

218/98 - Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project / Nigeria

Rapporteur:

24th Session: Commissioner Pityana

25th Session: Commissioner Pityana

26th Session: Commissioner Pityana

27th Session: Commissioner Pityana

28th Session: Commissioner Pityana

29th Session: Commissioner Pityana

SUMMARY OF FACTS:

1. The authors of the communication are three NGOs based in Nigeria with observer status with the African Commission. Nigeria is a State Party to the African Charter on Human and Peoples' Rights.
2. The Communication was received on 3rd August 1998.
3. The authors allege a violation of the African Charter in that
 - i) An unfair trial in respect of the trial and conviction of Lt. Gen. Oladipo Diya and four other soldiers and a civilian;
 - ii) The above mentioned victims were convicted and sentenced to death by a Special Military Tribunal for an alleged coup plot to overthrow the Nigerian Military Government under Gen. Sani Abacha;
4. It is alleged that on December 21st 1997, the Nigerian Military Government announced that it had uncovered a coup plot. Following this, 26 persons were arrested including Lt. Gen. Oladipo Diya, Major General Abdulkadir Adisa, Lt. Gen. Olarenwaju, Col. Akintonde and Professor Odekunle.
5. It is also alleged that in January 1998, the Nigerian Military government set up a Military Panel of Inquiry to investigate the alleged coup plot. Before the trial, the government displayed to a selected audience, videotapes of supposed confessions by the suspects.
6. On 14th February 1998, a Special Military Tribunal was constituted. Members of the tribunal included serving judges, but the Chairman is a member of the Provisional Ruling Council (PRC).
7. The decision of the tribunal is not subject to appeal, but confirmation by the PRC, the members of which are exclusively members of the armed forces.

8. The Tribunal concluded its proceedings in early April 1998 and on 28th April 1998, announced the conviction and sentencing to death of six of the accused, including the five persons mentioned above.
9. The authors contend that the arrest, detention, arraignment and trial of the convicted and sentenced persons was unlawful, unfair and unjust and as such a violation of the provisions of the African Charter on Human and Peoples' Rights.
10. The communication alleges that the following Articles of the African Charter on Human and Peoples' Rights have been violated: *Articles 4, 5, 6, 7, and 26*.

PROCEDURE:

11. At the 24th ordinary session, the Commission considered the communication and decided to be seized of it.
12. On 26th November 1998, letters were sent to the parties involved informing them of the Commission's decision.
13. At its 25th ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give its opinion on the effect of article 56(7) of the Charter in view of the political developments in Nigeria, and postponed consideration on admissibility to the 26th ordinary session.
14. On 13th May 1999, the Secretariat of the Commission dispatched letters to all the parties notifying them of this decision.
15. At its 26th ordinary session held in Kigali, Rwanda, the Commission declared the communication admissible in line with the recommendation of the Secretariat and requested parties to submit arguments on the merits of the case.
16. By separate letters dated 17th January 2000, all the parties were informed of the decision.
17. On 17th February 2000, the Secretariat received a Note Verbale from the High Commission of the Federal Republic of Nigeria in Banjul, requesting the Commission to forward the following documents to the country's competent authorities to enable them prepare appropriate responses to the alleged violations:
 - (a) The Draft Agenda for the 27th ordinary session and the letter of invitation to the said session;
 - (b) A copy of the complaint that was attached to the Secretariat's Note; and
 - (c) A copy of the Report of the 26th ordinary session
18. Further to the above request, the Secretariat of the Commission on 8th March 2000, forwarded all the documents requested, except the Report of the 26th ordinary

session, together with a copy of the summary and status of all communications filed against Nigeria which were pending before the Commission during the 26th ordinary session, a copy each of the three communications (*Nos. 218/98, 224/98 and 225/98*) as submitted by their authors, and a copy of the written response of Media Rights Agenda on the merits of *communication 224/98*.

19. At its 27th Ordinary Session held in Algiers, Algeria, the Commission found a violation of Article 7 of the Charter and requested the Government of Nigeria to compensate the victims accordingly.
20. At its 28th Ordinary Session held in Cotonou, Benin, the rapporteur noted that although a decision had been taken at the 27th Ordinary Session, some amendments were necessary in order to reflect the peculiar nature of trials of soldiers by military tribunals. He undertook to continue working on the case and the matter was deferred to the 29th Ordinary Session.

THE LAW:

Admissibility

21. At its 25th ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give an opinion on the effect of Article 56(7) of the Charter in view of the changing political and constitutional situation in Nigeria. Relying on the case law of the Commission, the Secretariat submitted that based on the well established principle of international law, a new government inherits its predecessor's obligations, including responsibility for the previous government's misdeeds (*see Krishna Achutan and Amnesty International / Malawi, communications 62/92, 68/92 and 78/92*).
22. The Commission has always dealt with communications by deciding upon the facts alleged at the time of submission of the communication (*see communications 27/89, 46/91 and 99/93*). Therefore, even if the situation has improved, such as leading to the release of the detainees, repealing of the offensive laws and tackling of impunity, the position still remains that the responsibility of the present government of Nigeria would still be engaged for acts of human rights violations which were perpetrated by its predecessors.
23. It was noted that although Nigeria was under a democratically elected government, section 6(6)(d) of the Constitution provides that no legal action can be brought to challenge 'any existing law made on or after 15th January 1966 for determining any issue or question as to the competence of any authority or person to make any such law'. This means that there is no recourse within the Nigerian legal system for challenging the legality of any unjust laws.

For the above reasons, and also for the fact that, as alleged, there were no avenues for exhausting local remedies, the Commission declared the communication admissible.

Merits

24. In interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly fifteen years. The Commission is also enjoined by the Charter and international human rights standards which include decisions and general comments by the UN treaty bodies (Article 60). It may also have regard to principles of law laid down by State Parties to the Charter and African practices consistent with international human rights norms and standards (Article 61). In this matter, the Charter is silent on its application to military courts or tribunals.
25. The issues brought before the Commission have to be judged in the environment of a military junta and serving military officers accused of offences punishable in terms of military discipline in any jurisdiction. This caution has to be applied especially as pertaining to serving military officers. The civilian accused is part of the common conspiracy and as such it is reasonable that he be charged with his military co-accused in the same judicial process¹. We are making this decision conscious of the fact that Africa continues to have military regimes who are inclined to suspend the constitution, govern by decree and seek to oust the application of international obligations. Such was the case in Nigeria under Military strongman Sani Abacha.
26. We believe that this decision must indicate the durability of the norms prescribed by the Charter and the duties on whatever system of governance may be in place, to abide by the international norms as well as duties established in international human rights law. It must be clearly understood that the military tribunal here is one under an undemocratic military regime. In other words, the authority of the executive and the legislature has been subsumed under the military rule. Far from this suggesting that military rulers have carte blanche to govern at the whim of a gun, we wish to underscore the fact that the laws of human rights, justice and fairness must still prevail².
27. It is our view that the provisions of Article 7 should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike especially under an unaccountable, undemocratic military regime. The Human Rights Committee in its General Comment No 13 states that Article 14 of the ICCPR

¹ In General Comment No 13 (XXI/1984) para.4 the UN Human Rights Committee argues that “While the Covenant does not prohibit such categories of courts (military or special courts which try civilians), nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.”

² In Communications No: 137/94, 139/94, 154/96 and 161/97 International PEN, Constitutional Rights Project, and Civil Liberties Organisation, Interights on behalf of Ken Saro-Wiwa, Jr/Nigeria, the Commission found that trials held under the Civil Disturbances (Special Tribunals) Decree No 2 of 1987 were in violation of the Charter in that the judgements of the tribunals were not subject to appeal but had to be confirmed by the Provisional Ruling Council, the members of which were military officers. The decree effectively ousts the jurisdiction of the ordinary courts and as such they had no access to a competent, independent, fair and impartial court (*vide Compilation; ibid; paras 89-101*).

applies to all courts and tribunals whether specialised or ordinary. The Committee went on to note the existence of military or special courts in many jurisdictions which, nonetheless, try civilians. It is noted that this could present serious problems as far as equitable, impartial and independent administration of justice is concerned. Such courts are resorted to in order to justify recourse to exceptional measures which do not comply with normal procedures. The European Commission has ruled that the purpose of requiring that courts be “established by law” is that the organisation of justice must not depend on the discretion of the Executive, but must be regulated by laws emanating from parliament. The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.

28. It is alleged that in contravention of Article 7(1)(c) of the Charter, the convicted persons were not given the opportunity to be represented and defended by counsel of their choice, but rather that junior military lawyers were assigned to them and their objections were overruled. The fairness of the trial is critical if justice is to be done. For that especially in serious cases, which carry the death penalty, the accused should be represented by a lawyer of his choice. The purpose of this provision is to ensure that the accused has confidence in his legal counsel. Failure to provide for this may expose the accused to a situation where they will not be able to give full instructions to their counsel for lack of confidence.
29. Besides, it is desirable that in cases where the accused are unable to afford legal counsel, that they be represented by counsel at state expense. Even in such cases, the accused should be able to choose out of a list the preferred independent counsel “not acting under the instructions of government but responsible only to the accused”. The Human Rights Committee also prescribes that the accused person must be able to consult with his lawyer in conditions which ensure confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with established professional standards without any restrictions, influences, pressures or undue interference from any quarter (*Burgos v Uruguay* and *Estrella v Uruguay*).
30. The right to fair trial is essential for the protection of all other fundamental rights and freedoms. In its Resolution on the Right to Recourse Procedure and Fair Trial, the Commission has observed that the right to fair trial includes, among other things, that:
 - a) In the determination of charges against individuals, the individual shall be entitled in particular to:
 - (i) have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice.
31. The assignment of military lawyers to accused persons is capable of exposing the victims to a situation of not being able to communicate, in confidence, with counsel of their choice. The Commission therefore finds the assignment of military counsel to the accused persons, despite their objections, and especially in a criminal proceeding which carries the ultimate punishment a breach of Article 7(1)(c) of the Charter (*vide* the Ken Saro-Wiwa decision cited above).

32. The communication alleges that under the military rule, the decision of the military tribunal is not subject to appeal, but may be confirmed by the Provisional Ruling Council. The PRC in this instance arrogates to itself the role of Complainant, prosecutor and judge in its own cause. This, it alleged, is a violation of Article 7(1)(a) of the Charter.

Article 7 (1)(a) of the Charter provides:

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

33. The foreclosure of any avenue of appeal to competent national organs in a criminal case attracting punishment as severe as the death penalty clearly violates the said Article. It also falls short of the standard stipulated in paragraph 6 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, to wit:

Any one sentenced to death shall have the right to appeal to the court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

34. Article 6(4) of the ICCPR also makes provision for this protection. In a case against Nicaragua in 1986, the Inter-American Commission of Human Rights (IACHR) stated that “the existence of a higher tribunal necessarily implies a re-examination of the facts presented in the lower court” and that the omission of the opportunity for such an appeal deprives defendants of due process. In other words, a higher threshold of rights is intended for those who are charged with crimes the sentence of which might be the death penalty (*vide: ACHPR Communications 60/91 and 87/93 Constitutional Rights Project/Nigeria*).

35. The communication further alleges that except for the opening and closing ceremonies, the trial was conducted in camera in contravention of Article 7 of the Charter. The Charter does not specifically mention the right to public trials; neither does its Resolution on the Right to Recourse Procedure and Fair Trial. Mindful of developments in international human rights law and practice, and drawing especially from General Comment of the Human Rights Committee to the effect that “the publicity of the hearings is an important safeguard in the interest of the individual and of society at large..., apart from exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons...”³

36. The publicity of hearings is an important safeguard in the interest of the individual and the society at large. At the same time article 14, paragraph 1 acknowledges that courts have the power to exclude all or parts of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the UN Human Rights Committee considers that a hearing must be open to the

³ UN Human Rights Committee General Comment No 13 (XXI/1984) para 6.

public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons.

37. In *Le Compte, van Leuven & de Meyere v Belgium*, the European Commission held that there is no public hearing unless the court dealing with the matter holds its proceedings in public both when considering the facts and when deciding on the law. While it may be acceptable in certain circumstances for the hearing to be held *in camera*, the proceedings should remain fair and in the interests of the parties. While there may be circumstances where a trial in camera may be held, for example, where the identity of the accused or the safety of witnesses need to be protected, this does not prescribe a right but is subject to the discretion of the judicial officer.
38. Article 14 of ICCPR explains that the trial should also guarantee the right of the accused “to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” Where the trial is held in camera, there can be no independent demonstration that these requirements have been met.
39. The State party has not shown that the holding of the proceedings in secret was within the parameters of the exceptional circumstances contemplated above. The Commission therefore finds this a violation of the victims’ right to fair hearing guaranteed under Article 7 of the Charter.

40. Article 7(1)(b) stipulates that

Every individual shall have the right to have his cause heard. This comprises:
(b) the right to be presumed innocent until proven guilty by a competent court or tribunal.

The presumption of innocence is universally recognised. With it is also the right to silence. This means that no accused should be required to testify against himself or to incriminate himself or be required to make a confession under duress (Article 6(2) and 14(3)(g) of ICCPR).

41. In *Krause v Switzerland* the European Commission noted that this principle constituted a fundamental principle, which protects everybody against being treated by public officials as if they were guilty of an offence even before such guilt is established by a competent court. It has been alleged that videotapes show the accused making confession before other military officials. It is suggested that the officials affirmed the guilt of the accused on the basis of the “confessions”. No evidence was led showing that these were the same officials who presided or participated in the Military Tribunal that tried them. The alleged tapes were not presented to the Commission as evidence. In the circumstances, the Commission cannot make a finding on hearsay evidence. We cannot therefore find that the right to presumption of innocence has been violated.
42. The communication alleges that the trial, conviction and sentence of civilians (as at the time of filing of the complaint, one civilian was convicted and sentenced to death) by the tribunal, composed of military personnel as judges, was a breach of

Article 7 of the Charter. The Commission is not convinced that in the circumstances of this case, it was possible to have a separation of trials nor has it been alleged that the civilian accused applied for such separation. It may well be that the cause of justice would not have been served by such a separation. In the circumstances and in this respect, we are not in a position to find a violation Article 7(1)(d) of the Charter.

43. The communication alleges that the composition of the tribunal which was presided over by a serving military officer did not meet the requirement of an independent and impartial judicial panel to try the accused, and therefore a violation of Article 7(1)(d) of the Charter.

Article 7(1)(d) of the Charter provides:

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

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

44. It has been stated elsewhere in this decision, that a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process. We make the point that Military Tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process. What causes offence is failure to observe basic or fundamental standards that would ensure fairness. As that matter has been dealt with above, it is not necessary to find that a tribunal presided over by a military officer is a violation of the Charter. It has already been pointed out that the military tribunal fails the independence test.

45. The Complainant alleges a violation of Articles 5 and 6 of the Charter. No details of the specific elements which constitute such claims are made in the complaint. In the absence of such information, the Commission cannot find a violation as alleged.

For the above reasons, the Commission

Finds violation of Articles 7(1)(a), (c) of the Charter

Urges the Government of the Federal Republic of Nigeria to bring its laws in conformity with the Charter by repealing the offending Decree.

Requests the Government of the Federal Republic of Nigeria to compensate the victims as appropriate.

**Done at the 29th Ordinary Session held in Tripoli, Libya,
from 23rd April to 7th May 2001.**