

## **Separate Opinion of Judge Rafaâ Ben Achour**

1. I fully concur with the judgment delivered by the Court in the matter of *Mshana v. United Republic of Tanzania*, involving one Elinazi Eliabu.
2. While the Court rightly declined to uphold the violations alleged, it strongly reiterated the obligations incumbent on the Respondent State under the African Charter on Human and Peoples' Rights (hereinafter "the Charter").
3. The Court held, and I concur, that the particular circumstances of the case do not allow for a finding of a violation of Articles 6 and 7(1)(d) of the African Charter on Human and Peoples' Rights.
4. However, in this separate opinion, I wish to highlight a structural issue which, in my view, was not sufficiently addressed in the reasoning: the lack of specifics in the Respondent State's domestic legislation on police custody (section 32 of the Criminal Procedure Act) regarding the time-limits for bringing a person before a judge, in particular where it is merely stipulated that the arrested person be brought before a court "as soon as practicable".
5. The relevant provisions of domestic law merely stipulate that any person placed in police custody, whether arrested with or without a warrant, including for offences punishable by death, must be brought before a court "as soon as practicable".
  - where, in the absence of a warrant, a person is placed in police custody for an offence punishable by death, they must be brought before a court "as soon as practicable";
  - where a person is arrested under a warrant, they must also be brought before a court "as soon as practicable".

6. These provisions, which are identical in terms of the time requirement, do not set any specific maximum time-limit, whether expressed in hours or days, thus leaving a wide margin of discretion to the investigating and detention authorities.

**I. On the requirement for normative determination in matters of individual liberty**

7. The protection of individual liberty, as guaranteed by Article 6 of the Charter,<sup>1</sup> is not limited to the prohibition of manifestly arbitrary deprivation of liberty; it also implies that any restriction must be accompanied by procedural safeguards that are sufficiently specific to make judicial review effective and predictable.

8. Police custody is a crucial stage in criminal proceedings, during which the arrested person is in a particularly vulnerable situation. The absence of a clear-time limit increases the risk of abuse, undue pressure and infringements of the rights of defence, in particular the right to be assisted by counsel and the right to be brought expeditiously before a judge.

9. In this regard, a standard that merely requires that an act be performed “as soon as practicable” gives the arresting and investigating authority excessive latitude, which is incompatible with the requirement of legal certainty inherent in the principle of legality, particularly in criminal matters.

10. Article 7 of the Charter,<sup>2</sup> which guarantees the right to a hearing, is inseparable from the guarantees provided for in Article 6, since judicial review of deprivation of liberty is one of the primary benchmarks of the right to a fair trial.

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<sup>1</sup> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

<sup>2</sup> 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

11. Read together, this double guarantee requires State Parties not only to provide for judicial review of police custody, but also to set a clear, precise and binding time-limit for such review, in order to rule out any uncertainty as to when such review must take place.

12. In my view, the absence of a specific time-limit in the Respondent State's legislation entails three major risks:

- a risk of arbitrariness, insofar as the length of police custody depends exclusively on the assessment of the executive authorities;
- a weakening of effective judicial review, as the matter is brought before a judge only after a potentially prolonged period of detention;
- increased vulnerability of arrested persons, particularly in cases where the death penalty may be imposed, where pressure, ill-treatment or forced confessions are historically more frequent.

13. Even when, as in the instant case, the length of police custody may appear reasonable in retrospect, that the normative framework is indeterminate remains problematic in itself, regardless of its material application in a given case.

14. The applicable international standards on deprivation of liberty are consistent. Article 9 of the International Covenant on Civil and Political Rights requires that anyone arrested be brought before a judge "promptly".

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innocent until proved guilty by a competent court or tribunal; (c) the right to defense, 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 offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

15. The United Nations Human Rights Committee specified in its General Comment No. 35 (2014) that this period should not in principle exceed 48 hours, except in duly justified exceptional circumstances.<sup>3</sup>
16. At the regional level, the African Commission on Human and Peoples' Rights affirmed in *Huri-Laws v. Nigeria* (Communication No. 225/98) that detention without a clear legal basis or without a specific time-limit constitutes a violation of Article 6 of the Charter.
17. This Court itself has emphasised in several cases against Tanzania, notably in the case of *Armand Guéhi v. Tanzania* (judgment of 7 December 2018), that the absence of clear legal safeguards in relation to deprivation of liberty is incompatible with the African Charter.
18. Therefore, the indeterminate length of police custody under Tanzanian law constitutes a structural violation of the Respondent State's international obligations.

### **On the insufficiency of the sole assessment of reasonableness by jurisprudence**

19. It is well established that the assessment of the reasonableness of a time-limit is, by its nature, a matter for examination *in concreto*. However, the substitution of *ex post* judicial assessment for the absence of *ex ante* legislative determination cannot be regarded as fully satisfying the requirements of the Charter.

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<sup>3</sup> In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment. Laws in most States parties set precise time-limits, sometimes shorter than 48 hours, and those limits should also not be exceeded. An especially strict standard of expeditiousness, such as 24 hours, should apply in the case of juveniles.

20. The absence of a clearly established maximum time-limit leaves a structural risk of arbitrariness, regardless of whether, in a given case, the authorities acted expeditiously.
21. The finding that a given time-limit is not unreasonable in the circumstances of the case cannot preclude an examination of whether the regulatory framework itself complies with treaty requirements.
22. Legislation that does not set a specific time-limit for bringing an arrested person before a judge remains, by its very indeterminate nature, capable of producing effects that are incompatible with the Charter, even if those effects did not materialise in the particular case before this Court.
23. In my view, the Charter imposes on State Parties a positive obligation of legislative clarity and precision in matters of detention. It is not sufficient that administrative or judicial practice occasionally complies with reasonable time-limits; domestic law must also strictly regulate this practice in order to prevent any future abuses.
24. In this sense, the Court could have — without necessarily finding a violation in the present case — expressly noted that the absence of specific time-limits in the law constitutes a normative gap incompatible with African and international human rights standards and invited the Respondent State to harmonise its legislation accordingly.

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25. For these reasons, and without questioning the majority's holding that there was no violation in this case, I consider that domestic provisions limited to the phrase "as soon as", in relation to police custody, raise a serious difficulty with regard to the requirements of Articles 6 and 7 of the Charter, in that they do not, in themselves, guarantee sufficiently structured and predictable judicial review of deprivation of liberty.



**Judge Rafaâ Ben Achour**