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.

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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:
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> 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;
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> b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
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> c) the right to defence, including the right to be defended by counsel of his choice;
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> d) the right to be tried within a reasonable time by an impartial court or tribunal.
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> 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.

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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.

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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".

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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*

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- 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.

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- 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).

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> "[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

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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).