

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

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**Rapporteur:** 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**