

**Rapporteurs:** 17th Session: Commissioner Badawi  
18th Session: Commissioner Kisanga  
19th Session: Commissioner Kisanga  
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

**Facts as submitted by the authors:**

1. These communications were submitted to the African Commission by International Pen, the Constitutional Rights Project, Interights [and Civil Liberties Organisation] respectively. They were joined because they all concern the detention and trial of Kenule Beeson Saro-Wiwa, a writer and Ogoni activist, president of the Movement for the Survival of the Ogoni People. The communications 139/94 and 154/96 also complain of similar human rights violations suffered by Mr. Saro-Wiwa's co-defendants, also Ogoni leaders.
2. The communications 137/94 and 139/94 were submitted in 1994 before any trial began. After the murder of four Ogoni leaders on 21 May 1994, following riot during a public meeting organised by Movement for the Survival of the Ogoni Peoples (MOSOP) representing the rights of those who lived in oil producing areas of Ogoni land, Saro-Wiwa and many hundreds of others were arrested, Saro-Wiwa himself on 22 May 1994 and the vice-president of MOSOP, Ledum Mitee, shortly thereafter. Both communications allege that Mr Saro-Wiwa was severely beaten during the first days of his detention and was held for several days in leg irons and handcuffs. He was also denied access to his lawyer and the medicine he needed to control his blood pressure, at times prevented from seeing his family, and held in very poor conditions.
3. In its communication, submitted on 9 September 1994, the Constitutional Rights Project included a list of 16 other Ogonis who had been held without charge or bail for what was at that time over three months. Both communications alleged that Mr. Saro-Wiwa had been detained because of his political work in relation to MOSOP. He had been detained five times for brief periods since the beginning of 1993, and released each time without charge, except on one occasion in mid-1993 where he was held for several weeks and charged with unlawful assembly.
4. The State Military Administrator declared that Mr. Saro-Wiwa and his co-defendants had incited members of MOSOP to murder four rival Ogoni leaders, but no charges were brought until 28 January 1995. In the months between arrest and the beginning of the trial, the defendants were not

- allowed to meet with their lawyers, and no information on the charges was provided to the defence.
5. In February 1995 the trial of the defendants began before a tribunal established under the Civil Disturbances Act. The three members of this tribunals were appointed directly by General Abacha in November 1994, although counsel for the Rivers State Administrator argued in August that the cases were within the exclusive jurisdiction of the Rivers State High Court, since Rivers State is where the offences occurred.
  6. In June 1995 the Constitutional Rights Project submitted a supplement to its communication, alleging irregularities in the conduct of the trial itself: harassment of defence counsel, a military officer's presence at what should have been confidential meetings between defendants and their counsel, bribery of witnesses, and evidence of bias on the part of the tribunal members themselves. In October 1995 PEN also copied to the Commission a letter it sent to General Abacha protesting the lack of concrete evidence and the unfair conduct of the trial.
  7. On 30 and 31 October 1995, Ken Saro-Wiwa and eight of the co-defendants (Saturday Dobe, Felix Nuate, Nordu Eawo, Paul Levura, Daniel Gbokoo, Barinem Kiobel, John Kpunien and Baribor Bera) were sentenced to death, while six others including Mr. Mitee were acquitted. The CRP submitted an emergency supplement to its communication on 2 November 1995, asking the Commission to adopt provisional measures to prevent the executions.
  8. The Secretariat of the Commission faxed a note verbale invoking interim measures under revised Rule 111 of the Commission's Rules of Procedure to the Ministry of Foreign Affairs of Nigeria, the Secretary General of the OAU, the Special Advisor (Legal) to the Head of State, the Ministry of Justice of Nigeria, and the Nigerian High Commission in The Gambia. The note verbale pointed out that as the case of Mr. Saro-Wiwa and the others was already before the Commission, and the government of Nigeria had invited the Commission to undertake a mission to that country, during which mission the communications would be discussed, the executions should be delayed until the Commission had discussed the case with the Nigerian authorities.
  9. No response to this appeal was received before the executions were carried out.
  10. On 7 November 1995 the Provisional Ruling Council (PRC) confirmed the sentences of death and on 10 November 1995 all the accused persons were executed in secret at the Port Harcourt Prison. By section 7 of the Civil Disturbances (Special Tribunals) Decree No. 2 of 1987, under which the executed persons were tried, the PRC are required to receive the records of the trial Tribunal before confirmation of the decision is possible. These records were not prepared by the Tribunal and so were not available for the PRC.

11. In 1996 the Secretariat received a communication from Interights representing Ken Saro-Wiwa Jr. It alleged that the condemned persons had been detained arbitrarily prior to and during the trial and that they had been subjected to torture in the Army camp. Furthermore it alleged serious irregularities concerning the conduct of the trial: that the tribunals that convicted the accused persons were not independent; that there was no presumption of innocence; that the accused persons had not been given time or facilities in which to prepare their defence; that they had been denied legal representation by a counsel of their choice; that there was no right of appeal and that following the sentencing the persons were held incommunicado. Interights asserted that they were tried, convicted and sentenced to death for the peaceful expression of their views and opinions on the violations of the rights of the Ogoni people.
12. In December 1996 the Secretariat received a communication from the Civil Liberties Organisation, alleging that the Civil Disturbances (Special Tribunal) Decree is invalid because it was made without participation of the people; that its composition with military officers and members of the Provisional Ruling Council meant that it could not be impartial; and that the lack of judicial review of the decisions of this tribunal amount to a violation of the right to appeal and fair trial. The communication alleges that the trial, conviction and sentencing of Ken Saro-Wiwa and others violated Articles 7.1(b)(c) and (d) of the African Charter, and that the execution of these persons violates Article 4. The communication alleges that the arraignment of 19 more alleged suspects constitutes another potential violation of the Charter.]

**The Complaint:**

13. The Communications allege violation of Articles 1, 4, 5, 7, 9, 10, 11, 16 and 26 of the African Charter.

**The State Response and Observations:**

14. The government argues that its actions were necessary to protect the rights of the citizens who had been murdered; that the tribunal which tried Saro-Wiwa was competent because two of its three members were lawyers; that the process of confirmation by a state government was an adequate appeal; that the Civil Disturbances Decree had not been protested upon its enactment in 1987 and that it had been set up to deal with a crisis situation.

**Procedure before the Commission:**

15. **Communication 137/94** is dated 28 September 1994 and was submitted by International Pen.
16. **Communication 139/94** is submitted by Constitutional Rights Project and dated 9 September 1994.

17. The Commission was seized of the communications at its 16th Session in October 1994, but deferred its decision on admissibility pending notification and receipt of additional information from the Nigerian Government.
18. At the 16th session the Commission decided to merge the communications.
19. On 9 November 1994, a notification of the two communications was sent to the Nigerian Government and Rule 109 of the Rules of Procedure was invoked, requesting the Nigerian Government not to cause irreparable prejudice to Mr. Saro-Wiwa.
20. On 6 February 1995 a letter was received from International Pen stating that Mr. Saro-Wiwa was being ill-treated and that he was facing the death penalty.
21. On 13 February a letter was sent to the Nigerian Government re-emphasising the need for Rule 109 to be applied.
22. On 22 February 1995, a letter was received from complainants stating that Ken Saro-Wiwa had been charged and was scheduled to appear before a three person tribunal from which there was no right of appeal. The tribunal members are chosen by General Abacha in violation of international fair trial standards. The complainant recognised that local remedies had yet to be exhausted and announced its intention to present an update of the case to the Commission once the trial was completed.
23. At the 17th session the Commission declared the communications admissible. They were to be heard on their merits at the 18th session.
24. On 20 April 1995, letters were sent to the Government of Nigeria and the complainants informing them of this.
25. On 28 June 1995 a letter was received from the Constitutional Rights Project describing developments in the case.
26. On 1 September 1995, a letter was sent to the government of Nigeria stating that the communication would be heard on the merits at the 18th session of the Commission and inviting the government to send a representative.
27. At the 18th session the Commission decided that the communications should be taken up by the mission planned for Nigeria.
28. On 9 October 1995 a letter was received from PEN American Centre expressing concern for the state of health of Mr. Saro-Wiwa.
29. On 1 November 1995, upon hearing that a death sentence had been passed on Mr. Saro-Wiwa and eight of his co-defendants, the Secretariat faxed a note verbale to the government of Nigeria, invoking the revised

- Rule of Procedure 111 (formerly 109) asking that the executions should be delayed until the Commission had taken its mission and spoken with the competent authorities. This note verbale was also faxed to the Secretary General of the OAU, the Nigerian High Commission in Banjul, and the Special Adviser (Legal) to the Head of State of Nigeria.
30. On 2 November 1995 a letter was received from the Constitutional Rights Project notifying the Secretariat of the death sentences and requesting that provisional measures be invoked.
  31. On 9 November 1995 Commissioner Dankwa, hearing that the death sentence had been confirmed, wrote to the Secretariat requesting such action. He was faxed a copy of the note verbale.
  32. On 20 November 1995 the Secretariat received a note verbale from the Nigerian High Commissioner in Banjul, attempting to justify the executions.
  33. On 21 November 1995 the Secretariat wrote a note verbale to the Nigerian High Commission in Banjul, requesting the official judgement in the Saro-Wiwa case, which had been mentioned in the note verbale.
  34. On 30 November 1995 a letter was sent to the complainants stating that the communications would be taken up by the Commission's mission to Nigeria.
  35. On 13 December 1995, the Secretariat received a letter dated 13 November 1995 from the office of the Special Adviser to the Head of State, attempting to justify the executions.
  36. On 18 and 19 December 1995, the Commission held an extraordinary session on Nigeria in Kampala.
  37. On 26 January 1996 a letter was sent to the Constitutional Rights Project informing it of the interim measures taken with regard to Ken Saro-Wiwa.
  38. At the 19th session, held in March/April 1996 in Ouagadougou, Burkina Faso, the Commission heard statements from the government of Nigeria and the complainants. Mr. Chidi Anselm Odinkalu was duly authorised to appear for the complainants, and Mr. Osah and Mr. Bello appeared for the Nigerian Government. At the end of the hearing the Commission took a general view on the cases and deferred taking final decision in each case pending the accomplishment of its proposed mission to Nigeria. The Commission proposed May 1996 as the dates for the visit. The Nigerian delegation said they will communicate these dates to the Government of Nigeria for confirmation.
  39. On 8 May 1996 the Commission wrote to the Nigerian Government, Constitutional Rights Project and International PEN informing them that a decision had been taken at the 19th session to send a mission to the country where the cases would be taken up.

40. At the 20th session held in Grand Bay, Mauritius, October 1996, the Commission decided to postpone the final decision on the merits of the communications to the next session, awaiting the result of the planned mission to Nigeria. The Commission also decided to join communication 154/96 with these communications.
41. On 10 December 1996 the Secretariat sent letters to the complainants informing them of the decisions of the Commission.
42. On 10 December 1996 the Secretariat sent a note verbale to the government informing it of the decisions of the Commission.
43. On 29 April, the Secretariat received a letter from Mr. Olisa Agbakoba entitled **Preliminary objections and observations** to the Mission of the Commission which visited Nigeria from March 7-14 1997. The document was submitted on behalf of Interights with regard to 14 communications, including this one.
44. Among the objections raised and or observations made were: a) the neutrality, credibility and relevance; and composition of the Mission.
45. At its 21<sup>ST</sup> session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the submission of scholarly article and court decisions by the complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria. It must be stated that Mr. Chidi Odinkalu did send the article mentioned above.
46. On 22 May, the complainants were informed of the Commission's decision, while the State was informed on May 28.
47. **Communication 154/96** is dated 6 November 1995 and received at the Secretariat on 4 March 1996.
48. The communication requested the Commission to take interim measures to prevent the executions. A supplementary submission was sent with the communication informing the Commission that the executions had taken place on 10 November but that the communication was reaffirmed.
49. On 13 November 1995 the Nigerian Government wrote to the Commission informing it of the Government's view of the situation.
50. On 20 November 1995 the High Commission of Nigeria in the Gambia giving its opinion on the matter.
51. On 21 November 1995 the Commission wrote to the High Commission of Nigeria in the Gambia requesting a copy of the Justice's judgement in the case.
52. On 12 March 1996 a confirmation was sent to this effect by the complainant.

53. At the 19th session in March 1996 the communication was not considered, but the Commission took a general view of all the communications against Nigeria and deferred any decision on cases pending the accomplishment of its proposed mission to Nigeria.
54. On 13 August 1996 a complete copy of the communication was sent to the government of Nigeria.
55. On 13 August 1996 a letter was sent to the complainant informing him of the status of the case.
56. On 4 February 1997, the Secretariat received a letter entitled supplementary submissions with respect to communication No. 154/96
57. On 4<sup>th</sup> April, the Secretariat acknowledged receipt of the letter.
58. On 29 April, the Secretariat received a letter from Mr. Olisa Agbakoba entitled **Preliminary objections and observations** to the Mission of the Commission which visited Nigeria from March 7-14 1997. The document was submitted on behalf of Interights with regard to 14 communications, including this one.
59. Among the objections raised and or observations made were: a) the neutrality, credibility and relevance; and composition of the Mission.
60. At its 21<sup>ST</sup> session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the submission of scholarly articles and court case by the complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.
61. On 22 May, the complainants were informed of the Commission's decision, while the State was informed on May 28.
62. On May 27, the Secretariat received a letter from the complainant entitled **Additional Information on Ouster Clauses in Nigerian Law** in which he promised to furnish the Secretariat with the information requested by the Commission at its 21<sup>st</sup> session " within the next three weeks".
63. From this day on the procedure is identical to communications 137/94 and 139/94.
64. **Communication 161/97** was received on 10 January 1997.
65. On 14 January 1997 a note verbale with a copy of the communication was sent to the Ministry of External Affairs, copy to the Special Legal Adviser to the Head of State, the Nigerian High Commission, and the Embassy of Nigeria in Addis Ababa.

66. On 23 January 1997 an acknowledgement of receipt was sent to the complainant.
67. At its 21<sup>ST</sup> session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the submission of scholarly articles and court case by the complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.
68. On 22 May, the complainants were informed of the Commission's decision, while the State was informed on May 28.
69. At the 22<sup>nd</sup> Ordinary session, the Commission postponed taking a decision on the cases pending the discussion of the Nigerian Mission report.
70. At the 23<sup>rd</sup> Ordinary session held in Banjul The Gambia, from 20-29 April 1998, the Commission was unable to consider the communication due to lack of time.
71. On 25 June 1998, letters were sent from the Secretariat of the Commission to all parties concerned regarding the status of the communications.

## **LAW**

### **Admissibility**

72. Article 56 of the African 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,..."*

73. 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 consideration of communications, it has already been the subject of substantial interpretation; in the jurisprudence of the African Commission, there are several important precedents.
74. 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.

75. 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 legally prohibited their challenge in the Nigerian Courts (ACHPR/129/94:14-15).
76. In all of the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illusory. 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" (Reprinted in the Constitutional Rights Journal). It remains to be seen whether any Nigerian courts will be courageous enough to follow this holding, and whether the government will abide by their rulings should they do so.
77. In the present case, while the above reasoning was used in the initial decisions on admissibility, it is at the present time unnecessary. In light of the fact that the subjects of the communications are now deceased, it is evident that no domestic remedy can now give the complainants the satisfaction they seek. The communications are thus admissible.

### **Merits**

78. Article of the Charter 5 reads:

*"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 slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."*

79. Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience.
80. International PEN alleges that Ken Saro-Wiwa was kept in leg irons and handcuffs and subjected to ill-treatment including beatings and being held in cells which were airless and dirty, then denied medical attention, during the first days of his arrest. There was no evidence of any violent action on his part or escape attempts that would justify holding him in irons. Communication 154/96 alleges that all the victims were manacled in their cells, beaten and chained to the walls in their cells.

81. The government has made no written submission in these cases, and has not refuted these allegations in its oral presentation. It is well-established jurisprudence of the Commission that where allegations go entirely unchallenged, it will proceed to decide on the facts presented (See, e.g., the Commission's decisions in communications 59/91, 60/91, 64/91, 87/93 and 101/93). Thus, the Commission holds a violation of Article 5 of the Charter.

82. Article 6 of the African Charter reads:

*"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."*

83. All the victims were arrested and kept in detention for a lengthy period under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons ) Amended Decree No. 14 (1994), that stipulates that the government can detain people without charge for as long as three months in the first instance. The decree also states that the courts cannot question any such detention or in any other way intervene on behalf of the detainees. This decree allows the government to arbitrarily hold people critical of the government for up to 3 months without having to explain themselves and without any opportunity for the complainant to challenge the arrest and detention before a court of law. The decree therefore prima facie violates the right not to be arbitrarily arrested or detained protected in Article 6.

84. The government has made no defence of this decree, either for its general validity or its justice as applied in this case. Thus, the Commission holds a violation of Article 6.

85. Article 7 of the African Charter reads:

"1. Every individual shall have the right to have his cause heard. This comprises:

(a) The right to appeal to competent national organs against acts of violating his fundamental rights

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

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

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

86. As regards the conduct of the trial itself, it is unnecessary for the Commission to delve into the specific circumstances, because by the Commission's own precedent the tribunal was defective. As will be recalled, in its decision on Communication 87/93, the Commission considered that

special tribunals established under the Civil Disturbances Act violate Article 7.1(d) of the African Charter, because their composition is at the discretion of the executive branch. Removing cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch necessarily compromises their impartiality, which is required by the African Charter. This violation of the impartiality of tribunals occurs in principle, regardless of the qualifications of the individuals chosen for a particular tribunal.

87. The note verbale of the Nigerian High Commissioner in The Gambia points out that the tribunal was not a military one, but was presided over by a judge of the Nigerian Court of Appeal, and that tribunals are properly constituted in the Nigerian judicial system to deal with specific issues and for speedier dispensation of justice. The note verbale makes other specific points on the conduct of the trial, arguing for its fairness: the placement of evidence, its conduct in public, and the fact that some of the defendants were ultimately acquitted.
88. In its oral presentation at the 19th session, the government argued that the confirmation of sentence given by the state governors is an adequate appeal.
89. The Commission might cite opposing facts, casting doubt upon the fairness of the tribunal. For example, The Head of State personally chose its members consisting of three instead of the five persons required by the Civil Disturbances Act. When defence counsel wrote to the Chief Judge of the Federal High Court on 27 November 1994 for information on when the trial would begin, the judge responded, "This Court has nothing to do about the Tribunal. It is the responsibility of the Presidency".
90. There is a great deal of information available from Nigerian and international sources on the day-to-day conduct of the tribunal and the significance of its legal rulings. Yet in reaching its decision, the Commission need only rely upon its earlier holding, made in less politically charged circumstances, that the special tribunals established under the Civil Disturbances Act are in violation of the African Charter. As a result, it finds that Ken Saro-Wiwa and his co-defendants were denied the right to a fair trial, in violation of Article 7.1(d).
91. Section 7 of the Civil Disturbances (Special Tribunals) Decree No. 2 of 1987 decides that the confirming authority of judgments given under the act is the PRC, that is the ruling council of the Federal Military government, the members of which are exclusively members of the armed forces.
92. Section 8(1) of the same Decree stipulates:

"The validity of any decision, sentence, judgement, confirmation, direction, notice or order given or made, as the case may be, or any other thing whatsoever done under this Act shall not be inquired into by any court of law."

93. In this case, it is not safe to view the Provisional Ruling Council as impartial or independent. Section 8(1) effectively ousts all possibility of appeal to the ordinary courts. Thus, the accused persons had no possibility of appeal to a competent national organ, and the Commission finds a violation of Article 7.1(a).

94. Article 26 of the African Charter reads:

"States parties to the present Charter shall have the duty to guarantee the independence of the Courts...."

95. As stated above, the Special Tribunal and the Provisional Ruling Council are not independent. The Commission also finds that there is a violation of Article 26 of the African Charter.

96. The government has not contradicted the allegations contained in communication 154/96 that at the conviction in October 1995 the Tribunal itself admitted that there was no direct evidence linking the accused to the act of the murders, but held that they had each failed to establish that they did not commit the crime alleged. Communication 154/96 has also affirmed that prior to and during the trial, leading representatives of the government pronounced MOSOP and the accused guilty of the crimes at various press conferences and before the United Nations. As the allegations have not been contradicted, the Commission find a violation of the right to be presumed innocent, Article 7.1(b).

97. Initially, the accused were defended by a team of lawyers of their own choice. According to Communication 154/96 and Communication 139/94, this team withdrew from the case because of harassment, both in the conduct of the trial and in their professional and private lives outside. Communication 154/96 alleges that two of the lawyers were seriously assaulted by soldiers claiming to be acting on the instruction of the military officer responsible for the trial. On three occasions defence lawyers were arrested and detained and two of the lawyers had their offices searched. When these lawyers withdrew from the case, the harassment subsided.

98. After the withdrawal of their chosen counsel, the accused were defended by a team assigned by the Tribunal. However, this team also resigned, complaining of harassment. After that, the accused declined to accept a new team appointed by the Tribunal, and the court proceedings were closed without the accused having legal representation for the duration.

99. **Communication 154/96** also claims that the defence was denied access to the evidence on which the prosecution was based and that files and documents which were required by the accused for their defence were removed from their residences and offices when they were searched by security forces on different occasions during the trial.

100. The government claims that: "Their [the accused] defence team which comprised sly human rights activists such as Femi Falana and Gani Fawehinmi, known to be more disposed towards melodrama than the actual

defence of their clients, inexplicably withdrew from the Special Tribunal at a crucial stage of the trial in order to either play to the gallery or delay and frustrate the process".

101. This statement does not contradict the allegations of Communication 154/96, that two different defence teams were harassed into quitting the defence of the accused persons; it merely attributed malicious motives to the defence. The government has not responded to the allegations of withholding evidence from the defence. The Commission therefore finds itself with no alternative but to conclude that a violation of Article 7.1(c) has occurred.

102. Article 4 of the African Charter reads:

"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

103. Given that the trial which ordered the executions itself violates Article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of Article 4. The violation is compounded by the fact that there were pending communications before the African Commission at the time of the executions, and the Commission had requested the government to avoid causing any "irreparable prejudice" to the subjects of the communications before the Commission had concluded its consideration. Executions had been stayed in Nigeria in the past on the invocation by the Commission of its rule on provisional measures (Rule 109 now 111) and the Commission had hoped that a similar situation will obtain in the case of Ken Sarow-Wiwa and others. It is a matter of deep regret that this did not happen.

104. The protection of the right to life in Article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victims' lives was seriously endangered by the denial of medication during detention. Thus, there are multiple violations of Article 4.

105. Article 11 of the African Charter provides:

*"Every individual shall have the right to assemble freely with others..."*

106. Communication 154/96 alleges that Article 11 was violated because the murder trial directly followed public meetings of MOSOP. In its judgement, the Tribunal held that the condemned persons "created the fire that consumed the four Ogoni chiefs" by wrongfully organising election campaign rallies and permitting a large crowd of fanatical MOSOP and NYCOP youths to congregate. It appears that the Tribunal holds the accused responsible for the murders because they organised the rally after which the murders took place, although Ken Saro-Wiwa for one was prevented by government officials from attending the rally. The Commission has considerable difficulty with this position as it can adversely affect the right to assembly.

107. Article 10.1 of the African Charter reads:

*“Every individual shall have the right to free association provided that he abides by the law.”*

108. Communication 154/96 alleges that Article 10.1 was violated because the victims were tried and convicted for their opinions, as expressed through their work in MOSOP. In its judgement, the Tribunal held that by their membership in MOSOP, the condemned persons were responsible for the murders, guilt by association, it would seem furthermore that, government officials at different times during the trial declared MOSOP and the accused guilty of the charges, without waiting for the official judgement. This demonstrates a clear prejudice against the organisation MOSOP, which the government has done nothing to defend or justify. Therefore the Commission finds a violation of Article 10.1.

109. Article 9.2 of the African Charter reads:

*“Every individual shall have the right to express and disseminate his opinions within the law.”*

110. There is a close relationship between the rights expressed in the Articles 9.2, 10.1 and 11. Communication 154 alleges that the actual reason for the trial and the ultimate death sentences was the peaceful expression of views by the accused persons. The victims were disseminating information and opinions on the rights of the people who live in the oil producing area of Ogoniland, through MOSOP and specifically a rally. These allegations have not been contradicted by the government, which has already been shown to be highly prejudiced against MOSOP, without giving concrete justifications. MOSOP was founded specifically for the expression of views of the people who live in the oil producing areas, and the rally was organised with this in view. The Government's actions is inconsistent with Article 9.2 implicit when it violated Articles 10.1 and 11.

111. Article 16 of the Charter reads:

“1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.  
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

112. The responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the actions of the authorities. The state has a direct responsibility in this case. Despite requests for hospital treatment made by a qualified prison doctor, these were denied to Ken Saro-Wiwa, causing his health to suffer to the point where his life was endangered. The government has not denied this allegation in any way. This is a violation of Article 16.

113. Nigeria has been a State Party to the African Charter for over a decade, and is thus bound by Article 1 of the African Charter.

114. The Commission assists States parties to implement their obligations under the Charter. Rule 111 of the Commission's Rules of Procedure (revised) aims at preventing irreparable damage being caused to a complainant before the Commission. Execution in the face of the invocation of Rule 111 defeats the purpose of this important rule. The Commission had hoped that the Government of Nigeria would respond positively to its request for a stay of execution pending the former's determination of the communication before it.

115. This is a blot on the legal system of Nigeria which will not be easy to erase. To have carried out the execution in the face of pleas to the contrary by the Commission and world opinion is something which we pray will never happen again. That it is a violation of the Charter is an understatement.

116. The Nigerian Government itself recognises that human rights are no longer solely a matter of domestic concern. The African Charter was drafted and acceded to voluntarily by African States wishing to ensure the respect of human rights on this continent. Once ratified, States Parties to the Charter are legally bound to its provisions. A state not wishing to abide by the African Charter might have refrained from ratification. Once legally bound, however, a state must abide by the law in the same way an individual must.

#### **FOR THE ABOVE REASONS, THE COMMISSION**

**decides that** there has been a violation of Articles 5 and 16 in relation to Ken Saro-Wiwa's detention in 1993 and his treatment in detention in 1994 and 1995;

**decides that** there has been a violation of Articles 6 in relation to the detention of all the victims under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amended Decree no. 14 (1994). The government therefore has the obligation to annul these Decrees;

**Reiterates** its decision on communication 87/93 that there has been a violation of Article 7.1(d) and with regard to the establishment of the Civil Disturbances Tribunal. In ignoring this decision, Nigeria has violation Article 1 of the Charter;

**decides that** there has been a violation of Articles 4 and 7.1 (a), (b) (c) and (d) in relation to the conduct of the trial and the execution of the victims;

**holds that** there has been a violation of Articles 9.2, 10.1 and 11, 26, 16;

**holds that** in ignoring its obligations to institute provisional measures, Nigeria has violated Article 1.

Banjul, 31<sup>st</sup> October 1998.

