvas Viatory Makweli and John Mathias Maro were hard pressed to explain why a Seizure List or Certificate of Seizure was never issued in respect of the seized property, as required under the Criminal Procedure Act and conceded in Court. It is evident that this was not drawn up.

58. In addition, witness Ramadhani Athumani Mungi conceded that an arrest warrant was never issued in respect of the Applicant from 12 September 2007 when the alleged incident of crime that the Applicant

was allegedly involved in occurred, until he was detained from 26 October 2007, when he went to the Police Station to find out about his wife, and further on until 8 November 2007 when he was first arraigned before a Magistrate. This, in our view, evidences an intention on the part of the Police to disregard the laid down procedures relating to arrest of suspects and the provision of twenty (24) hours period within which suspects must be arraigned in Court as set out in Section 32(1) of the Criminal Procedure Act. Hence, even where it became apparent that the "evidence" that the Police had mounted against the Applicant in respect of the various charges would not pass muster, as admitted by witness Leonard Paul on cross-examination by Counsel for the Applicant, there were still continuous attempts to manufacture evidence to ensure that the murder charge against the Applicant would be upheld. However this failed as the Applicant was eventually acquitted of that charge in May 2013.

59. The testimony of Wilson Mushida an Officer of the Arusha Central Prison also failed to convincingly establish that the Applicant refused to attend Court in respect of the Criminal Cases he was facing such as to justify the long period of detention of over five and half years without trial. We observed that the witness appeared to have selective memory and could only recall the Applicant's movements (or lack thereof) in respect of the criminal charges he was facing but virtually nothing of his movements regarding the Miscellaneous Applications he had filed, except for Miscellaneous Application No. 16 of 2011 in respect of which the Respondent, unsuccessfully sought, by doubtful evidence, through this witness, to prove that the Applicant was in Court when the Application was withdrawn, even though, as evidenced by the

Respondent's own pleadings and the documentary evidence on record, the contrary was true.

The Merits

60. To recap briefly, the Applicant alleges that he was unlawfully arrested, interrogated, detained, charged and imprisoned without trial contrary to Sections 13(1)(a) and (b), 3(a), (b) and (c), 32(1), (2) and (3), 33, 38 (1), (2) and (3), 50 (1) and 52(1), (2) and (3) of the Criminal Procedure Act, Chapter 20 of the Laws of Tanzania (Criminal Procedure Act). These provisions deal with warrant of arrest, detention of persons arrested, police to report apprehensions, power to authorise search warrant or authorise search, periods for interviewing persons and questioning suspect persons, respectively. According to him, his unlawful arrest, detention, charging and imprisonment in relation to the multifarious Criminal Cases mounted against him violated his right, under Article 15(1) and (2)(a) of the Constitution of the United Republic of Tanzania, to freedom and the guarantee that such freedom shall only be deprived under circumstances, and in accordance, with procedures prescribed by law, respectively and that the unlawful seizure of his property in this regard is in contravention of his right to property as set out in Article 24(1) and (2) of the Constitution of the United Republic of Tanzania. The Applicant also claims the violation of his rights as enshrined in Articles 3, 5, 6, 7(1), 14 and 26 of the Charter.

61. Article 3 of the Charter provides for equality before the law and equal protection of the law. Article 5 thereof provides for the right of

every individual to the respect of the dignity inherent in a human being and to the recognition of his legal status. Article 6 provides for the right of every individual to liberty and to the security of his person and a right not to be deprived of his freedom except for reasons and conditions previously laid down by law. Article 7(1) of the Charter provides for the right of every individual to have his cause heard and for due process rights. Article 14 of the Charter provides for the right to property which may only be encroached upon in accordance with the provisions of appropriate laws. Article 26 of the Charter commits States Parties to the Charter to guarantee the independence of the Courts and to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed in the Charter.

62. For purposes of this dissenting opinion, we shall examine whether or not the actions of the Respondent in arresting, interrogating, detaining, charging and imprisoning the Applicant and the seizure of his property was in compliance and consonance with the Criminal Procedure Act and the Constitution of the United Republic of Tanzania, and more importantly, in compliance with the aforesaid provisions of the Charter.

63. Central to this is the question of the procedural integrity or lawfulness of the Applicant's arrest, detention in custody at the Police station and subsequent detention in prison awaiting trial. From the outset, it should be reiterated that the Applicant was purportedly arrested when he presented himself at the Police station to enquire why his wife was being detained. Strangely, no warrant of arrest had been issued against the Applicant at any time during the period of two months that,

as alleged in Court, he had run away and the Police were looking for him. In the absence of a warrant of arrest, the Police could arrest the Applicant provided that they strictly complied with the other procedural requirements particularly that requiring that he be arraigned in court within twenty (24) hours. There is no good reason and none was provided to this Court for not charging him in court within twenty (24) hours and for detaining him at the Police Station for fourteen (14) days in violation of the Criminal Procedure Act and the Charter. In addition, the charges in these cases kept metamorphosing and increasing year to year. From the time the Applicant was arrested and detained in remand and subsequently in prison awaiting trial from 26 October 2007 to 3 May 2013, when he was released, a period of about five and half years had lapsed.

64. Our examination of the documentary and testamentary evidence presented shows that the Respondent has failed to prove that the Applicant's arrest and detention for fourteen (14) days before trial is a matter of grave concern. As this is an issue dealing with the Applicant's liberty, the presumption is in favour of the Applicant and the onus is on the Respondent to rebut the Applicant's allegations of the Respondent's unlawful action in respect of his interrogation, detention and charging with serious crimes. The documentary and, particularly, the testimonial evidence leads us to the conclusion that the Respondent has not discharged this onus of proof, therefore, the presumption being in favour of the Applicant, we have no hesitation in finding that he was unlawfully detained, interrogated and charged. When it comes to an individual's liberty, the onus of proof that he or she has been lawfully arrested lies with the State.

65. Flowing from the actions of the Respondent as indicated above, we make the following findings:

66. The Applicant's right to equality before the law and equal protection of the law (Article 3 of the Charter) was violated as the laid down procedures for arrest, interrogation and charging of the Applicant were not followed.

67. The Applicant's right to the respect of the dignity inherent in a human being and to protection from cruel, inhuman or degrading punishment and treatment (Article 5 of the Charter) was violated.

68. The Applicant's right to liberty and to the security of his person and to not be deprived of his freedom except for reasons and conditions previously laid down by law, in particular, the right not to be arbitrarily arrested or detained (Article 6 of the Charter) was violated.

69. Article 7(1) 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 and customs in force

(b) The right to be presumed innocent until proved guilty by a competent court or tribunal

(c) The right to defence, including the right to be defended by counsel of his choice

(d) *The right to be tried within a reasonable time by an impartial court or tribunal"*

70. Article 26 of the Charter provides that:

"State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

71. These two provisions of the Charter come into play when considering the inordinate length of the disparate proceedings in the Criminal Cases against the Applicant, as well as in the handling of his attempts to seek redress before the Courts of the Respondent for the alleged violation of his basic rights, as provided for under the Constitution of applicable laws of the United Republic of Tanzania. This resulted in his languishing in prison for five (5) years plus, without trial.

72. Having believed, and we agree with the Applicant on this score, that his rights were violated, the Applicant sought redress for the violation of his rights through various domestic procedures in consonance with Article 7(1)(a) and 26 of the African Charter. The basic import of these applications was that he sought enforcement of his rights. But due to the unduly technical approach of the courts, he was unable to obtain redress. Jurisprudential developments across the world require that when addressing issues of fundamental rights, Courts should not take an overly technical approach which do not ensure

substantial justice but rather tend to derogate from it. Indeed, so important is this that, some jurisdictions, such as India, provide for epistolary jurisdiction wherein petitions regarding the respect for fundamental rights need not follow a specific format, what is considered important is the content therein, and it will be admissible if it indicates possible violations of basic rights.

73. This Court is also following this jurisprudential orientation as, in the instant case, it has decided that Applicants need not specify the particular provisions of the Charter that have allegedly been violated, rather, that they only need to be discernible from the alleged violations.

74. With regard to the Respondent, the enactment of the Basic Rights and Duties Enforcement Act was evidently intended to provide a procedure for the enforcement of the rights set out in Articles 12 to 29 of the Constitution of the United Republic of Tanzania. Though, in theory, there is such a procedure, as evidenced by this Application, there is a *lacuna* in its application which is detrimental to an applicant in the situation the Applicant herein found himself. The Applicant knows only too well about this as his attempts to enforce his basic rights since 2007 came to naught.

75. Articles 7(1) (b) to (d) of the Charter are relevant in respect of the Criminal Cases facing the Applicant. The issue here is whether the time taken to conclude the cases against him was reasonable. The time lapse between his detention in 2007 until May 2013 when he was acquitted of the murder charge is in our view not a reasonable time. This is particularly so considering the Respondent's almost culpable actions of withdrawing and reinstituting the charges. It behoves the Respondent to

withdraw the cases against the Applicant if there was insufficient evidence against him, no matter how heinous the crimes alleged to have been committed, rather than detaining the Applicant indefinitely while attempting to obtain evidence against him. The rule of law demands that laid down procedures should be followed. It is telling that there was chilling witness testimony by Mr. Ramadhani Mungi, who was a witness for the Respondent that the Respondent was waiting for the matter before this Court to come to an end to deal with the Applicant's cases. When asked to clarify his statement, the witness indicated that he meant preferment of more criminal charges against the Applicant and not as a threat to the person of the Applicant. We merely observe that criminal prosecution is not a game to be played whimsically and vengefully for gratification.

76. Freedom of the person is sacrosanct, and in our view, any act on the part of the State which curtails such freedom must fulfil the requirements of the Charter, in both word and spirit. Where a person is incarcerated pending trial, justice requires that the trial be concluded in the optimal time to enable the person know his or her fate, and more importantly, to prevent inordinately lengthy remand of a possibly innocent person; this is merely the concomitant of the presumption of innocence.

77. Article 26 of the Charter is also relevant in the instant case. It provides that:

"States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and

improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

78. Our admission of the Applicant's application on the ground that the local remedies were unduly delayed and prolonged is an indication that there exists in the Respondent State ample room for improvement to assure adequate protection of human rights in the administration of criminal justice.

79. Regarding the claim concerning the guarantee of the right to property (Article 14 of the Charter), it is our view that on the face of the record, the seizure of the Applicant's property was not done in accordance with the law. However, this is a moot point as the judgment dated 30 April 2013 delivered in respect of Criminal Case No. 712 of 2009 ordered the return of his property after the Court found that the prosecution had failed to prove the case against the Applicant in that matter. We will say no more on this aspect of the Application.

Compensation and Reparation

80. Since this a dissenting opinion, even if we would otherwise have been inclined to grant to the Applicant, in due course, compensation and or reparation, and costs, such orders would in the circumstances hereof be mere *brutum fulmen* and we will, therefore, not embark on such an exercise in futility.

81. **On the prayers:**

In Conclusion:

82. Having found the application admissible and that the Court has jurisdiction to consider the applications, we find that:

1. The Respondent has violated Articles 3, 5, 6, 7(1) (a) and (d) and 26 of the Charter;
2. There is no need to make a finding with regard to the alleged violation of Article 14 of the Charter, because the matter is moot;
3. The finding of a violation constitutes *per se* a form of reparation;
4. The Respondent must take steps to examine and address the possible *lacunae* occurring in the implementation of the Basic Rights and Duties Enforcement Act and remedy the same.

Done at Arusha, on this Twenty Eighth Day of the month of March in the year Two Thousand and Fourteen, in English.

Signed by:

Sophia A.B. AKUFFO, President

Elsie N. THOMPSON, Judge

Ben KIOKO, Judge

and Robert ENO, Registrar.

AFRICAN UNION

الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

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

IN THE MATTER OF

PETER JOSEPH CHACHA

V.

THE UNITED REPUBLIC OF TANZANIA

SEPARATE OPINION OF JUDGE B.M. NGOEPE

1. Although I agree with the conclusion reached by the majority, I do not agree with them regarding the Ruling on the admissibility of the evidence of Prof. Leonard P. Shaidi, professor of law at the University of Dar es Salaam, whom the Applicant had sought to call as his expert witness.

2. I was one of the minority against that Ruling. With respect, I still disagree with the majority decision on this point and associate myself with, and support entirely, the position held in the separate minority opinion of S.A. Akuffo - President, Thompson and Kioko JJ, appended to the majority decision.

3. I adopt the reasons given in the said minority opinion and therefore need not deal with the issue relating to the admission of the witness's evidence any further, except to make a few observations.

4. The objection against receiving the evidence of the professor on the basis that he is not an expert is misconceived:

4.1 That kind of argument only arises after the witness has testified and qualified or failed to qualify himself or herself as an expert.
4.2 If the Court finds that he/she is not an expert, the evidence would be discarded.
4.3 If the Court finds that he/she is an expert, the next step is to decide how much weight, if any, is to be attached to the evidence.

5. It is therefore hard to see how an argument that a witness is not an expert can be sustained before the witness is given the opportunity to qualify himself/herself; certainly not even on a curriculum vitae.

B. M. Ngoepe
Judge 28 MARCH 2014

Dr Robert Eno
Registrar

Peter Joseph Chacha *v.* The United Republic of Tanzania
(Application N° 003/2012)

Dissenting opinion of Judge Fatsah Ouguergouz

1. I voted against the operative part of the Judgment because I am of the view that the application filed by Mr. Peter Joseph Chacha meets the condition of exhaustion of local remedies required by Article 56 (5) of the African Charter and that it is therefore admissible.

2. In the instant case, the issue of exhaustion of local remedies should be assessed in the light of the rights which the Applicant alleges have been violated.

3. In his application, the Applicant, who was detained from 26 October 2007 to 13 May 2013,[1] alleges notably the violation of his fundamental right to liberty, as guaranteed by the Constitution of Tanzania, as well as the violation of some provisions of the Criminal Procedure Act of Tanzania relating to arrest, detention, conviction and imprisonment.

4. Even though the Applicant has not specifically mentioned any provision of the African Charter on Human and Peoples'Rights or any other international legal instrument ratified by Tanzania, there is no doubt that the violations he alleges relate notably to his right to liberty as well as his right to fair trial.

5. It should be noted here that, in his letter of 20 February 2012, in response to a letter from the Registrar of the Court, dated 13 February 2012, requesting him to show proof of exhaustion of local remedies, the Applicant stated that consideration of his complaint was unduly prolonged and that it was at variance with Article 7 of the African Charter on Human and Peoples' Rights (hereinafter

[1] This corresponds to a period of detention of 5 years, 6 months and 18 days.

F.O.

referred to as the "African Charter"), which he reproduced the full text in his letter.

6. In his Reply dated 15 May 2013, Counsel for the Applicant also referred to Articles 3, 5, 6, 7 (1), 14 and 26 of the African Charter (*Reply*, para. 4)

7. In his Rejoinder dated 23 July 2013, the Respondent State described reference made to these provisions of the African Charter by the Applicant as "new facts" or "new issues", which were not contained in the pleadings or raised in the initial application (*Rejoinder*, paras. 5 and 16)[2].

8. That is a characterization to which I can not subscribe because by referring to some articles of the African Charter, the Applicant is only clarifying the rights allegedly violated by the Respondent State and referring to the provisions of the African Charter which guarantee them.

9. In so doing, the Applicant did nothing else than to respond to the preliminary objection raised by the Respondent State, which stems from the absence of reference in the application to an international legal instrument to which it is a party. It is indeed what the Respondent State seems to admit implicitly when it concludes, in relation to the reference to these Articles of the African Charter, that "[t]his also will be a prejudice to the Preliminary objection raised by the Respondent in the reply to the effect that the jurisdiction of the Court cannot be moved by citing provisions of the Constitution of the United Republic of Tanzania alone [...]" (*Rejoinder*, para. 5 *in fine*).

10. The Applicant's claim that Article 7 of the African Charter was violated by the Respondent State was bound to have serious consequences on the content of the judgment that the Court was to deliver. Indeed, Article 7 provides for the right of the individual to a fair trial and this right is generally defined in relation to a number of procedural guarantees or requirements. In the existing human rights catalog this right is therefore one of the most lengthily expressed, if not the longest, as evidenced by Article 7 of the African Charter and Article 14 of the International Covenant on Civil and Political Rights.

11. This is a typical procedural right because it guarantees the effectiveness of all substantive rights set out in the African Charter. It is the only human right whose effective respect will in turn determine the effective control of the implementation of all the other rights set out in the Charter.

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[2] "the Applicant has pleaded/sought new reliefs which were not pleaded in the original Application" (*Rejoinder*, para. 16).

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12. It indeed behoves on the State Parties and their Executive and Legislative branches to ensure the effective implementation of the provisions of the African Charter. In case of breach of their obligations, it is primarily the responsibility of their judiciary to redress the situation. It is only after internal legal procedure fails, and therefore on a subsidiary basis, that the African Charter and its Protocol (as well as other international human rights treaties) provide for the intervention of the organs which they establish.

13. The rule of exhaustion of local remedies thus turns the right to a fair trial into a kind of "pivotal right", a right which, to a certain extent, serves as a nexus between the domestic and the international legal orders. It is therefore the qualitative weight of this right which, to a great extent, explains the quantitative weight that it has in the African Charter and other international human rights conventions.

14. Article 7 of the African Charter defines this right as follows:

> "1. 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;
>
> b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> c) the right to defence, including the right to be defended by counsel of his choice;
>
> d) the right to be tried within a reasonable time by an impartial court or tribunal.
>
> 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offense for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender".

15. Since it was established in 1987, the African Commission on Human and Peoples' Rights (hereinafter referred to as the "African Commission") has always interpreted this provision extensively and has even adopted an entire resolution on the provision. At its 11th Ordinary Session (Tunis, Tunisia, 2 to 9 March 1992), it indeed adopted a resolution entitled "*Resolution on the Right to Recourse and Fair Trial*,"[3] in which it has *inter alia* considered that:

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[3] At its 52nd Ordinary Session, held from 9 to 22 October 2012 in Yamoussoukro (Côte d'Ivoire), the Commission also adopted a resolution entitled "*Resolution on the need to issue guidelines on the conditions of custody and preventive detention in Africa*" and charged the

"2. [t]he right to fair trial includes, among other things, the following:

a) All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations;
b) Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them;

c) Persons arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released;

d) Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court;

e) In the determination of charges against individuals, the individual shall be entitled in particular to:

i) Have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice;
ii) Be tried within a reasonable time;
iii) Examine or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
iv) Have the free assistance of an interpreter if they cannot speak the language used in court;

3. Persons convicted of an offence shall have the right of appeal to a higher court".

16. The Court thus could draw from this resolution and the jurisprudence of the African Commission for the interpretation and application of Article 7 of the African Charter. Articles 60 and 61 of the African Charter, relating to the applicable principles, also allow the Court to draw inspiration from the relevant provisions of the International Covenant on Civil and Political Rights, as well as from their interpretation by the Human Rights Committee of the United Nations.

17. I wish here to underscore the fact that in the instant case, the Court was seized of the alleged violation of many rights of the Applicant, including his right to fair trial. It was therefore difficult for the Court to consider the objection to the admissibility of the application raised by the Respondent State, with respect to the exhaustion of local remedies, without hearing the merits of the matter concerning the abovementioned right.

Rapporteur on prisons and detention conditions in Africa to draft such guidelines as well as instruments for its effective implementation.

F.O.

18. Regarding now this rule of exhaustion of local remedies, it is true that generally, as rightly pointed out by the Respondent State, both in its written pleadings and at the hearing, that "the exhaustion of local remedies is a fundamental consideration in the admissibility test" (*Memorial in Response*, para. 49; *Verbatim Record*, 2 December 2013, p. 8, lines 33-34). The Court also agrees with this in paragraphs 142-144 of the judgment, based on the established jurisprudence of the African Commission in this area.

19. The African Commission has highlighted very early that:

> "The requirement of exhaustion of local remedies is founded on the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body".[4]

Still, according to the Commission, requiring the exhaustion of local remedies

> "ensures that the African Commission does not become a tribunal of first instance, a function that is not in its mandate and which it clearly does not have the resources to fulfil".[5]

20. This rule should however be applied with a certain degree of flexibility and without excessive formalism, given the context of human rights protection. It is therefore generally acknowledged that some specific circumstances may discharge the Applicant of the obligation to exhaust the local remedies available to him.

21. Referring both to the letter and spirit of Article 56 (5) of the African Charter, the Commission thus declared admissible a considerable number of communications on the basis of what was referred to as "*the principle of constructive exhaustion of local remedies*".[6] For instance, it declared some

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[4] Communications No. 25/89, 47/90, 56/91, 100/93 (1995) (Joined), *Free Legal Assistance Group, Lawyers'Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*, paragraph 45 of the decision adopted by the Commission in October 1995 at its 18th Ordinary Session, held in Praia (Cape Verde).

[5] Communication No. 74/92, *Commission nationale des droits de l'Homme et des libertés v. Chad*, paragraph 28 of the decision adopted by the Commission in October 1995 at its 18th Ordinary Session, held in Praia (Cape Verde).

[6] Communication No. 232/99, *John D. Ouko v. Kenya*, paragraph 19 of the decision adopted by the Commission at its 28th Ordinary Session held in Cotonou (Benin), from 20 October to 6 November 2000; see also Communication No. 288/2004, *Gabriel Shumba v. Republic of Zimbabwe*, paragraphs 49, 63, 66, 74-77 of the decision adopted by the Commission at its 51st Ordinary Session held in Banjul (The Gambia) from 18 April to 2 May 2012.

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communications admissible due to the fact that the procedure was unduly prolonged.

22. In its decision relating to the communication *Sir Dawda K. Jawara v. the The Gambia*, the Commission was of the view that local remedies should not only exist but must also be "available, efficient and satisfactory". It considers a remedy as "available" when the author of the communication could file it without hindrance, as "efficient" where if offers chances of success and as "satisfactory" where it makes it possible to redress the alleged violation.[7]

23. In the practice of the African Commission and other international quasi-judicial and judicial organs, consideration is given not only to remedies provided for in theory in the national legal system, but also to the general legal and political context as well as the personal situation of the Applicant.

24. In the instant case, it was for the Court to consider in particular if the remedies available to the Applicant were "efficient", and this, through a equitable distribution of the burden of proof between the Applicant and the Respondent State.

25. In the jurisprudence of the African Commission, the Inter-American Commission and the European Court, the burden is on the Respondent State which raises the objection of failure to exhaust local remedies, to prove that the Applicant did not use a remedy which was both available and effective. The remedy should indeed be able to redress the grievance in question and to provide reasonable chances of success for the victim of the alleged violation.

26. Thus, according to the European Court,

> "Article 35 § 1 of the Convention provides for a distribution of the burden of proof. As far as the Government is concerned, where it claims non-exhaustion it must satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success".[8]

27. Once the Government concerned has discharged its obligation by demonstrating that there is still an appropriate and efficient remedy available to

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[7] Communications 147/95 and 149/96, *Sir Dawda K. Jawara v. The Gambia*; see paragraphs 31 and 32 of the decision adopted by the Commission on 11 May 2000, at its 27th Ordinary Session held in Algiers (Algeria).

[8] *Scoppola v. Italy (No. 2)*, Application No. 10249/03, Grand Chamber, Judgment of 17 September 2009, para. 71.

the Applicant, the burden shifts to the latter to prove that either this remedy was exhausted or for, one reason or another, it was inappropriate and ineffective.

28. The European Court also allows the Applicant to raise certain specific circumstances which exempt it from this requirement, such as the total passiveness of national authorities when faced with serious allegations that State agents have committed offences or caused prejudice, for example, when they fail to carry out investigation or fail to provide any help. Under such conditions, the burden of proof shifts once again, and it is for the Respondent State to show what measures it has taken in view of the magnitude and gravity of the issues raised.

29. In short, the issue here is to determine, whether, considering all the circumstances surrounding the matter, the Applicant has done all what could possibly be expected of him to exhaust the local remedies available in the judicial system of the Respondent State.

30. In the instant case, I am of the view that the Applicant has effectively done all what could reasonably be expected of him to exhaust the local remedies available in Tanzanian Courts and that the Respondent State, for its part, failed to provide the proof that the Applicant has not made use of a remedy which was both "available and effective".

31. In the reasoning of the present Judgment, the Court formulated its conclusions with regard to this fundamental issue in five paragraphs (paras. 141, 145, 148, 151 and 152), concentrating exclusively on the behaviour of the Applicant. It did not consider the conduct of the judicial authorities of the Respondent State, as it should have done, and in so doing, it did not distribute the burden of proof equally between the Parties to the present case.

32. That is what I am now intending to demonstrate in the following paragraphs; I will do so by *inter alia* stressing the considerable exchange of letters between the Registry and the Applicant with regard to this issue of exhaustion of local remedies.

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33. The application was received at the Registry of the Court on 30 September 2011; it was however registered at the end of the month of February 2012 and was only communicated to the Respondent State on 27 June 2012, that is, nearly nine (9) months after it was received. Such a lengthy delay can be explained notably by the fact that the Applicant was requested on several occasions to prove that his application met the requirements under Rule 34 of the Rules of Court.

34. The Registrar indeed acknowledged receipt of the application by letter of 4 October 2011, in which he invited the Applicant, in order for his application to be registered, to prove that the requirements under Rule 34 of the Rules of Court had been fully met.

35. By letter dated 20 October 2011,[9] the Applicant replied that his application met these requirements and intended to show proof by submitting copies of some ten (10) documents, including some letters to the Minister of Interior, the Minister of Justice, the National Commission for Human Rights and Good Governance, and to the Attorney General of Tanzania, as well as the responses to these letters.

36. On 13 February 2012, the Registrar of the Court acknowledged receipt of the said letter and, in order to register the application, requested the Applicant to show that the requirements under paragraph 4 of Rule 34 of the Rules of Court, and "in particular, on the exhaustion of local remedies" have been met.

37. The Applicant responded to this request by letter dated 20 February 2012, received at the Registry on 22 February 2012. In this handwritten letter, fingerprinted, the Applicant stated that he informed the Minister of Interior, the Minister of Justice, and the Attorney General of Tanzania of the violation of his rights but that they had not yet taken any action. He underscored the fact that the letters in response received from them, on 27 February 2008, 9 January 2009 and 28 September 2010, respectively, were "evidence to prove the inordinate delay of such local remedies".

38. He further stated that he had seized the High Court of Tanzania in Arusha, in an urgent action ("*Supported by certificate of urgency*"), of the violation of his constitutional rights (Criminal Application No. 16 of 2011, received by the district Registrar on 19 May 2011), but that his application was not considered because of the lack of quorum of three (3) judges required under the *Basic Rights and Duties Enforcement Act No. 33 of 1994 (An Act to provide for the procedure for enforcement of constitutional basic rights, for duties and for related matters)*.[10]

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[9] This letter was received at the Registry of the Court on 13 February 2012, nearly four (4) months later.

[10] See paragraph 1 of its Section 10 entitled "Constitution of the High Court" and which provides that: "For the purposes of hearing and determining any petition mad under this Act including references made to it under section 9, the High Court shall be composed of three Judges of the High Court, save that the determination whether an application is frivolous, vexatious or otherwise fit for hearing may be made by a single judge of the High Court".

39. He concluded that the procedure for consideration of his application was "unduly prolonged" and that it was thus inconsistent with Article 7 of the African Charter, which has been quoted exhaustively in his letter.

40. By letter dated 27 February 2012, the Registrar of the Court informed the Applicant that his application had been registered; it was only four (4) months later, *i.e.* on 27 June 2012, that the application was communicated to the Respondent State, pursuant to a decision taken in that regard by the Court at its 25th Ordinary Session (11-26 June 2012).

41. By letter dated 25 April 2012, the Registrar of the Court requested the Applicant to submit to him copies of letters and any other document, including judgments, to prove that he had exhausted local remedies.

42. In his handwritten reply dated 2 May 2012, the Applicant recalled that the High Court of Tanzania in Arusha had still not constituted a quorum of three (3) judges required under the *Basic Rights and Duties Enforcement Act No. 33 of 1994* mentioned above and had therefore violated Article 30 (3) of the Constitution.[11]

43. The Applicant also pointed out that he had filed an appeal before the High Court of Tanzania in order for his fundamental rights, guaranteed by the Constitution, to be respected and that he was detained for five (5) years. He further underscored that in spite of the promises made by the Minister of Interior, the Minister of Justice and the Attorney General of Tanzania, no action had yet been taken.

44. He finally stated that he was yet to receive a copy of the *Search warrant* and the *Certificate of seizure* of his vehicle and of his audio/video/studio equipment,

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Section 9, entitled "Where a matter arises in a subordinate court", provides as follows: "Where in any proceedings in a subordinate court any question arises as to the contravention of any of the provisions of sections 12 to 29 of the Constitution, the presiding Magistrate shall, unless the parties to the proceedings agree to the contrary or the Magistrate is of the opinion that the raising of the question is merely frivolous or vexatious, refer the question to the High Court for decision; save that if the question arises before a Primary Court, the Magistrate shall refer the question to the Court of a resident Magistrate which shall determine whether or not there exists a matter for reference to the High Court".

[11] Paragraph 3 of Article 30 of the Tanzanian Constitution of 1977 provides that "Any person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, my institute proceedings for redress in the High Court".

which he had requested from the *Regional Crime Officer* of Arusha by letter dated 18 January 2011.

45. By letter dated 21 May 2012, the Registrar of this Court requested the Applicant to submit copies of his letter of 19 February 2012 to the Minister of Interior and copied to the Tanzanian Commission of Human Rights and Good Governance, his two letters of 8 February 2010 and 15 July 2010 addressed to the Attorney General's Chambers, Public Prosecution Division, the response received on 5 October 2011 to his appeal *Criminal Application No. 16 of 2011* filed before the High Court of Tanzania,[12] as well as any other document which he would like to adduce.

46. The Applicant responded by letter dated 25 May 2012, reiterating the fact that the High Court of Tanzania had still not constituted a quorum of three (3) judges required to consider his *Criminal Application No. 16 of 2011*; he attached to this letter, copies of the three (3) letters requested, that is:

- his letter of 19 February 2008, addressed to the Minister of Interior, with copies to the Tanzanian Commission for Human Rights and Good Governance, in which he complained about the behaviour of Mr. Ramadhani Mungi, Head of the Department of Criminal Investigation in the Arusha District;[13]
- his letter of 8 February 2010, addressed to the Attorney General's Chambers, Public Prosecutions Division, where he claimed that proceedings in the criminal matters No. 912/2007, No. 931/2007, No. 933/2007, No. 1027/2007, No. 1029/2007, No. 883/2008, had been carried out against him illegally, that is, in the absence of a report from the Police or the Department in charge of criminal matters;[14] and

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[12] In his appeal filed on 19 May 2011 against the Attorney General of Tanzania and relating to a criminal suit pending before the High Court of Tanzania in Arusha, the Applicant alleged the violation, by the Police, of Articles 13 (1), 14, 15 (1) (2) and 30 (3) of the Constitution, and the violations of Sections 13 (1) (a) and (b), (3) (a), (b) and (c), 32 (1), (2) and (3), 33, 50 (1) and 52 (1) and (2) of the Criminal Procedure Act.

[13] Mr. Mungi is said to have abused his authority and to have seized his vehicle, his audio/video/studio equipment illegally under the pretext that this equipment had been stolen. Mr. Mungi is said to have wrongfully accused him of murder and four cases of armed robbery (criminal matter No. 915/2007, No. 931/2007, No. 933/2007, No. 1027/2007 and No. 1029/2007). In this letter, he referred to the violation of his constitutional right of liberty, of his person, his property and for the Police to respect fair trial in relation to the investigation of the accused.

[14] In this letter, the Applicant also claimed that cases No. 712/2009 and No. 716/2009 had been entirely fabricated by the Officer in charge of Investigations in the Arusha region and that they were registered when he was absent from the Court. He informed the *Attorney General's Chambers, Public Prosecutions Division,* that he had decided to seize the *High*

F.O.

- his letter of 15 July 2010, also addressed to the Attorney General's Chambers, Public Prosecutions Division, in which the Applicant, in reference to the *Criminal Application No. 6 of 2010*, filed pursuant to Article 90 (1) (c) (4) of the Criminal Procedure Act, was requesting for an end to proceedings in the criminal matters No. 915/2007, No. 931/2007, No. 933/2007, No. 1027/2007, No. 1029/2007, No. 883/2008, No. 712/2009 and No. 716/2009; in support of his request, he argued that the proceedings were to be conducted based on concrete and detailed facts and that the Director of Public Prosecution could not in any case prosecute him as long as there was no *First Information Reports* against him, that he had not been interrogated by a Police Officer pursuant to Sections 50 (1) and 51 (1) of the Criminal Procedure Act, that his detention was in violation of Sections 32 and 33 of the Criminal Procedure Act, and that he was detained for fourteen (14) days, between 26 October 2007 and 8 November 2007, without the Police Officer making any report to the competent judge; the Applicant consequently requested that the Director of Public Prosecution should ensure that the procedure was not abused.

47. In his letter dated 25 May 2012, the Applicant also attached copies of:
- the response of 27 February 2008 by the Minister of Interior, to his letter of 19 February 2008, informing him that his file was under consideration and that he would be informed in due course of any further developments;
- the response of 25 March 2008 by the Tanzanian Commission for Human Rights and Good Governance to his letter of 19 February 2008, advising him to follow up the handling of his file by the Minister of Interior who had already been seized thereof;
- his letter of 22 December 2008 to the Minister of Justice and Constitutional Affairs, in which he complained about having been charged in the absence of any Police report and requested his assistance in the handling of his complaints;
- the response made on 9 January 2009 by the Minister of Justice and Constitutional Affairs to his letter of 22 December 2008, advising him to follow the handling of his file by the Minister of Interior who had already been seized of it;
- his letter of 18 September 2009 to the Minister of Interior, informing him that in the absence of a response from his Ministry to the complaints brought to his attention in his letter dated 19 February 2008, he would seize the courts; he prayed the latter to refer to the *Criminal Record Offices* of the District of Arusha and Arumeru for the year 2007, which according to him, did not contain any report concerning the crimes they claim he had committed or the seizure of his property; and underscoring that Mr. Mungi abused his authority by keeping him in detention illegally and retaining his property illegally;

Court of Tanzania in Arusha pursuant to Article 90 (1) (c) (4) of the Criminal Procedure Act, and this, to find out why he had been arrested without a police report.

- his letter of 8 February 2010 to the Minister of Interior, reminding him of his earlier letter of 19 February 2008 and requesting once more his assistance in the treatment of his complaints;
- the response of the Attorney General's Chambers, Public Prosecutions Division, dated 30 March 2010, in which he informed the Applicant that he had contacted his office in Arusha "to enquire about the situation and to make the necessary decision in the interest of justice";
- the letter of the Attorney General's Chambers, Public Prosecutions Division, dated 28 September 2010, and in reply to the letter of the Applicant dated 15 July 2010, in which he informed the latter that his file was under consideration, requesting him to exercise patience and promising to inform him of any developments relating to his file;
- his letter of 18 January 2011 to the Regional Crime Officer of Arusha, requesting for copies of the *Search warrant* and of the *Certificate of seizure* of his vehicle and his audio/video/studio equipment;
- his appeal against the Attorney General of the United Republic of Tanzania, filed on 19 May 2011 before the High Court of Tanzania in Arusha (*Criminal Application No. 16 of 2011*), alleging the violation by the Police of some of his rights guaranteed under Articles 13 (1) and 15 (1) and (2) (a) of the Constitution and Sections 13 (1) (a) and (b), (3) (a), (b) and (c), 32 (1), (2) and (3), 33, 50 (1) and 52 (1) and (2) of the Criminal Procedure Act, and requesting for a declaration under part III of Chapter 1 of the Tanzanian Constitution;
- his letter of 29 June 2011, to the *Resident Judge* of the High Court of Tanzania in Arusha, requesting for the setting up of a panel of three (3) judges to consider his *Criminal Application No. 16 of 2011*;
- his letter of 14 November 2011 to the *District Registrar* of the High Court of Tanzania in Arusha, to be informed of the date of hearing of his appeal in the *Criminal Application No. 16 of 2011*;
- the Order issued on 16 November 2010 by a judge of the High Court of Tanzania in Arusha, removing from the Cause List the appeal in the *Criminal Application No. 6 of 2010*, which had been declared inadmissible because it was founded on a provision (Section 90 (1) (c) (4)) of the Criminal Procedure Act which had been repealed; and
- a *Notice of preliminary objection* raised by the Attorney General, as well as the response of the latter on the merits and a *Counter Affidavit* relating to the appeal in the *Criminal Application No. 16 of 2011*.

48. Up to this stage of the procedure before the present Court, the Applicant was not assisted by any Counsel. By letter dated 27 June 2012, the Registrar has however requested the Pan-African Lawyers'Union, (hereinafter referred to as "PALU"), if they could assist the Applicant in the matter before the Court; by letter date 16 July 2012, PALU accepted to provide assistance to the Applicant and, by letter dated 27 July 2012, the latter accepted their assistance. By letter

dated 14 August 2012, the Registry requested the Respondent State to kindly facilitate the contact between the Applicant and his Counsel, that is, PALU.

49. The Memorial in Response of the Respondent State is dated 30 August 2012 and was submitted to the Registry of the Court on 3 September 2012; it was communicated to Counsel for the Applicant on 4 September 2012, requesting him to respond within thirty (30) days.

50. By letter dated 17 October 2012, Counsel for the Applicant informed the Registry that he had still not been authorised to visit the Applicant in the Arusha Prison, in order to receive instructions from him on how to prepare his Reply to the Memorial in Response of the Respondent State; consequently, he requested for an extension by thirty (30) days of the deadline for the deposit of the said Reply.

51. After a few reminders, the Reply of the Applicant, dated 15 May 2013, was finally filed at the Registry on 16 May 2013. Based on the circumstances, the Court decided to consider this Reply as submitted within time and requested the Respondent State to submit a Rejoinder, if it so desired. The Rejoinder of the Respondent State, dated 25 July 2013, was filed in the Registry on 2 August 2013.

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52. In the light of this brief overview of documents submitted to the Court by the Applicant, in order to prove that he had exhausted available and effective local remedies, it appears *prima facie* that the procedure in this matter was unduly prolonged. The Applicant did not only go on appeal before the High Court of Tanzania, but also seized some administrative authorities, such as the Ministry of Justice or the National Commission of Human Rights and Good Governance; the latter, which is yet empowered by the Constitution to deal with complaints,[15] contented itself with referring the Applicant to the Tanzanian Ministry of Interior.

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[15] Indeed, in terms of Article 130 of the 1977 Constitution, the Commission can, in particular, exercise the following functions:
"b. to receive complaints in relation to violation of human rights in general;
c. to conduct inquiry on matters relating to infringement of human rights and violation of principles of good governance;...
e. if necessary, to institute proceedings in court in order to prevent violation of human rights or restore a right that was caused by that infringement of human rights, or violation of principles of good governance;

53. The Applicant also pointed out some abnormalities in the handling of the matter before local courts, such as, the absence of a quorum of three (3) judges at the High Court of Tanzania for his appeal to be considered.

54. It therefore appears that the Applicant, being in addition a detainee, indigent, probably an illiterate, without the assistance of Counsel, did what could possibly be expected of him to exhaust the local remedies in the Respondent State.

55. As stated earlier in paragraphs 25 to 28, it behoves on the Respondent State to prove to the present Court that there were accessible and effective local remedies available to the Applicant.

56. In its written submissions and at the Public Hearings, the Respondent State merely highlighted the availability of local remedies which are still open to the Applicant; it failed to show their effectiveness.

57. In its Memorial in Response, the Respondent State admitted, in the following words, that the Applicant filed many appeals:

> "since the arrest of the applicant and prior to filing this application in the African Court, the applicant made several applications (petitions) in the High Court of Tanzania in Arusha Registry whereby he was contesting the very same issues brought before this Honourable Court, being: the right to personal freedom and the right to property" (para. 25).

58. Regarding the appeal in the *Criminal Application No. 7 of 2007*, rejected by the High Court for reasons of its premature nature, the Respondent State averred that "the available legal remedy was for the applicant to appeal to the Court of Appeal of Tanzania", and cited the constitutional and legislative provisions on the functions of the Court of Appeal (*Memorial in Response*, para. 27). He concluded that "the applicant did not pursue any of the available legal remedies. This being the case it cannot be said that local remedies were exhausted" (*Memorial in Response*, para. 29).

59. On the appeal in the *Criminal Application No. 47 of 2010*, rejected by the High Court because it was "improperly filed", the Respondent State has indicated that the Applicant had two available remedies. The first was constitutional, because according to it, the Applicant could "reinstitute the matter under the proper jurisdiction being the **Constitutional Court** through the Basic Rights and Duties Enforcement Act" (*Memorial in Response*, para. 33,

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f. inquire into the conduct of any person concerned and any institution concerned in relation to the ordinary performance of his duties or functions or abuse of the authority of his office".

emphasis added). The second available remedy would have been to go on appeal before the Court of Appeal of Tanzania (*Memorial in Response*, para. 34).

60. The Respondent State reiterated this position at the Public Hearing of 4 December 2013.[16] The first remedy mentioned however, does not seem to be available to the Applicant because in terms of Articles 125 to 128 of the 1977 Constitution, the Constitutional Court of Tanzania can only be seized in exceptional cases and to resolve very specific issues.

61. Again, without any demonstration, the Respondent State concluded that "the applicant did not pursue this available legal remedy. This being the case, it cannot be said that the local remedies available to the Applicant were exhausted" (*Memorial in Response*, para. 35).

62. Lastly, regarding the appeals in the *Criminal Application No. 78 of 2010*, *Criminal Application No. 80 of 2010*, and *Criminal Application No. 16 of 2011*, all three of them withdrawn at the behest of the Applicant, the Respondent State, and again without demonstrating the efficiency of the remedies, underscored as follows: "a local remedy was available as withdrawal of an application does not mean its finality. The Applicant could have reinstated the matter. The Applicant did not pursue the matter. Therefore the Applicant did not exhaust this local remedy which was available to him" (*Memorial in Response*, paras. 38, 39 and 41).

63. More generally, with regard to criminal matters where the Applicant is the subject, the Respondent State observed that:

> "[i]f the Applicant is of the view that his constitutional rights were infringed, there were and still there are adequate avenues for redress which have ben/are available to the Applicant, but have not been exhausted by the Applicant" (*Rejoinder*, para. 4);

or, that

> "[t]he local remedies are available and have been available to the Applicant. The local remedies are effective, adequate, fair and impartial" (*Rejoinder*, para.13).

64. The Respondent State also noted that:

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[16] "In Miscellaneous Criminal Application Number 47 of 2010, the High Court struck out the Application, the available legal remedy included reinstating the matter and the proper jurisdiction being the **Constitutional Court** through the Basic Rights and Duties Enforcement Act. Or to appeal against the decision of the Court to strike out the Application as per Section 4 (1) of the Appellate Jurisdiction Act" (emphasis added), *Verbatim Record*, 4 December 2013, page 31, lines 7-11 (English version).

> "[t]he criminal cases are at various stages in the High Court of Arusha Registry, in the Resident Magistrate Court of Arusha and in the District Court of Arusha District. The said Courts have not conducted the hearing of the cases facing the Applicant to determine the fate of the applicant as whether he is guilty or not of the offences/charges facing him. For the cases which are pending in the Resident Magistrate Court and the District Court, the Applicant has to wait for the judgements of the courts of which if he is not satisfied has the remedy/right to appeal to the High Court of Tanzania as per Section 359 (1) of the Criminal Procedure Act [...]" (*Memorial in Response*, para. 47).

It further underlined what follows:

> "[t]he Applicant has in no manner demonstrated/proven that the local remedies have indeed failed him as he chose not to pursue them. Further, the Applicant has not even faulted the system in his application. Indeed, the legal system of Tanzania is very effective and sufficient, since the Constitution of the United Republic of Tanzania provides/guarantees the independence of Judiciary in the exercise of its mandate" (*Memorial in Response*, para. 48).

Given the numerous grievances expressed by the Applicant, it is very difficult to agree with the Respondent State when it declares in the abovementioned paragraph 48 of its Memorial in Response that "the Applicant has not even faulted the system in his Application".

65. Besides, the Respondent State was not able to explain to the Court why the quorum of three (3) judges required under the *Basic Rights and Duties Enforcement Act No. 33 of 1994* for the High Court of Tanzania to make a decision on the Applicant's application was never constituted.

66. At the Public Hearings, when the Court asked a question relating to the quorum, Counsel for the Respondent State merely responded as follows:

> "With respect to the question as to whether there was a need for a quorum of Three Judges we submit that: Section 10 (1) of the Basic Rights and Duties Enforcement Act CAP 3 of the Laws of Tanzania, states that the High Court in hearing a Petition requires a three judge bench, **save for the purposes of making a determination as to whether the Application is frivolous, vexatious, or otherwise fit for hearing it may be heard by a single judge. However, in this case, the single judge who terminated the petition in the absence of the Applicant did not make such determination"** (emphasis added).

The rule is therefore to establish a bench of three (3) judges and the exception, the appointment of a single judge; the frivolous or vexatious nature of the application which would justify this exception was however not established by the Respondent State.

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67. Further, regarding the relations between domestic Courts in Tanzania and this Court, the Respondent State argued as follows:

> "The Applicant is soliciting this Honourable Court to adjudicate on matters of local jurisdiction. If the Court proceeds to do so it will be in fact usurping the powers of the local municipal courts which is not the jurisdiction of the Honourable Court" (*Memorial in Response*, para. 49).
>
> "Indeed the application before the Honourable Court is the Applicant's list of grievances with the administration of justice in relation to his on-going cases in the municipal courts. We are of the strong belief that a body of the stature [of] the African Court on Human and Peoples' Rights was not established to adjudicate grievances of on-going cases within the national jurisdiction of State parties" (*Memorial in Response*, para. 12).

68. To state that the Court cannot hear cases being considered in domestic Courts is to misunderstand the true role of the African Court. It is indeed the mission of the Court to ensure the proper respect of international obligations undertaken by a State Party. It however has to ensure first of all that the domestic Courts of the State were able to fix the situation. This is the *ratio legis* of the rule of exhaustion of local remedies, and it is the duty of the Court to ascertain whether or not these remedies meet some requirements to ensure their effectiveness.

69. Thus, when the Respondent State argues that some of the criminal matters concerning the Applicant "have been tried according to the laws governing the criminal proceedings of the United Republic of Tanzania" (*Rejoinder*, para 9 (c)), this is not sufficient to make it not liable to its international obligations which it accepted freely, and this does not prevent this Court either from verifying whether the relevant provisions of the Criminal Procedure Act, for example, comply with the requirements provided for by the norms of international law applicable to the Respondent State.

70. The Respondent State, however, did not at any moment show, or tried to show, that procedural guarantees offered to the Applicant were consistent with these requirements, and in particular, to those under Article 7 of the African Charter.

71. In the light of the foregoing, it is evident that even though local remedies, which were in theory available to the Applicant, were not formally exhausted, the Respondent State did not prove that the said remedies were both "available and effective", that is, that the Applicant could "concretely" avail himself of them and that these remedies could produce the results for which they were established.

72. In the reasoning of the present Judgment, the Court expressed its position with regard to this fundamental issue in five paragraphs (paras. 141, 145, 148, 151 and 152), concentrating exclusively on the behaviour of the Applicant. It did not consider the conduct of the judicial authorities of the Respondent State, as it should have done, and did not therefore distribute the burden of proof equally between the Parties to the present case.

73. The Respondent State did not either show proof of the fact that the duration of the procedure in domestic Courts was reasonable in the circumstances, as provided for in the African Charter (Article 7: "right to be tried within a reasonable time") and the International Covenant on Civil and Political Rights (Article 14: "right to be tried without excessive delay"), to which the Respondent State is a party. Article 107 A (2) of the 1977 constitution of Tanzania is also very clear on that issue; it indeed provides as follows:

> "In delivering decisions in matters of civil and criminal matters in accordance with the laws, the Court shall observe the following principles, [...]
> (b) not to delay dispensation of justice without reasonable ground. [...]
> (e) to dispense justice without being tied up with technical provisions which may obstruct dispensation of justice".

74. It is not sufficient for the Respondent State to state that, for example, "the Judiciary dispenses justice without being tied up with technical provisions which may obstruct dispensation of justice" (*Rejoinder*, para. 9 (d)); it is also necessary for the Respondent State to prove it in relation to each grievance raised in that respect by the Applicant.

75. Here again, I am of the view that the Court did not distribute the burden of proof equally between the Parties and was too severe towards the Applicant and not so severe towards the Respondent State (paras. 124 to 127). It is therefore imperative for the Court to define and apply precise and relatively balanced standards of proof with regard to this condition of exhaustion of local remedies.

76. Since this condition was, in my view, fulfilled in the instant case, it was still necessary to ensure that the application was filed "within a reasonable time from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter" (Rule 40 (6) of the Rules).

77. Contrary to the assertions made by the Respondent State, it is not a condition which poses any problem in the instant case, considering the wording of Rule 40 (6) of the Rules, which is not restrictive and the relatively liberal practice of the Court in this matter. Be that as it may, the critical date for the assessment of the reasonable time is not, as the Respondent State claims (*Memorial in Response*, para. 56, *Verbatim Record*, 2 December 2013, page 14, line 10), the date it has

ratified the Protocol, that is, 10 February 2006,[17] but the date of deposit of the declaration provided for under Article 34 (6), that is, 9 March 2010; it is indeed only on that date that the doors of our courtroom were opened to the Applicant.

78. To conclude, Mr Peter Joseph Chacha's application met all the conditions for admissibility under Article 56 of the African Charter and ought to have been considered on the merits by the Court.

Fatsah Ouguergouz
Judge

Dr. Robert ENO
Registrar

[17] "Furthermore, the United Republic of Tanzania deposited its instrument to the Court on 10th February 2006. Therefore the Court was in existence at the time the Applicant withdrew or had his application dismissed or struck out by the municipal Courts. The Applicant could therefore have instituted his application before the honourable Court before the elapse of the period of six (6) months; rather, he waited over a year to file his application before the honourable Court" (*Memorial in Response*, para. 56).