

## **DECISIONS of the 26<sup>th</sup> Session**

### **Kigali, November 1999**

#### **140/94, 141/94, 145/95 Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria**

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<b>Rapporteur:</b>	17th session:	Commissioner Badawi
	18th session:	Commissioner Umozurike
	19th session:	Commissioner Umozurike
	20th session:	Commissioner Dankwa
	21st session:	Commissioner Dankwa
	22nd session:	Commissioner Dankwa
	23rd session:	Commissioner Dankwa
	24 <sup>th</sup> session:	Commissioner Dankwa
	25 <sup>th</sup> session:	Commissioner Dankwa
	26 <sup>th</sup> session:	Commissioner Dankwa

#### **Summary of Facts:**

1. **Communication 140/94** alleges that decrees issued in 1994 by the military government of Nigeria proscribed The Guardian, Punch and The Concord newspapers from publishing and circulating in Nigeria. The Decrees are titled: The Concord Newspapers and African Concord Weekly Magazine (Proscription and Prohibition from Circulation) Decree No. 6, The Punch Newspapers (Proscription and Prohibition from circulation) Decree No. 7 and the Guardian Newspaper and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree No. 8, all of 1994. The military government had earlier closed down the Guardian and the Concord publications whose premises were still being occupied and sealed up by armed security personnel and policemen, in defiance of court orders.
2. Furthermore, the military government of Nigeria arrested and detained 6 pro-democracy activists, Chief Enahoro, Prince Adeniji-Adele, Chief Kokori, Chief Abiola, Chief Adebayo and Mr. Eno. At the time the communication was brought, they were in detention and no charges had been brought against them, except Chief Abiola, who was charged with treason and treasonable felony. The health of the detainees was deteriorating in detention.
3. The military government allegedly sent armed gangs to the houses of five leading pro-democracy activists, namely Chief Ajayi, Chief Osoba, Mr. Nwankwo, Chief Fawehinmi, and Commodore Suleiman. The gangs broke into the houses, destroyed inventory and attacked the alleged victims.
4. **Communication 141/94** alleges that the Federal Government of Nigeria, through Decrees Nos. 6, 7, and 8 of 1994, restrained and restricted the right of Nigerians to receive information and to express and disseminate their opinions. The complaint also

alleges that the government violated proprietary rights of owners of companies by the said decrees.

5. Further objection to Decrees 6, 7 and 8 of 1994 are that they contain clauses which oust the jurisdiction of the courts, thus prohibiting them from entertaining any action in respect of the Decrees.
6. **Communication 145/95** elaborates on the facts stated above. It alleges that at about 3.00 am on Saturday, 11 June 1994, scores of heavily armed security operatives, agents of the Federal Military Government of Nigeria, stormed Concord House, the premises of Concord Press Nigeria Limited, and African Concord Limited, publishers of, among others, the weekly "African Concord" news magazine; "Weekend Concord", a weekly newspaper; "Sunday Concord", another weekly newspaper, and a community-based weekly published in each state of the Federation, "Community Concord".
7. The security agents stopped production work on various publications, drove out the workers and sealed up the premises. On the same day, at about the same time, the exercise was repeated by other heavily armed security agents of the Federal Military Government at the premises of Punch Nigeria Limited, publishers of the newspapers "The Punch", "Sunday Punch", and "Top life". The security agents also stopped production work on "The Punch", drove out the workers, sealed up the premises and detained the editor, Mr. Bola Bolawole, for several days.
8. On 15 August 1994 at about 12.30 a.m., about 150 armed policemen stormed Rutam House, the premises of Guardian Newspapers Limited and Guardian Magazines Limited, publishers of the newspapers and news magazines "The Guardian", "The Guardian on Sunday", "The African Guardian", "Guardian Express", "Lagos Life", and "Financial Guardian".
9. The policemen ordered that the production of the Monday edition of "The Guardian", which was then in progress, be stopped. They ordered all the workers out and sealed up the premises. Later in the day, 15 journalists in "The Guardian" group were arrested and detained briefly before being released on bail. Security agents were still searching for senior editorial staff of the newspapers.
10. Acting through their solicitor, Gani Fawehinmi, the publishers of all the newspapers instituted separate legal actions before two Federal High Courts in Lagos against the Government of Nigeria over illegal invasion of their premises and closure of their newspapers. They challenged the sealing up of the newspapers premises as a violation of the right to freedom of expression guaranteed by Section 36 of the Constitution of Nigeria, 1979, and Article 9 of the African Charter incorporated into Nigerian domestic laws.
11. Both courts gave judgement in favour of the publishers, after considering the evidence and legal submissions from both the Government and the publishers. The courts made monetary awards in damages to the publishers and ordered the security agents to vacate the newspapers' premises. The security men briefly vacated the premises, but returned a few weeks later to re-occupy them. The damages awarded were never paid.

12. While the suits were pending before the courts, on 5 September 1994, the Government of Nigeria issued three military decrees, Decrees No. 6, 7 and 8, by which it proscribed over 13 newspapers and magazines published by the three media houses from being published and also prohibited them from circulation in Nigeria or any part thereof for a period of six months which may be further extended.
13. The representative of the complainants, in his oral presentation before the Commission, emphasised that the phrases "previously laid down by law" and "within the law" in Articles 6 and 9(2), respectively, do not permit Nigeria to derogate from its international obligations by making laws at its whim.
14. The government responded orally that all decrees were necessary due to the "special circumstances" which brought it to power. It maintained that most of the detainees had been released and most newspapers were permitted to circulate. The government stated that it derogated from provisions of the constitution of Nigeria "in view of the situation", justified by public morality, public safety and overriding public interest. With specific regard to Article 9, the government argued that "within the law" must refer to the current law of Nigeria, not to the Nigerian constitution or an international standard.

#### **Complaint:**

15. The complainants allege that the following provisions of the African Charter have been violated: Articles 5,6,7, 9, 14 and 26.

#### **Procedure:**

16. **Communication 140/94** is dated 7 September 1994 and is submitted by Constitutional Rights Project. The Secretariat acknowledged its receipt on 23 January 1995.
17. At the 16th Session the Commission decided to be seized of the communication and to send notification of it to the Government of Nigeria. In addition, the Commission called upon the Government of Nigeria to ensure that the health of the victims was not in danger. Rule 109 of the Rules of Procedure was therefore invoked.
18. At the 17th session, held in March 1995 in Lomé, Togo, the Commission declared the communication admissible. There was no response from the Nigerian Government.
19. **Communication 141/94** is dated 19 October 1994 and was filed by the Civil Liberties Organisation. It was received at the Secretariat on 24 October 1994.
20. At the 16th Session in October 1994, the Commission was seized of the communication and decided that the State should be notified. It was also decided that the communication be joined with communication 140/94.
21. **Communication 145/95** is dated 7 September 1994 and is filed by Media Rights Agenda, a Nigerian NGO.
22. At the 18th session the Commission was seized of the communication. It was also decided that the communication should be taken up along with the others on the Nigeria mission.

23. The Commission decided to send a mission to Nigeria from 7 to 14 March 1997 and the communications were taken up by the mission. The mission report has been adopted by the Commission.
24. The parties were regularly notified of all the procedure.

## LAW

### Admissibility

25. Article 56 (5) of the African Charter reads:

*Communications ...shall be considered if they:*

*Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,...*

26. This is just one of the 7 conditions specified by Article 56, but it is that which usually requires the most attention. Because Article 56 is necessarily the first considered by the Commission, before any substantive interpretation; in the jurisprudence of the African Commission, there are several important precedents.
27. Specifically, in four decisions the Commission has already taken concerning Nigeria, Article 56.5 is analysed in terms of the Nigerian context. Communication 60/91 (Decision ACHPR/60/91) concerned the Civil Disturbances Tribunal; Communication 101/93 (Decision ACHPR/101-93) concerned the Legal Practitioners' Decree; and Communication 129/94) concerned the Constitution (Modification and Suspension) Decree and the Political Parties (Dissolution) Decree.
28. All of the Decrees in question in the above communications contain "ouster" clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals. (ACHPR/60/91:23 and ACHPR/87/93:22) The Legal Practitioners Decree specifies that it cannot be challenged in court and that anyone attempting to do so commits a crime (ACHPR/101/93:14-15). The Constitution Suspension and Modification Decree legally prohibited its challenge in Nigerian courts (ACHPR/129/94:14-15).
29. In all of the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of the government. A few courts in the Lagos Division have occasionally found that they have jurisdiction; in 1995, the Court of Appeal in Lagos relying on common law, found that courts could examine Decrees notwithstanding their ouster clauses, where the decree is "offensive and utterly hostile to rationality".
30. Prior to the issue of the decree, the publishers affected had brought suits; two of them had already won monetary damages and an order that the security agents should vacate the premises. Neither of these directives was ever complied with.

31. Because there is no legal basis to challenge government action under these decrees, the Commission reiterates its decision on communication 129/93 that "it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results". (ACHPR 129/94:8.). Indeed there is no remedy.

**For these reasons and consistent with its earlier decisions, the Commission declared the communications admissible.**

### **Merits**

32. Article 7(1) (a) provides:

- 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 violating his fundamental rights...***

33. To have a duly instituted court case in the process of litigation nullified by executive decree forecloses all possibility of jurisdiction being exercised by competent national organs. A civil case in process is itself an asset, one into which the litigants invest resources in the hope of an eventual finding in their favour. The risk of losing the case is one that every litigant accepts, but the risk of having the suit abruptly nullified will seriously discourage litigation, with serious consequence for the protection of individual rights. Citizens who cannot have recourse to the courts of their country are highly vulnerable to violation of their rights. The nullification of the suits in progress thus constitutes a violation of Article 7(1)(a).

**34. Communication 141/94** alleges that the Federal Government of Nigeria, through Decrees Nos. 6, 7, and 8 of 1994, restrained and restricted the right of Nigerians to receive information and to express and disseminate their opinions.

35. Article 9 of the African Charter reads:

- 1. Every individual shall have the right to receive information.***
- 2. Every individual shall have the right to express and disseminate his opinions within the law.***

**36.** Freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of public affairs in his country. Under the African Charter, this right comprises the right to receive information and express opinion.

**37.** The proscription of specific newspapers by name and the sealing of their premises, without a hearing at which they could defend themselves, or any accusation of wrongdoing, legal or otherwise, amounts to harassment of the press. Such actions not only have the effect of hindering the directly affected persons in disseminating their opinions, but also poses an immediate risk that journalists and Newspapers not yet affected by any of the Decree will subject themselves to self-censorship in order to be allowed to carry on their work.

**38.** Decrees like these pose a serious threat to the public of the right to receive information not in accordance with what the government would like the public to know. The right to receive information is important: Article 9 does not seem to permit derogation, no matter what the subject of the information or opinions and no matter the political situation of a country.

Therefore, the Commission finds that the proscription of the newspapers is a violation of Article 9 (1).

39. The complainant argues that Article 9(2) must be read as referring to "already existing law". The government argues that the decrees were justified by the special circumstances; the complainant invokes the constancy of international obligations.
40. According to Article 9 (2) of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level; this would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.
41. In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in Article 27(2), that is, that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest".
42. The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.
43. The government has provided no concrete evidence that the proscription was for any of the above reasons given in Article 27(2). It has failed to prove that proscription of the newspapers was for any reason but simple criticism of the government. If the newspapers had been guilty of libel, for example, they could have individually been sued and called upon to defend themselves. There was no substantive evidence presented that the newspapers were threatening national security or public order.
44. For the government to proscribe a particular publication, by name, is thus disproportionate and not necessary. Laws made to apply specifically to one individual or legal personality raise the serious danger of discrimination and lack of equal treatment before the law, guaranteed by Article 3. The proscription of these publications cannot therefore be said to be "within the law" and constitutes a violation of Article 9(2)
45. **Communication 140/94** alleges that the government sent armed gangs to attack leading human rights activists and to destroy their homes. The government has made no substantive response to this allegation.
46. Article 5 of the Charter states:  
*Every individual shall have the right to the respect of the dignity of inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly ...torture, cruel, inhuman or degrading punishment or treatment shall be prohibited.*
47. The African Commission in several previous decisions, has set out the principle that where allegations of human rights abuse go uncontested by the government concerned, even after

repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given (See the Commission's decisions in communications 59/91, 60/91, 64/91, 87/93 and 101/93). This principle conforms with the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights as provided for in the Charter.

48. In view of the foregoing, the Commission finds a violation of Article 5.

49. The detention of six human rights activists without charges as alleged in **communication 140/94** and the detention of Mr. Bola Bolawole and 15 journalists in "The Guardian" group as alleged in **communication 145/95** has also not been disputed by the government.

50. Article 6 of the Charter reads:

*"Every individual shall have the right to liberty and to the security of his person...  
In particular, no one may be arbitrarily arrested or detained."*

51. To detain persons on account of their political beliefs, especially where no charges are brought against them renders the deprivation of liberty arbitrary. The government has maintained that no one is presently detained without charge. But this will not excuse past arbitrary detentions. The government has failed to address the specific cases alleged in the communications. The Commission therefore finds that there was a violation of Article 6.

52. The complainants also allege that the government violated proprietary rights of owners of companies by the said Decrees.

53. Article 14 of the Charter reads :

*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*

54. The government did not offer any explanation for the sealing up of the premises of many publications, but maintained the seizure in violation of direct court orders. Those affected were not previously accused or convicted in court of any wrongdoing. The right to property necessarily includes a right to have access to one's property and the right not to have one's property invaded or encroached upon. The Decrees which permitted the Newspapers premises to be sealed up and for publications to be seized cannot be said to be "appropriate" or in the interest of the public or the community in general. The Commission finds a violation of Article 14.

**For these reasons, the Commission**

**finds** that there have been violations of Articles 5, 6, 7(1)(a), 9(1) and (2), and 14 of the African Charter.

**Invites** the government to take all necessary steps to comply with its obligations under the Charter.

**Done in Kigali, Rwanda on 15 November 1999**

**Rapporteurs:** 18th Session: Commissioner Umozurike  
19th Session: Commissioner Umozurike  
20th Session: Commissioner Kisanga  
21st Session: Commissioner Dankwa  
22<sup>nd</sup> Session : Commissioner Dankwa  
23<sup>rd</sup> Session : Commissioner Dankwa  
24<sup>th</sup> Session : Commissioner Dankwa  
25<sup>th</sup> Session : Commissioner Dankwa  
26<sup>th</sup> Session : Commissioner Dankwa

**Summary of Facts:**

1. **Communication 143/95** alleges that the Government of Nigeria, through the State Security (Detention of Persons) Amended Decree No. 14 (1994), has prohibited any court in Nigeria from issuing a writ of habeas corpus, or any prerogative order for the production of any person detained under Decree no. 2 (1984). Complainant argues that this law violates the African Charter on Human and Peoples' Rights. The Decrees were applied to detain without trial several human rights and pro-democracy activists and opposition politicians in Nigeria.

**The State Party's Response and Observations :**

2. The government has presented no written response to this allegation, but in oral statements before the Commission (31 March 1996, 19th Ordinary Session, Ouagadougou, Burkina Faso, Chris Osah, Head of Delegation) maintains that no individual is presently being denied the right to habeas corpus in Nigeria. It has said that the provision of Decree No. 14 suspending the right to habeas corpus applies only to persons detained in respect of state security, and was implemented only between 1993 and 1995, during the period of political insecurity following the annulled elections of June 1993.
3. The government acknowledges that this provision is still on the statute books in Nigeria, but suggested that the right to habeas corpus would be restored in the future by saying, "as the democratisation of society goes on, all these [decrees] will become superfluous. They will have no place in society".
4. **Communication 150/96** complains that the State Security (Detention of Persons) Decree No. 2 of 1984, which enables a person to be detained for a reviewable period of three months if he endangers State security, violates Article 6 of the Charter. It also complains of the amended Decree of 1994 prohibiting the writ of habeas corpus.
5. The communication alleges that Mr. Abdul Oroh, Mr. Chima Ubani, Dr. Tunji Abajom, Chief Frank Kokori, Dr. Fred Eno, Honourable Wale Osun and Mr. Osagie Obayunwana were detained under this decree, without charge and also deprived of the right to bring habeas corpus actions. The communication alleges that they are detained in dirty, hidden, sometimes underground security cells; denied access to medical care, to their families and lawyers; and not permitted to have journals, newspapers and books. It is alleged that the



detainees are sometimes subjected to torture and rigorous interrogations. The communication alleges that these conditions, combined with the courts' inability to order the production of detained persons even on medical grounds, places the detainees' lives in danger. The communication alleges that these circumstances constitute inhuman and degrading punishment or treatment.

6. The communication complains that the clauses ousting the jurisdiction of the courts to consider the validity of decrees or acts taken thereunder is a violation to the right to have one's cause heard, protected by Article 7(1)(a) and 7(1)(d) of the Charter, and undermines the independence of the judiciary in contravention of Article 26.
7. The government has presented no response in respect of this communication.

**Complaint:**

8. The communications allege violation of Articles 5, 6, 7 and 26 of the Charter.

**Procedure:**

9. **Communication 143/95** dated 14 December 1994 and filed by the Constitutional Rights Project, was received at the Secretariat on 2 February 1995.
10. In February 1995, the Commission was seized of the communication, and on 7 February 1995, a notification was sent to the Nigerian Government with the attached communication asking the said Government to respond within three months.
11. At the 18th Session in October 1995, the communication was declared admissible, and should be brought up by the proposed mission to Nigeria.
12. **Communication 150/96** is submitted by Civil Liberties Organisation and dated 15 January 1996. It was received at the Secretariat on 29 January 1996.
13. At the 20th session held in Grand Bay, Mauritius in October 1996, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria.
14. The mission went to Nigeria from 7 to 14 March 1997 and a report was submitted to the Commission.
15. The parties were duly notified of all the procedures.

**LAW**

**Admissibility**

16. Article 56 (5) of the Charter requires that a complainant exhausts local remedies before the Commission can consider the case. Section 4 (1) of the State Security (Detention of Persons) Decree No. 2 of 1984 states:

***(1) no suit or other proceedings shall lie against any persons for anything done or intended to be done in pursuance of this Act.***

***Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law, and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question.***

17. In its decision on communication 129/94, the Commission accepted the argument of complainants that the above ouster decrees create a situation in which "it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results." (ACHPR 129/94:8.)

18. The ouster clauses create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos Division have occasionally found that they have jurisdiction; in 1995, the Court of Appeal in Lagos relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is "offensive and utterly hostile to rationality". On their face, ouster clauses remove the right of courts to review decrees.

19. For these reasons, the Commission declared the communications admissible.

### **Merits**

20. Both communications allege that the government has prohibited the issuance by any court of the writ of habeas corpus or any prerogative order for the production of any person detained under Decree No. 2 of 1984. Decree No. 14 denies the right to those detained for acts "prejudicial to State security or the economic adversity of the nation". A panel has the power to review the detentions but this is not a judicial body and its members are appointed by the President.

21. Article 6 of the Charter reads:

***Every individual shall have the right to liberty and 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.***

22. The problem of arbitrary detention has existed for hundreds of years. The writ of habeas corpus was developed as the response of common law to arbitrary detention, permitting detained persons and their representatives to challenge such detention and demand that the authority either release or justify all imprisonment.

23. Habeas corpus has become a fundamental facet of common law legal systems. It permits individuals to challenge their detention proactively and collaterally, rather than waiting for the outcome of whatever legal proceedings may be brought against them. It is especially vital in those instances in which charges have not, or may never be, brought against the detained individual.

24. Deprivation of the right to habeas corpus alone does not automatically violate Article 6. Indeed, if Article 6 were never violated, there would be no need for habeas corpus provisions. However, where violation of Article 6 is widespread, habeas corpus rights are essential in ensuring that individuals' Article 6 rights are respected.

25. The question thus becomes whether the right to habeas corpus, as it has developed in common law systems, is a necessary corollary to the protection of Article 6 and whether its suspension thus violates this Article.

26. The African Charter should be interpreted in a culturally sensitive way, taking into full account the differing legal traditions of Africa and finding its expression through the laws of each country. The government has conceded that the right to habeas corpus is important in Nigeria, and emphasised that it will be reinstated "with the democratisation of society."

27. The importance of habeas corpus is demonstrated by the other dimensions of communication 150/96. The government argued that no one had actually been denied the right to habeas corpus under the Amended Decree. Communication 150/96 provides a list of such individuals who are detained without charges in very poor conditions, some incommunicado, and are unable to challenge their detention due to the suspension of this right. The government has however made no specific response.

28. First of all, in accordance with its well-established precedent (See the Commission's decisions in communications 59/91, 60/91, 64/91, 87/93 and 101/93), since the government has presented no defence or contrary evidence that the conditions of detention are acceptable, the Commission accepts the allegations that the conditions of detention are a violation of Article 5 of the Charter, which prohibits inhuman and degrading treatment. The detention of individuals without charge or trial is a clear violation of Articles 6 and 7(1)(a) and (d).

29. Furthermore, these individuals are being held incommunicado with no access to lawyers, doctors, friends or family. Preventing a detainee access to his lawyer clearly violates Article 7(1)(c) which provides for the "right to defence, including the right to be defended by a counsel of his choice." It is also a violation of Article 18 to prevent a detainee from communicating with his family.

30. The fact that the government refuses to release Chief Abiola despite the order for his release on bail made by the Court of Appeal is a violation of Article 26 which obliges States parties to ensure the independence of the judiciary. Failing to recognise a grant of bail by the Court of Appeal militates against the independence of the judiciary.

31. These circumstances dramatically illustrate how a deprivation of rights under Articles 6 and 7 is compounded by the deprivation of the right to apply for a writ of habeas corpus. Given the history of habeas corpus in the common law to which Nigeria is an heir, and its acute relevance in modern Nigeria, the amended Decree suspending it must be seen as a further violation of Articles 6 and 7(1)(a) and (d).

32. The government argues that habeas corpus actions are still available to most detainees in Nigeria, and that the right to bring habeas corpus actions is denied only to those detained for state security reasons under Decree No. 2. While this does not create a situation as serious as when all detainees were denied the right to challenge their detention, the limited application of a

provision does not guarantee its compatibility with the Charter. To deny a fundamental right to a few is just as much a violation as denying it to many.

33. The government attempts to justify Decree No. 14 with the necessity for state security. While the Commission is sympathetic to all genuine attempts to maintain public peace, it must note that too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform.

34. Finally, as noted in the admissibility section of this decision, there is a persistent practice of ouster clauses in Nigeria, which remove many vital matters from the jurisdiction of the ordinary courts. A provision for habeas corpus is not of much use without an independent judiciary to apply it. The State Security Decree contains a clause forbidding any court from taking up any matter arising under it. In previous decisions on ouster clauses in Nigeria, the Commission has found that they violate Articles 7 and 26 of the Charter, the duty of the government to ensure the independence of the judiciary (See the Commission's decisions in communications 60/91, 87/93 and 129/94).

**For these reasons, the Commission**

**finds** that there are violations of Articles 5, 6, 7(1)(a), (c) and (d), 18 and 26 of the Charter and

**recommends** that the government of Nigeria brings its laws in line with the Charter.

**Done at Kigali, Rwanda on 15 November 1999**

**Rapporteur:** 19<sup>th</sup> Session: Commissioner Dankwa  
20<sup>th</sup> Session: Commissioner Dankwa  
21<sup>st</sup> Session: Commissioner Dankwa  
22<sup>nd</sup> Session: Commissioner Dankwa  
23<sup>rd</sup> Session: Commissioner Dankwa  
24<sup>th</sup> Session: Commissioner Dankwa  
25<sup>th</sup> Session: Commissioner Dankwa  
26<sup>th</sup> Session: Commissioner Dankwa

**Summary of Facts:**

1. The communication concerns 11 soldiers of the Nigerian army: WO1 Samson Elo, WO2 Jomu James, Ex. WO2 David Umukoro, Sat. Gartue Ortoo, LCPI Pullen Blacky, Ex LCPI Lucky Iviero, PVT Fakolade Taiwo, PVT Adelabi Ojejide, PVT Chris Miebi, Ex PVT Otem Anang, and WO2 Austin Ogbeowe. They were arrested in April 1990 on suspicion of being part of a coup plot and were tried twice, once in 1990 and once in 1991. They were found innocent on both occasions but still have not been freed. On 31 October 1991 they were granted state pardon by the then-Armed Forces Ruling Council. However, they continue to be held at Kirikiri Prison under terrible conditions. The complaint argues that there are no further domestic remedies available, since the jurisdiction of the courts over the matter has now been ousted by military decree.

**Complaint:**

2. The communication alleges violation of Article 6 of the Charter.

**Procedure:**

3. The communication is dated 22 August 1995 and was received at the Secretariat on 18 September 1995.

4. At the 20th session held in Grand Bay, Mauritius, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria. The mission was undertaken between 7 and 14 March 1997 and the report was submitted to the Commission.

5. The parties were kept informed of all the procedures.

**LAW**

**Admissibility**

6. Article 56 of the Charter reads:

*"Communications... shall be considered if they:*

*...*

*(5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."*

7. This is just one of the seven conditions specified by Article 56, but it is the one that usually requires the most attention. Because Article 56 is necessarily the first considered by the Commission, before any substantive consideration of communications, it has already been the subject of substantial interpretation; in the jurisprudence of the African Commission, there are several important precedents.

8. Specifically, in the four decisions the Commission has already taken concerning Nigeria, Article 56 (5) is analysed in terms of the Nigerian context. Communication 60/91 (Decision ACHPR/60/91) concerned the Robbery and Firearms Tribunal; Communication 87/93 (Decision ACHPR/87/93) concerned the Civil Disturbances Tribunal; Communication 101/93 (Decision ACHPR/101/93) concerned the Legal Practitioners Decree; and Communication 129/94 (ACHPR/129/94) concerned the Constitution (Modification and Suspension) Decree and the Political Parties (Dissolution) Decree.

9. All of the Decrees in question in the above communications contain "ouster" clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals. (ACHPR/60/91:23 and ACHPR/87/93:22). The Legal Practitioners Decree specifies that it cannot not be challenged in the courts and that anyone attempting to do so commits a crime (ACHPR/101/93:14-15). The Constitution Suspension and Modification legal prohibited their challenge in the Nigerian Courts (ACHPR/129/94:14-15).

10. In all of the cases cited above, the Commission found that the ouster clauses render local remedies non-existent or ineffective. They create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos Division have occasionally found that they have jurisdiction. For instance, in 1995 the Court of Appeal, Lagos Division, relying on common law, concluded that courts should examine some decrees notwithstanding ouster clauses, where the decree is "offensive and utterly hostile to rationality". But this decision has not been followed by any subsequent case.

11. In the instant communication, the jurisdiction of the courts was ousted. Thus, no matter how meritorious the victims' case for freedom may be, it cannot be entertained by the courts. Accordingly, the case was declared admissible.

## **Merits**

12. Article 6 of the African Charter provides:

***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.***

13. The government has not disputed any of the facts as presented by Constitutional Rights Project.

14. The African Commission, in several previous decisions, has set out the principle that where allegations of human rights abuses go uncontested by the government concerned,

especially after repeated notification, the Commission must decide on the facts provided by the complainant and treat those facts as given<sup>1</sup>.

15. As the government has offered no other explanation for the detention of the 11 soldiers, the Commission has to assume that they are still being detained for the acts for which they were found innocent in two previous trials. This is a clear violation of Article 6, and shows disrespect by the Nigerian government for the judgements of its own courts.

16. Later, (although it was unnecessary because they were found innocent of any crime), the soldiers were granted state pardons, but still not freed. This constitutes a further violation of Article 6 of the Charter.

**For these reasons, the Commission**

**finds that** Article 6 of the African Charter has been violated

**urges** the Government of Nigeria to respect the judgements of its courts and free the 11 soldiers.

**Done in Kigali, Rwanda on 15 November 1999**

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<sup>1</sup> See the Commission's decisions on *communications 59/91- Embga Mekong Louis vs. Cameroon*, *60/91- Constitutional Rights Project vs. Nigeria ( in respect of Wahab Akamu, G. Adegan and others*, *64/91 - Krishna Achuthan (on behalf of Aleke Banda)*, *87/93- Constitutional Rights Project vs. Nigeria ( in respect of Zamani Lekwot and 6 others ) vs. Nigeria and 101/93 - Civil Liberties Organisation ( in respect of the Nigerian Bar Association) vs. Nigeria*

**Rapporteur:** 20<sup>th</sup> Session: Commissioner Kisanga  
21<sup>st</sup> Session: Commissioner Dankwa  
22<sup>nd</sup> Session: Commissioner Dankwa  
23<sup>rd</sup> Session: Commissioner Dankwa  
24<sup>th</sup> Session: Commissioner Dankwa  
25<sup>th</sup> Session: Commissioner Dankwa  
26<sup>th</sup> Session: Commissioner Dankwa

**Summary of Facts:**

1. In March 1995, the Federal Military Government of Nigeria announced that it had discovered a plot to overthrow it by force. By the end of the month, several persons including civilians and serving and retired military personnel had been arrested in connection with the alleged plot.
2. A Special Military Tribunal was established under the Treason and Teasonable Offences (Special Military Tribunal) Decree, which precluded the jurisdiction of the ordinary courts. The Military Tribunal was headed by Major-General Aziza, and composed of five serving military officers. The tribunal used the rules and procedures of a Court-Martial, and no appeal lay from its judgement. The tribunal's decision was only subject to confirmation by the Provisional Ruling Council, the highest decision making body of the military government.
3. The trials were conducted in secret, and the suspects were not given the opportunity to state their defence or have access to lawyers or their families. They were not made aware of the charges against them until their trial. The suspects were defended by military lawyers who were appointed by the Federal Military Government.
4. Thirteen civilians tried by the Tribunal were convicted for being accessories to treason and sentenced to life imprisonment. These were: Dr. Beko Ransome-Kuti, Mallan Shehu Sanni, Mr. Ben Charles Obi, Mrs. Chris Anyanwu, Mr. George Mba, Mr. Kunle Ajibade, Alhaji Sanusi Mato, Mr. Julius Badejo, Mr. Matthew Popoola, Mr. Felix Mdamagida, Miss Rebecca Onyabi Ikpe, and Mr. Moses Ayegba. Miss Queenette Lewis Alagoe was convicted as an accessory after the fact and sentenced to 6 months imprisonment. The life sentences were later reduced to 15 years imprisonment.
5. The communication alleges that since their arrest, the accused have been held under inhuman and degrading conditions. They are held in military detention places, not in the regular prisons, and are still deprived of access to their lawyers and families. They are held in dark cells, given insufficient food and no medicine or medical attention.



### **Complaint:**

6. The complainant alleges violations of Articles 5, 7(1)(a), (c) and (d) and 26 of the African Charter.

### **Procedure:**

7. The communication is dated 19 January 1996 and was received at the Secretariat on 29 January 1996.
8. At the 20th session held in Grand Bay, Mauritius October 1996, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria. The Mission took place between 7 and 14 March 1997 and the report was submitted to the Commission.
9. The parties were kept informed of all the procedures.

## **LAW**

### **Admissibility**

10. Article 56 of the Charter reads:

*Communications... shall be considered if they:...*

*(5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.*

11. This is just one of the seven conditions specified by Article 56, but it is the one that usually requires the most attention. Because Article 56 is necessarily the first to be considered by the Commission, before any substantive consideration of communications, it has already been the subject of substantial interpretation; in the jurisprudence of the African Commission, there are several important precedents.

12. Specifically, in four decisions the Commission has already taken concerning Nigeria, Article 56(5) is analysed in terms of the Nigerian context. Communication 60/91 (Decision ACHPR/60/91) concerned the Robbery and Firearms Tribunal; Communication 87/93 (Decision ACHPR/87/93) concerned the Civil Disturbances Tribunal; Communication 101/93 (Decision ACHPR/101/93) concerned the Legal Practitioners Decree; and Communication 129/94 (ACHPR/129/94) concerned the Constitution (Modification and Suspension) Decree and the Political Parties (Dissolution) Decree.

13. All of the Decrees in question in the above communications contain "ouster" clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals. (ACHPR/60/91:23 and ACHPR/87/93:22). The Legal Practitioners Decree specifies that it cannot be challenged in the courts and that anyone attempting to do so commits a crime (ACHPR/101/93:14-15). The Constitution Modification and Suspension prohibited their challenge in the Nigerian Courts (ACHPR/129/94:14-15).

14. In all of the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos district have occasionally found that they have jurisdiction; in 1995 the Court of Appeal in Lagos, relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is "offensive and utterly hostile to rationality".

15. In the instant communication, the jurisdiction of the ordinary courts was ousted and the case against the accused persons was brought before a special tribunal. From this tribunal there is no appeal to the ordinary courts.

16. Thus, as dictated both by the available facts and the precedent of the African Commission, the communication was declared admissible.

### **Merits**

17. In all of the above-cited cases, the ouster clauses in addition to being prima facie evidence of admissibility, were found to constitute violations of Article 7. The Commission must take this opportunity, not only to reiterate the conclusions made before, that the constitution and procedures of the special tribunals violate Articles 7 (1)(a) and (c) and 26, but to recommend an end to the practice of removing entire areas of law from the jurisdiction of the ordinary courts.

18. In oral statements before the Commission, the Nigerian Government has claimed that "as a developing nation, we do not have enough resources to man these law courts very well." (Examination of State Reports, 13th Session, April 1993, Nigeria-Togo, p.35) This was given as a justification of "special" tribunals. Another justification given was that a breakdown of law and order had caused a high volume of cases (Id. pp. 37 and 39)

19. The Government denied that there is anything special at all about these extraordinarily constituted courts and maintained that they respected all the procedures of the regular courts; however, the government did concede that they include military officers, and that from the special tribunals there is no means of appeal to the regular courts.

20. Although the government argues that the procedure before special tribunals offers the same protections for rights as the regular courts (See Id. at 38), this assertion is belied by the very reasons the government gives for the tribunals, as well as the evidence submitted by the complainants.

21. The Commission's previous decisions found that the special tribunals violated the Charter because their judges were specially appointed for each case by the executive branch, and would include on the panel at least one, and often a majority, of military or law enforcement officers, in addition to a sitting or retired judge. The Commission here reiterates its previous decisions and declares that the trial of these persons before a special tribunal violates Article 7(1)(d) and Article 26.

22. The system of executive confirmation, as opposed to appeal, provided for in the institution of special tribunals, violates Article 7(1)(a).

23. If the domestic courts are overburdened, which the Commission does not doubt, the Commission recommends that Government consider allocating more resources to them. The

setting up of a parallel system has the danger of undermining the court system and creates the likelihood of unequal application of the laws.

24. The complainants have alleged that the accused were not permitted to choose their own counsel. This is a question of fact. The government has not responded to this case specifically, neither has it contradicted this accusation. Therefore, in accordance with its established practice, (See the Commission's decisions in communications 59/91, 60/91, 64/91, 87/93 and 101/93) the Commission must take the word of the complainant as proven and thus finds a violation of Article 7(1)(c).

25. Finally, the complaint alleges that the conditions of detention of the convicted persons constitute inhuman and degrading treatment, in violation of Article 5. The government has not made any specific response to any of the accusations in the communication, and has not provided any information to contradict the allegations of inhuman and degrading treatment.

26. While being held in a military detention camp is not necessarily inhuman, there is the obvious danger that normal safeguards on the treatment of prisoners will be lacking. Being deprived of access to one's lawyer, even after trial and conviction, is a violation of Article 7(1)(c).

27. Being deprived of the right to see one's family is a psychological trauma difficult to justify, and may constitute inhuman treatment. Deprivation of light, insufficient food and lack of access to medicine or medical care also constitute violations of Article 5.

**For the above reasons, the Commission**

**finds** a violation of Articles 5, 7(1)(a), (c) and (d) and 26.

**appeals** to the Government of Nigeria to permit the accused persons a civil re-trial with full access to lawyers of their choice; and improve their conditions of detention.

**Done in Kigali, Rwanda on 15 November 1999**

**Rapporteur:** 20th Session: Commissioner Dankwa  
21st Session: Commissioner Dankwa  
22<sup>nd</sup> Session: Commissioner Dankwa  
23<sup>rd</sup> Session : Commissioner Dankwa  
24<sup>th</sup> Session : Commissioner Dankwa  
25<sup>th</sup> Session : Commissioner Dankwa  
26<sup>th</sup> Session : Commissioner Dankwa

**Summary of Facts:**

1. Between May and June 1995 the Nigerian police in the city of Owerri arrested Vincent Obidiozor Duru, Nnemeka Sydney Onyecheghe, Patrick Okoroafor, Collins Ndulaka and Amanze Onuoha. They were accused of serious offences ranging from armed robbery to kidnapping.
2. The police completed its case and submitted a report on 25 July 1995. In this report the police linked the suspects to various robberies and kidnapping of young children which had occurred and for which ransoms were demanded. One of the kidnapped children escaped but the whereabouts of the others are still unknown, although the ransoms have been paid. The report concluded that the suspects should be detained under Decree No. 2 of 1984 (which permits detainees to be held for three months without charge) in order to permit further investigations and for the suspects to be charged with armed robbery and kidnapping. At present the suspects are imprisoned and no charges have been brought against them.

**Complaint:**

3. The communication alleges violations of Articles 6 and 7 of the Charter.

**Procedure:**

4. The communication is dated 5 February 1996 and was received at the Secretariat on 28 February 1996.
5. At the 20th session held in Grand Bay, Mauritius, in October 1996, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria. The mission was undertaken between 7 and 14 March 1997 and the report submitted to the Commission.
6. The parties were duly notified of all the procedures.

**LAW**

**Admissibility**

7. *Prima facie*, the communication satisfies all of the requirements for admissibility contained in Article 56. The only question that might be raised is with regard to the exhaustion of local remedies required by Article 56(5). Article 56(5) requires that the complainants must have exhausted all available local remedies, or else prove that such remedies are unduly prolonged.
8. The very violation alleged in this case is that the victims are detained without charge or trial, thus constituting an arbitrary detention. The normal remedy in such instances is for the victims to bring an application for a writ of habeas corpus, a collateral action in which the court may order the police to produce an individual and justify his imprisonment.
9. However, the police report contained in the file recommends that the suspects be detained under Decree No. 2 of 1984 (Document Ref. No. CR:3000/IMS/Y/Vol. 33/172, p. 10 para.). By the State Security (Detention of Persons) Amended Decree No. 14 (1994), the government has prohibited any court in Nigeria from issuing a writ of habeas corpus, or any prerogative order for the production of any person detained under Decree No. 2 (1984).
10. Thus, even the remedy of habeas corpus does not exist in this situation. There are consequently no remedies for the victims to resort to, and the communication was therefore declared admissible.

## Merits

11. Article 6 of the African Charter reads:

***...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.***

12. The State Security (Detention of Persons) Act provides that the Chief of General Staff may order that a person be detained if he is

***satisfied that any person is or recently has been concerned in acts prejudicial to State security or has contributed to the economic adversity of the nation, or in the preparation or instigation of such acts.***

13. Persons may be detained indefinitely if the detention is reviewed every six weeks by a panel of nine persons, six of whom are appointed by the President, the other three being the Attorney-General, the Director of the Prison Service, and a representative appointed by the Inspector-General of Police. The panel does not have to agree that continued detention is necessary: the detention will be renewed unless the Panel is satisfied that the circumstances no longer require the continued detention of the person.
14. The detainees were arrested between May and June 1995, nearly two years ago. There is no evidence that they have been tried or even charged.
15. Even if the required reviews of detention as provided for by the Act, are being held, the Panel which conducts the review cannot be said to meet judicial standards as majority of its members are appointed by the President (the Executive) and the other three are also

representatives of the executive branch. The Panel does not have to justify the continued detention of individuals, but only issue orders in the case of release.

16. This Panel cannot thus be considered impartial. Consequently, even if recommendations from the meetings of this Panel are responsible for the detainees' continued detention, this detention must be considered arbitrary, and therefore in violation of Article 6.
17. Furthermore, Article 7(1) of the Charter provides that every individual shall have the right to an appeal to competent national organs against acts violating his fundamental rights, and the right to be tried within a reasonable time by an impartial court or tribunal.
18. The meetings of the Review Panel cannot be considered a competent national organ. Since it appears that the right to file for habeas corpus is also closed to the accused individuals, they have been denied their rights under Article 7(1)(a).
19. A subsidiary issue is the length of time that has elapsed since their arrest. In a criminal case, especially one in which the accused is detained until trial, the trial must be held with all possible speed to minimise the negative effects on the life of a person who, after all, may be innocent.
20. That nearly two years can pass without even charges being filed is an unreasonable delay. Thus, the detainees' rights under Article 7(1)(d) have also been violated.

**For these reasons, the Commission,**

**finds** violations of Articles 6, 7(1)(a) and (d) of the Charter

**appeals** to the Government of Nigeria to charge the detainees, or release them.

**Done in Kigali, Rwanda on 15 November 1999**

## 206/97 Centre For Free Speech / Nigeria

### Rapporteur:

23<sup>rd</sup> Session: Commissioner Dankwa

24<sup>th</sup> Session: Commissioner Dankwa

25<sup>th</sup> Session: Commissioner Dankwa

26<sup>th</sup> Session: Commissioner Dankwa

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### Summary of Facts:

1. The complainant alleges the unlawful arrest, detention, trial and conviction of four Nigerian journalists, by a Military Tribunal presided over by one Patrick Aziza.
2. The journalists were convicted for reporting stories on the alleged 1995 coup attempt in their various newspapers and magazines. The journalists are: Mr. George Mba of *TELL* magazine, Mr. Kunle Ajibade of *THE NEWS magazine*, Mr. Ben Charles Obi of *CLASSIQUE* Magazine and Mrs. Chris Anyanwu of *TSM* Magazine.
3. The journalists were tried in secret and were not allowed access to counsel of their choice.
4. The journalists were sentenced to various terms of imprisonment.
5. The convicted journalists could not appeal against their sentences because of the various Decrees promulgated by the Military Regime that ousts the jurisdiction of regular courts from hearing appeals on cases decided by a Military Tribunal.

### Complaint:

The complainant asserts that the following Articles of the African Charter have been violated:

**Articles 6, 7 and 24 and Principle 5 of the U. N. Basic Principles on the Independence of the Judiciary**

### Procedure:

6. The communication is dated 14 July 1997 and the Secretariat acknowledged receipt on 23 September 1997.
7. Correspondences were exchanged between the Secretariat and the parties for additional information and to keep the latter informed of the procedures.

## **LAW**

### **Admissibility**

8. For a communication submitted under Article 55 of the Charter to be declared admissible, it must satisfy all the conditions stipulated under Article 56 of the Charter. Such conditions must be assessed based on the circumstances of each particular case. In this case, the communication *prima facie* is in accordance with these requirements. The only issue that might be raised is with regard to the exhaustion of local remedies as provided for under Article 56(5) of the Charter.

**9. Article 56(5) states:**

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

*... are sent after exhausting local remedies if any, unless it is obvious that this procedure is unduly prolonged.*

10. The jurisdiction of the courts are ousted by Treason and Treasonable Offences (Special Military Tribunal) Decree. Applying the decisions of the Commission in communication 60/91, which concerned the Robbery and Firearms Tribunal, communication 87/93 on the Civil Disturbances Tribunal, communication 101/92 on the Legal Practitioners Decree and communication 129/94 relating to the Constitution (Suspension and Modification) Decree and the Political Parties (Dissolution), the Commission finds that local remedies in the instant communication were non-existent or ineffective.

**For the above reasons, the Commission declared the communication admissible.**

### **Merits:**

11. The complainant alleges the illegal arrest and detention of the Journalists as being in violation of their right to liberty and security of person as provided for in Article 6 of the Charter.

Article 6 of the Charter provides:

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

12. The complainant also alleges violation of Article 7 of the Charter and Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary in that the Journalists were tried in secret, were denied access to counsel of their choice and later sentenced to various terms of imprisonment. Further, that the convicted Journalists could not appeal against their sentences because of the various Decrees promulgated by the Military government that ousts the jurisdiction of the regular courts from hearing such cases.



Article 7 (1) of the Charter provides:

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

Principle 5 of the UN Basic Principles stipulates:

***Everyone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.***

13. It is alleged that the convicted persons were not allowed access to their lawyers, neither were they given the opportunity to be represented and defended by lawyers of their own choice at the trial. Article 7 (1) (c) of the Charter provides:

***Every individual shall have the right to defence, including the right to be defended by counsel of his choice.***

14. In its Resolution on the Right to Recourse Procedure and Fair Trial, the Commission in re-enforcing this right observed in paragraph 2 (e) (i) thus:

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

***(i) ... communicate in confidence with counsel of their choice***

The denial of this right therefore is in contravention of Article 7(1)(c) of the Charter.

15. The issue of the arraignment and trial of the Journalists must also be addressed here. The complainant alleges that the Journalists were arraigned, tried and convicted by a Special Military Tribunal, presided over by a serving military officer and whose membership also included some serving military officers. This is in violation of the provisions of Article 7 of the Charter and Principle 5 of the UN Basic Principles.
16. It could not be said that the trial and conviction of the four Journalists by a Special Military tribunal presided over by a serving military officer who is also a member of the PRC, the body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in article 7 of the Charter. The above act is also in contravention of Article 26 of the Charter.

Article 26 of the Charter states:

***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.*

17. Unfortunately, the government of Nigeria has not responded to the several requests from the Commission for the former's reaction to the communication. The African Commission on several previous decisions has set out the principle that where allegations of human rights violations go uncontested by the government concerned, particularly after repeated notifications or request for information on the case, the Commission must decide on the facts provided by the complainant and treat those facts as given ( see communications Nos. 59/91, 60/91, 64/91, 87/93 and 101/93).
18. In the circumstances, the Commission finds itself compelled to adopt the position that the facts alleged by the complainant are true.

**For the above reasons, the Commission:**

**concludes** that the violations of Articles 6 and 7 (1)(a) and (c ) and 26 occurred in this case.

**urges** the government of Nigeria to order for the release of the four Journalists.

**Done in Kigali, Rwanda on 15 November 1999**

## **215/98 Rights International / Nigeria**

### **Rapporteur:**

23rd session: Commissioner Dankwa  
24th session: Commissioner Dankwa  
25th session: Commissioner Dankwa  
26th Session: Commissioner Dankwa

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### **Summary of facts:**

1. Complainant is an NGO based in the United States.
2. Complainant alleges that Mr. Charles Baridorn Wiwa a Nigerian student in Chicago was arrested and tortured at a Nigerian Military Detention Camp in Gokana.
3. Complainant alleges that Mr. Wiwa was arrested on 3 January 1996 by unknown armed soldiers in the presence of his mother and other members of his family.
4. It is alleged that Mr. Wiwa remained in the said Military detention camp from 2-9 January 1996.
5. While in detention, Mr. Wiwa was horsewhipped and placed in a cell with forty-five other detainees.
6. After Mr. Wiwa was identified as a relative of Mr. Ken Saro - Wiwa he was subjected to various forms of torture.
7. Enclosed in the communication is medical evidence of Mr. Wiwa's physical torture.
8. After 5 days in the detention camp in Gokana, Mr. Wiwa was transferred to the State Intelligence Bureau (SIB) in Port Harcourt.
9. Mr. Wiwa was held from 9-11 January 1996, without access to a legal counsel or relatives, except for a five minutes discussion with his grandfather.
10. Mr. Wiwa, it is alleged was not informed of the charges against him nor was he provided with an explanation for his prolonged detention until 11 January 1996
11. On 9 January 1996, Mr. Wiwa was finally allowed to prepare a statement in his own defence but without a legal counsel, and he did not know what to write.
12. On 11 January 1996, Mr. Wiwa and 21 other Ogonis were brought before the Magistrate Court 2 in Port-Harcourt, charged with unlawful assembly in violation of Section 70 of the Criminal Code Laws of Eastern Nigeria 1963.

13. The charging instrument states that Mr. Wiwa participated in the said unlawful assembly on 4 January 1996 which happens to be a day after he was arrested.
14. Mr. Wiwa however was granted bail.
15. While Mr. Wiwa was out on bail some un-known people believed to be government agents abducted him and threatened his life by forcing him into a car in Port-Harcourt.
16. On the advice of Human rights lawyers, Mr. Wiwa fled Nigeria on 18 March 1996 to Cotonou, Republic of Benin where the UN High Commissioner for Refugees declared him a refugee.
17. On September 17 1996, the US government granted him refugee status and he has been residing in the United States since then.

### **Complaint:**

18. The complainant alleges that the following Articles of the African Charter on Human and Peoples' Rights have been violated: Articles 5, 6, 7 (1)(c) and 12 (1) and (2).

### **Procedure:**

19. The Communication is dated 17 February 1998 and was received at the Secretariat on 19 March 1998.
20. At its 23rd ordinary session held in Banjul, The Gambia from 20-29 April 1998, the Commission decided to be seized of this communication and to notify the state concerned to send its comments on admissibility.
21. At its 24th ordinary session held in Banjul, The Gambia from 22 to 31 October 1998, the Commission declared the communication admissible and invited submissions on the merits of the case during the 25th ordinary session. The Commission also requested the Secretariat to study this communication and communication No. 205/ 97 with a view to consolidating them.

## **LAW**

### **Admissibility**

22. Article 56 (5) of the Charter provides:

*Communications...shall be considered if they:  
are sent after exhausting local remedies, if any, unless it is obvious that  
this procedure is unduly prolonged*

23. The Commission declared the communication admissible on grounds that there was lack of available and effective domestic remedies for human rights violations in Nigeria under the military regime.

24. Relying on its precedents in *communications 87/93 and 101/93*, (the former was brought on behalf of seven men sentenced to death under a Decree which prohibits the courts from reviewing any aspect of the trial, while the latter was brought on behalf of the Nigerian Bar Association based on a Decree which infringed upon Nigerian lawyers' freedom of association and also precluded the courts from hearing cases relating to the said decree) the Commission interpreted the standard for constructive exhaustion of domestic remedies to be satisfied where there is no adequate or effective remedy available to the individual. In this particular case, the Commission found that Mr. Wiwa was unable to pursue any domestic remedy following his flight for fear of his life to the Republic of Benin and the subsequent granting of refugee status to him by the United States of America.

25. On the issue of consolidation of the communication with No. 205/97, the Commission decided that since it is a stage behind and since a decision on admissibility is yet to be taken on communication 205/97, it should not, therefore, delay decision on the merits of communication 215/98.

### **Merits**

26. The complainant alleges that while in detention, he was horsewhipped and subjected to various forms of torture. Article 5 of the Charter states:

***Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly...torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.***

27. The complainant also alleges the illegal arrest and detention of Mr. Wiwa as being in contravention of his rights to liberty and security of person as guaranteed under Article 6 of the Charter, which provides:

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

28. It is alleged further that except for the five minutes discussion Mr. Wiwa had with his grandfather, he was not allowed access to his relatives or a counsel and was also neither informed of the nature of the offence nor the reasons for his arrest and detention in violation of Article 7 (1)(c) of the Charter, which provides:

***Every individual shall have the right to have his cause heard. This comprises: (c) the right to defence, including the right to be defended by counsel of his choice;***

29. In its Resolution expounding on the components of the right to fair trial, the Commission had observed that:

***...the right to fair trial includes, among other things, the following:***  
***(b) persons who are arrested shall be informed at the time of the arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them;***  
***(e) In the determination of charges against individuals, the individual***

*shall be entitled in particular to:...*

i) *Have adequate time and facilities for the presentation of their defence and to communicate in confidence with counsel of their choice*

30. The complainant alleged that he was abducted and threatened by persons believed to be agents of the government, an action which led to his fleeing the country for safety. He attests that his flight, as evidenced by the granting of refugee status to him by two countries (Republic of Benin and the U. S. ) was based on well-founded fear of persecution by the Nigerian government. He attests further that since then, he has been living in the U. S. as a refugee. The above acts are in violation of Mr. Wiwa's rights to freedom of movement and residence and his right to leave and to return to his country guaranteed under Article 12(1) and (2) of the Charter, which state:

*(1) Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.*

*(2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality.*

31. Despite invitations to the Government of Nigeria for its response to the allegations in this communication, the Commission has received none. The Commission is, therefore, compelled to conclude the complaint on the facts in its possession, which are the allegations of the complainant.

**For the above reasons, the Commission**

**finds** the government of Nigeria in violation of Articles 5, 6, 7(1) (c) and 12(1) and (2) of the Charter

**Done in Kigali, Rwanda on 15 November 1999**