IN THE SUPREME COURT OF NIGERIA

Suit No: SC45/1997

Petitioner: General Sanni Abacha, Attorney-General of the Federation, State Security Service, Inspector-General of Police

And

Respondent: Chief Gani Fawehinmi

Date Delivered: 2000-04-28

Judge(s): Salihu Modibbo Alfa Belgore, Michael Ekundayo Ogundare, Uthman Mohammed, Anthony Ikechukwu Iguh,Okay A

Judgment Delivered

The facts of this case are simple enough. The respondent, a legal practitioner, was arrested without warrant at his residence on Tuesday, January 30th, 1996 at about 6 a.m., by 6 men who identified themselves as operatives of the State Security Service (hereinafter is referred to as SSS) and Policemen, and taken away to the office of the SSS at Shangisha where he was detained. At the time of his arrest the respondent was not informed of, nor charged with, any offence. He was later detained at the Bauchi prisons. In consequence, he applied ex-parte through his counsel, to the Federal High Court, Lagos pursuant to the Fundamental Rights (Enforcement Procedure) Rules 1979 for the following reliefs against the 4 respondents who are now appellants before us and shall hereinafter be referred to as appellants:-

A declaration that the arrest of the applicant, Chief Gani Fawehinmi at his residence at 9A Ademola Close GRA, Ikeja, Lagos on Tuesday, January 30, 1996. by the State Security Service (S.S.S.) or officers, servants, agents, privies of the respondents and\\or of the Federal Military Government constitutes a violation of the applicant's fundamental rights guaranteed under sections 31, 32 and 38 of the 1979 Constitution and Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

A declaration that the detention and the continued detention of the applicant without charge since Tuesday January 30, 1996 when the applicant was arrest by the officers, servants, agents, privies of the respondents at his residence, 9A Ademola Close GRA, Ikeja, Lagos constitutes a gross violation of the applicant's fundamental rights guaranteed under sections 31,32 and 38 of the 1979 Constitution and Articles 5,6 and 12 of the African Charter on Human & Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

A mandatory order compelling the respondents, whether by themselves or by their officers, agents, servants privies or otherwise howsoever to forthwith release the applicant.

Alternatively

An order of mandamus compelling the respondents to forthwith arraign the applicant before a properly constituted Court or Tribunal as required by section 33 of the Constitution of the Federal Republic of Nigeria 1979 as preserved by decree 107 of 1993 and Articles 7 of the African Charter on Human and Peoples Rights' (Ratification and Enforcement) Act. Cap. 10 Laws of the Federation of Nigeria 1990.

An injunction restraining the respondents, whether by themselves or by their officers, agents, servants, privies or otherwise howsoever from further arresting, detaining or in any other manner infringing on the fundamental rights of the applicant.

N10,000,000.00 (Ten Million Naira) damages for the unlawful and unconstitutional arrest and/or detention of the applicant ' Chief Gani Fawehinmi.

Leave having been granted, he applied by motion on notice for the said reliefs. On being served with the motion papers learned counsel for the appellants filed a preliminary objection to the effect that the respondent could not maintain the action against the appellants on the ground that the Court lacked competence to entertain it. The reasons given for the objection were:

By a subsidiary legislation made by the Inspector-General of Police in exercise of the powers conferred on him by State

Security (Detention of Persons) Decree No. 2 of 1984 (as amended) and further by section 4 of the aforementioned Decree No. 2 of 1984 (as amended), the respondent/applicants are immune to any legal liabilities in respect of any action done pursuant to the Decree.

The Federal Military Government (Supremacy and Enforcement) of Powers Decree No. 12 of 1994 and Constitution (Suspension and Modification) Decree No. 107 oust the jurisdiction of this Honourable Court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree.

This Honourable Court lacks the constitutional jurisdiction to entertain any action relating to the enforcement of any of the provisions of Chapter IV of the 1979 Constitution (as amended) and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

Arguments on the preliminary objection were taken form learned counsel appearing for the parties in the course of which a detention order No. 00455 dated 3/2/96 by which the respondent was detained, was shown to the Court and Counsel for the respondent. In a reserved ruling given on 26th day of March 1996, the learned trial judge found-

1. \"That the Inspector-General of Police has been given the power to detain a person by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 as amended by the State Security (Detention of Persons) (Amendment) Decree No. 11 of 1994.

2. That the Court cannot question the legality of the Detention Order since it was made by the appropriate authority under the Decree.

3. That any of the provisions of the African Charter on Human and peoples' Rights which is inconsistent with Decree No. 107 of 1993 (the grundnorm) is void to the extent of its inconsistency.

4. That the African Charter on Human and Peoples'Rights has no legs to stand on its own under the Nigerian law. It cannot be enforced as a distinct law. As such, it is subject to our domestic law and ouster decree.\"

The learned judge concluded-

\"In the result, I hold that jurisdiction of this court is ousted by Decree No. 2 of 1984 and therefore, it cannot entertain the action. Consequently, the objection raised by the respondents is sustained, this suit is accordingly struck out. This ruling affects the order of this court made on the 14th of February, 1996.\"

The respondent being dissatisfied with the decision of the Federal High Court, appealed to the Court of Appeal which Court, in a unanimous decision given on 12th day of December 1996 allowed the appeal in a part and remitted \"the case back to the trial Court to consider the issue of the consequences of the detention for the four days of the appellant which is apparently not covered by the order'. In coming to this conclusion, the Court of Appeal found:

\"That the learned trial judge was right in coming to the conclusion that the Inspector-General of Police is empowered to issue a detention Order under the provisions of Decree No. 2 of 1984 as amended and that he had no jurisdiction to entertain the matter in that by virtue of the provisions of section 4 of Decree No. 2 of 1984 as amended and Decree No. 11 of 1994, the jurisdiction of the court is ousted to entertain the appellant's case.\"

That though the Detention Order should have been exhibited to the Notice of Preliminary Objection, the way and the manner it was introduced in the court below did not occasion any miscarriage of justice.\"

That notwithstanding the fact that Cap. 10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of 1993 or No. 11 of 1994 cannot affect its operation in Nigeria.

That the provision of Cap. 10 (The African Charter on Human and Peoples' Right Act) of the laws of the Federation 1990 are provisions in a class of their own. While the Decrees of the Federal Military Government may over-ride other municipal laws they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. They are protected by the International law and the Federal Military Government is not legally permitted to legislate out of its obligations.

That the appellant (respondent before us) was wrong in the procedure he adopted to enforce the Charter under the special jurisdictions of the court in reliance on section 42 of the Constitution. The learned trial judge was right to decline jurisdiction under the circumstances on the basis of the procedure adopted.

That the Detention Order is not a legislative judgment by any means.

Pats-Acholonu,JCA in his concurring judgment observed:

\"When I look at this case, I observe that one of the respondents is the Head of State - General Sani Abacha himself. I wonder whether the appellant is unaware of the Provisions of Section 67 of the Constitution of the Federal Republic of Nigeria. That section provides immunity against the civil or criminal action or proceedings against the person of the President or the Head of State. It is wrong in law to have joined him as a party. The constitution is the primary law of the land. I hold therefore, that the name of the Head of State should not have been reflected in the suit in the first place. It

offends the provision of the Constitution.\"
No other judge of the court below who sat on the appeal made any observation to the same effect. But this observation of Pats-Acholonu JCA is now made a ground of appeal in the cross-appeal.
Both parties are aggrieved by the decision of the court below and have appealed to this court. In the main appeal, the appellants complained against those parts of the judgment of the Court below that relate to findings on the status of the African Charter on Human and Peoples' Right and the order remitting the case to the trial court for the action before the latter court to be resolved on the period of four days not covered by the Detention Order. The respondent cross-appealed against those parts of the court below relating to-

Power of Inspector-General to sign and issue a detention order;

Mode of enforcement of fundamental rights guaranteed under the African Charter on Human and Peoples' Rights (hereinafter is referred to simply as the African Charter;

Procedure for tendering detention order; and

Immunity of the Head of State.

Pursuant to the rules of this court the parties filed and exchanged their respective written briefs of arguments. And at the oral hearing of appeal, their learned counsel proffered oral arguments in further elucidation of the issues raised in their respective briefs. I have fully considered the submissions made by learned counsel both in their briefs and in oral arguments.
I will consider first the main appeal under two broad headings (i) Status of the African Charter vis-'-vis the country's municipal laws including the Constitution and (ii) The period of four days not covered by the Detention Order. These two broad headings cover all the issues formulated by the parties in their respective briefs. The status of the African Charter is strictly not necessary for the determination of the main appeal in that in spite of what their Lordships of the Court below said on it, it did not affect the final decision they arrived at. The respondent has, however, raised it again in his cross-appeal in arguing that his case should be sent back to the trial Court for trial not in respect of the period of four day before the detention order was issued but in respect of the entire period of his detention.

Status of the African Charter.

The Organisation of African Unity of which Nigeria is a member, on 19th January, 1981 adopted the African Charter on Human and Peoples' Rights providing for rights and obligations between member state (e.g. Art 23) and between citizens and member states (e.g. Art 19). Nigeria adopted the treaty in 1983 when the National Assembly enacted the African Charter on Human and peoples' Rights (Ratification and Enforcement) Act 1983 (now Cap. 10 Laws of the Federation of Nigeria, 1990). I have carefully considered all that has been said by learned counsel for the parties on the status of the Charter as an international treaty entered into by our country. I do not consider it necessary to set out in extenso in this judgment their submissions. Suffice it to say that an international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly. See section 12(1) of the 1979 Constitution which provides:

\"12(1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly,(AFRC).\"

(see now the re-enactment in section 12(1) of the 1999 Constitution).

Before its enactment into law by National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts. See the recent decision of the Privy Council in Higgs & Anor. V. Minister of National Security & Ors. The Times of December 23, 1999 where it was held that-

\"In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the Crown. Treaties formed no part of domestic law unless enacted by the legislature. Domestic Courts had no

jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizen' right and duties in common or statute law. They might have an indirect effect upon the construction of statues or might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty\"

In my respectful view, I think the above passage represents the correct position of the law, not only in England, but in Nigeria as well.

Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990 (hereinafter is referred to simply as Cap. 10), it becomes binding and our Courts must give effect to it like all other laws falling within the Judicial power of the Courts. By Cap. 10 the African Charter is now part of the laws of Nigeria and like all other laws the Courts must uphold it. The Charter gives to citizens of member states of the Organisation of African Unity rights and obligations, which rights and obligations are to be enforced by our Courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution. See Chapter IV of the 1979 and 1999 Constitutions.

No doubt Cap. 10 is a statue with international flavour. Being so, therefore, I would think that if here is a conflict between it and another statue, its provisions will prevail over those of that other statue for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the Court below that the Charter possesses \"a greater vigour and strength\" than any other domestic statue. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr. Adegbrouwa, learned counsel for the respondent. Nor can its international flavour prevent the National Assembly, or the Federal Military Government before it removing it from our body of municipal laws by simply repealing Cap. 10. Nor also is the validity of another statute to be necessarily affected by the mere fact that it violates the African Charter or any other treaty, for that matter- see: Chae Chin Ping v. United States 130 US. 181 where it was held that Treaties are of no higher dignity than acts of Congress, and may be modified or repeal by Congress in like manner: and whether such modification or repeal is wise or just is not a judicial question.

With all I have said above, I now come back to the case on hand. The respondent was said to have been detained by virtue of a detention order issued by the Inspector-General of Police in exercise of the powers conferred on him by section 1(1)of the State Security (Detention of Persons) Act, Cap. 414 Laws of the Federation of Nigeria, 1990 (formerly Decree N0.2 of 1984). It is the case of the Appellants that the Act ousted the jurisdiction of the Courts in respect of anything done under the Act. This submission found favour with the court below. For Musdapher JCA who delivered the lead judgment of that court with which the other justices that sat with him agreed, said:

\"In such matters involving the ordinary laws, the Courts in this country have the jurisdiction to examine in appropriate cases how discretionary powers are exercised. It is part of administrative law which frowns at abuse or misuse of power. But in Nigeria there are provisions in Decrees such as No. 2 of 1984 which empowers the executive to detain people without trial. Usually no reasons are given by the detaining authority as to how a detainee constitutes a menace or threat to the State. It is regarded as a matter of security of the State which is not open to probing by the courts, also for security reasons. Attempts by courts to order the release of such detainees on application by habeas corpus is even ousted. See Decree No 22 of 1986. In Lekwot v Judicial Tribunal (1993) 2 NWLR (Pt 276) 410 @ 447, I quoted as follows from a paper presented by the Chief Justice of Nigeria at the 6th International Appellate Judges' Conference, 1991:

'Human Rights under a Military Regime may be aberrations. In a democratic Government under the rule of law, all judicial powers of the State are vested in the judiciary. Under the Military Regimes, the powers are invariably eroded. The erosion may be creating Military (or Special) Tribunals '.. It may also be the ouster of the jurisdiction of courts of law;

In Okeke v. A-G Anambra State (1992) INWLR (pt. 215) 60 at 86, Uwaifo, JCA observed as follows:

Decree No. 13 of 1984 is an ouster legislation. Once the provision of a Decree or Constitution ousting the jurisdiction of the courts on any specific matters are clear and unambiguous, the court are bound to observe and apply them. They are not entitled, even when the ouster has drastic effect on the right of any person, to approach its interpretation by a false or twisted meaning given to it by unacceptable restricted construction;

In view of the authorities, I have to resolve the 5th and 6th issues against the appellant.'

It is as a result of this conclusion that the learned Justice of Appeal finally held:

\"In the result, this appeal partially succeeds. I remit the case back to the trial court to consider the issue of the consequences of the detention for the four days of the appellant which is apparently not covered by the order.\"
Muhammad J.C.A. in his own judgment observed:
\"The grundnorrm in Nigeria under the present Military administration is the Constitution (Suspension and Modification) Decree No. 107 of 1993 and the subsequent Decrees regulating the exercise of executive, legislative and judicial powers in the country. Section 5 of Decree No. 107 enacts as follows:
'No question as to the validity of this Decree or any other Decree made during the period 31st December 1983 to 26th August 1993 or made after the commencement of this Decree or of an Edict shall be entertained by any court of law in Nigeria.\"

The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 provides:
\'No Civil proceedings shall lie or be instituted in any court for or on account afar in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before or after the commencement of this Decree, the proceedings shall abate, be discharged and made void.\'
These two enactments, which have been judicially examined since the inception of the Military regimes in Nigeria in a plethora of cases leave no room for any interpretative mechanisms to found jurisdiction when jurisdiction has been effectively ousted. The courts have always construed such clauses strictly, However, where, as in this case, the language is plain, the courts have to give effect to it. The legislations are undoubtedly drastic, but the courts are bound to give effect to them and decline adjudicating.\"
And Pats-Acholonu J.C.A. for his part. said:
\"Let me pause here and examine the case in hand with the background of Section 4 of the State Security (Detention of Persons) Act Cap. 414.

4(I) No suit or other legal proceedings shall be taken against any person for anything done or intended to be done in pursuance of this Act.
(2)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 nor proposed to be done in pursuance of this Act shall not be inquired into of any court of law and accordingly Sections 219 and 259 of that Constitution shall not apply in relation to any such question.
(Before going further, I wish to remark in passing and in further buttressing of my opinion and holding that the suspension of operation of the provision of African Charter and the Incorporating Act has never been intended nor to my mind carried out).
On the fact of it the purport of the provision is that the jurisdiction of the court is completely ousted.\"
The respondent has argued strenuously against the position taken by their Lordships, \\, too, must say that I find it rather strange that after the views expressed by them on the status and applicability of the African Charter they could turn round. . as they did, to reach the position that the courts\' jurisdiction was ousted in detention cases. It looks a somersault!
Now Section 4 of the State Security (Detention of Persons) Act provides:
4. (I) No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this Act.
(2)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.

Be it noted that while Chapter IV of the Constitution was suspended for the purpose of the Act, no mention was made of Cap. 10 which was then merely in existence. i would think that Cap. 10 remained unaffected by the provision of Section 4 (1). A treaty is not deemed abrogated or modified by later statute of unless such purpose has been cleared expressed in the later statute - see Cook v. united States. 288 US 102. this is more so in this case as section 1 of Cap. 10 provides.

\"1. As from the commencement of this Act. the provisions of the African Charter on Human and Peoples\' Rights which are set out C in the Schedule to this Act shall, subject as there under provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative. executive or judicial powers in Nigeria.\"

It is thus enacted that all authorities and persons exercising legislative, executive or judicial powers in Nigeria are enjoined to give full recognition and effect to the 0 Africa, in Charter. That is. the plenitude of the Government of Nigeria cannot do anything inconsistent with the Charter. Section I was never suspended or repealed by any of the Constitution (Suspension and Modification) Decrees enacted bet when 19 3 and 1999: it remained in force throughout this period. The position then is that the courts\' jurisdiction to give \'\"full recognition and effect\" to the African Charter remained unimpaired.

This conclusion is. in my respectful view, further reinforced by sections 16(I) & (1) and 17 of the Constitution (Suspension and Modification) Decree, No. 107 of 1993, in force at all times relevant to the proceedings leading to this appeal. The sections read:

\"16 (I) Subject to this Decree or any other Decree made during the period 31st December 19H3 to 26th August 1993 or made after the commencement of this Decree. all existing law, that is to say, all laws (other than the Constitution of the Federal Republic of Nigeria 1979) which whether being a rule of law or a provision of an Ad of the National Assembly or of a Law made by a State House of Assembly or any other enactment or instrument whatsoever. Shall, until that law is altered by an authority having power to do so. continue to have e1lei.:t with such modifications (whether by way of addition, alteration or omission) as may be necessary to bring that into conformity with the Constitution of the Federal Republic of Nigeria 1979, as amended, suspended, modified or otherwise affected by this Decree or any other Decree made during the period 3Ist December 1983 to 26th August 1993 or made after the commencement of this Decree, and with the provisions of any Decree made after the commencement of this Decree or Edict relating to the performance of any functions which are conferred by law on any person or authority.

(2) It is hereby declared that the continued suspension by this Decree or any other Decree made after the commencement of this Decree by any Decree or any provision of the Constitution of the Federal Republic of Nigeria 1979 shall be without prejudice to the continued operation in accordance with subsection (I) of this section of any law which immediately before the commencement of this Decree was in force by virtue of that provision\"

\"17. All laws (other than any law to which section 16 of this Decree applies) which, whether being a rule of law or a provision of an Act. a Decree. an Edict or a By-law or of any other enactment or instrument whatsoever. was in force immediately before the commencement of this Decree or made before that date but comes into force on or after the commencement of this Decree shall until that law is altered by an authority having power to do so. Continue to have effect as if made in exercise of the powers conferred by or derived under this Decree.\"

By these provisions, Cap, 10 remained in full force and effect as it was never at any time altered by the Provisional Ruling Council nor was there any need for its modification to bring it into conformity with the 1979 Constitution (as amended, suspended or modified) or any decree made after the commencement of Decree No. 107 of 1993. that is. after 17th November 1993. Cap. 10 was not inconsistent with any provision of the 1979 Constitution or any such decree.

I think both Courts below were in ,error to decline. pursuant to Cap. 10. jurisdiction to entertain respondent\'s case for the entire period of his detention.

One reason given by the court below for abruptly denying the respondent redress under the Charter is that he came by way of a wrong procedure. With profound respect to their Lordships, I think they are wrong for so holding. In Fajinmi v. The Speaker, Western House of Assembly (1962) I SCNLR 300, (1962) vol. 4 NSCC 144,(1962) ANLR Pt. I page 205 this court held that where there is no provision as to the procedure to be followed in enforcing the jurisdiction conferred, the plaintiff was entitled to bring the case in the usual form of an action and to have it heard. And in Ogugu\'. The State (1994) 9 NWLR (PU66) I. again this court. per Bello CJN. at pages 26-27 held:

\"However. I am unable to agree with Mr. Agbakoba that because mother the African Charter nor its Ratification and Enforcement Act has made a special provision like Section 42 of the Constitution for the enforcement of its human

and peoples\' rights within a domestic jurisdiction, there is a lacuna in our laws for the enforcement of these rights. Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the juridical powers of the courts as provided by the Constitution and all other laws relating thereto...

It is apparent from the foregoing that the human and Peoples\' Rights\' of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court\".

From these authorities the court below could not be right when it held that the respondent came by a wrong procedure. The respondent could have come by way of an action commenced by a writ or by any other permissible procedure such as A the Fundamental Rights (Enforcement Procedure) Rules, 1979. The trial court, therefore wrongly declined jurisdiction to entertain respondent\'s action before it, for the same reason.

It has been suggested that section 1(2) (b) (i) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994, No. 12 of B 1994 ousted the jurisdiction of the courts in this matter. My simple answer is that the Decree would not apply. The Decree provides:

Whereas the military revolution which took place on 17th November, 19lJ3 effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree No, 107 of 1993. ...

And whereas by section 5 of the said Constitution (Suspension and C Modification) Decree, no 4uestion as to the validity of any Decree or any Edict (in so far as by section thereof the provisions of the Edict are not inconsistent with the provisions of a Decree) shall be entertained by any Court of law in Nigeria.

1 (1)the preamble hereto is hereby affirmed and declared as 0 forming part of this Decree is hereby declared also that:

(a) for the efficacy and stability of the Government of the Federal Republic of Nigeria; and with a view to assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federal Republic of Nigeria:

(i) no civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before on or after the commencement of this Decree the proceedings shall abate, be discharged and made void;

(ii) the question whether any provision of Chapter IV of the Constitution of the Federal Republic of Nigeria 1979 has been, is being or would be contravened by anything done or purported to be done in pursuance of any Decree shall Hint be inquired into in any court of law and accordingly, no provision of, that Constitution shall apply in respect of any such question.\"

As earlier observation in this judgment, cap.10 is preserved by sections 16 and 17of Decree No. 107 of 1993. By virtue of the preamble to Decree No. 12 of 1994 and selection (I) thereof. Cap. 10 is equally preserved by the said Decree. I can find nothing in the dams of the respondent that calls in question the validity of any decree. The only evidently before the trial court was the affidavit of Ganiyat Fawehinmi in which she deposed, inter alia, as follows:

\"3. That on Tuesday. January 30, 1996 at about 6.00 a.m. six (6) men who identify themselves as operatives of the State Security Service (SSS) and policemen invaded our residential at 9A Ademola Close GRA. Ikeja. Lagos, and arrested the applicant.

4.That no warrant of arrest was shown to the applicant before and after his arrest although the applicant demanded for same.

5.Thereafter the applicant was taken away in a light blue Peugeot 504 Station Wagon car with Reg. No. LA 31 n H to the State Security Service, Shangisha, and detained there.

6.That at the time of the said arrest the applicant was not informed of the offence he had committed,

7. That the applicant has not been charged with the commission of any name in any court.

There was no counter-affidavit impugning the faults deposed to above. The notice of preliminary objection filed by the appellants to the respondent\'s application for the enforcement of his rights did not say that the respondent was detained pursuant to any detention order. Nor was there any affidavit evidence to that effect. I cannot therefore, see how it could be said that the respondent\'s action is a challenge to any decree.

I am not unmindful that in the course of proceedings in the trial court a detention order was shown to the court. As it was never tendered and admitted in evidence. it did not form pan of the proceedings in this case. Nor was it evidence in which the court could act.

Ouster of court\'s jurisdiction is not a mallet of course. For the court\'s jurisdiction to be ousted it must be dearly shown that a particular action falls within the ouster clause. That is not the case here. With respect to their Lordships of the Court below, I an III not impressed by the views expressed by them on the failure of the appellants to tender in

evidence the deletion order they relied on. The conclusion I reach is that on the record before us, Decree No. 12 of 1994 does not apply.

From alibi have said above, it is crystal clear that the issues rose in the main appeal must be resolved against the appellants. I unhesitatingly dismiss their appeal for THC same reasons, issue 3 of the cross-appeal is resolved in favor of the respondent as cross-appellant.

I am now left with Issues I. 2 & 4 of the cross-appeal. Blue I raises the question of the competence of the Inspector-General of Police to issue the detention order in this else. Decree No.2 of I n4 empowered the Chief of Staff to issue a detention order. Be amendments to the Dense, the power was given variously to the Chief of General Staff or the Inspector-General of Poll's testate Security (Detention of Persons) (Amendment) Decree No.] 2 of 1986), Chief of General Staff. Inspector-General of Police or the Minister of internal Affairs (State Security (Detention of Persons) (Amendment) Decree 1988), Chief of General Starve only (State Security (Detention of Persons) (Amendment) Decree No.3 of 1990) and the Vice President (State Security (Detention of Persons) (Amendment) A Decree No. 24 of I 99()). The changes in the designation of Chief of Stair to Chief of General Staff to Vice-President followed the constitutional changes made to the nomenclature of the office of No, 2 in the military regime. In the Constitution (Suspension and Modification) Decree No. 107 of 1993. the office of the Vice President disappeared and we haw instead the office of the Chief of General Staff a return to the 19 5 position. No consequential amendment was. however. made to the State Security (Detention of Persons) Decree as to the person entitled to issue a detention order. The position remained as it was in 1990 when the V ice- President was given that power.

Then came 1994 when another amendment was made to the Decree. The State Security (Detention of Persons) Decree No. II of 1994, provided as follows:

\"1. The State Security (Detention of Persons) Decree 1984 as amended by State Security (Detention of Persons) (Amendment) Decree 1984. 19 6. 1988 and 1990 is further amended:

(a) By inserting immediately after the words \'Chief of General Starr the words \'or the Inspector-General of Police wherever they occur in the Decree.\"

It would appear that this amendment overlooked Decree No. 24 of ILJ90 which substitute the Vice-President for the Chief of General Stall. The position in law was that as at the time of the promulgation of Decree No, II of 1994 only the Vice-President. a non-existing office at the time, could issue a detention order; the Chief of General Staff had not been given back that power. It is the muddle in Decree No. I I of 1994 that the respondent is now capitalizing on to submit that -

\"Since the Chief of General Staff was non-existent under and unknown to Decree No.2 of 1984 as amended by Decree No. 24 of ILJ90, the police of the Inspector-General of Police cannot with respect, be inserted after an office that does not exist.\"

With respect. I do not accept this submission. As a result of the muddle made in Decree No. II of 19LJ4 only the inspector-General of Police was left to issue a detention order. And since he was the one who signed the order detaining the respondent. the order could not be faulted on this ground. Had the order been signed by the Chief of General Staff, I would not have hesitated in declaring it void as his power to issue such an order hall been taken away by Decree No, 24 of 1990. In conclusion I resolve issue I against the respondent. I On Issue 2, I think the respondent misconstrued what the Court below I decided. That court did not say that the procedure adopted by the trial court in dealing with the detention order was right but that the irregularity did not occasion a miscarriage of justice. This is what Musdapher J.C.A. who read the lead judgment said:

\"There is 110 dispute that the Detention Order in the instant case as produced in court and was examined by the learned trial Judge and the appellant\'s counsel. The issue of admissibility of the Detention Order was not raised at the trial. It is a new issue first raised on appeal \\without leave, Throughout his lengthy submissions in the court below ,the learned counsel for the appellant did not protest the manner the Detention Order was introduced in the proceedings, He not only referred to it in his submissions but used it to show teal the appellant was arrested and detained days before the Detention Order was signed. A party to any civil proceedings who knowing of an irregularity. allows the irregular procedure to be adopted and indeed used document irregularly produced in the proceedings cannot complain on appeal on the procedure adopted: see Akhiwu v. The Principal Lotteries Officer, Mid- Western State (1972) I All NLR (Pt.I) 22l). The Detention Order. should have been exhibited or somehow tendered. It was not tendered. The learned counsel for the respondents produced it. It was accepted by the learned counsel for the appellant who not only read it but also relied upon it to show the illegality of the arrest or detention of the appellant for a few days. I am of the view, that under these circumstances, the appellant cannot now at the appeal stage impugn the admissibility of the Detention Order. In any event, the substantive action has not commenced, What is in contest is whether the court has jurisdiction to entertain the

suit. It was on that preliminary issue the Detention Order was examined by all concerned. the appellant\'s counsel relying on it to argue that the Inspector-General of Police could not in law issue it. I do not think it is of any moment to now argue that the Detention Order was not formally admitted in evidence. Though the Detention Order should have been exhibited to the notice of preliminary objection. the way and the manner it was introduced in the court below did not occasion any miscarriage of justice.\"

It is not disputed here that the irregularity did not occasion a miscarriage of justice. The failure to fault this finding puts an end to the case of the respondent on this complaint. I, then fore. resolve the issue against the respondent.

On Issue 4. the unsolicited passing remark of Pats-Acholonu, JCA. not being a decision, cannot be made a subject of an appeal. The learned Justice of Appeal had observed:

\"When I look at this case. I observe that one 0[\' the respondents is the Head of State - General Sani Abacha himself I wonder whether the appellant is unaware of the provisions of Section 267 of the Constitution of the Federal Republic 0[\' Nigeria. That section provides immunity against the civil or criminal action or proceedings against the person of the President or the Head of State. It is wrong in law to have joined him as a party. The Constitution is the primary law 0[\' the land. I hold therefore that the name of the Head of State should not have been reflected in the suit in the first place. It offends the provision of the Constitution.\"

The observation above did not arise out of any issue canvassed before the court below nor were arguments advanced on it. It is. therefore. not a decision that could be appealed against: it is only a mere remark. All this notwithstanding. it is patently clear that the observation is erroneous in law. Section 267 referred to therein had been suspended by Decree No. 107 of 1993. Even if it were not suspended it is clear that by its provisions it would not apply to a case where the official concerned (here, General Sani Abacha) was sued in his official capacity - see subsection (2) of section 267.

\"(2) The provisions 0[\' subsection (I) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.\"

I leave the matter at that and say no more on it.

Since I have resolved Issue 3 in favor of the respondent, it follows that his cross-appeal must succeed and it is allowed by me. I set aside the consequential order made by the court below and in its place I order that respondent\'s case be remitted to the Federal High Court for trial of all his claims by another Judge of that court. I award to him N I 0.000.00 costs in this court.

BELGORE, J.S.c. (Dissenting on the Cross-Appeal): I have read in draft after having a conference the judgment of my learned brother, Achike JSC and I am in full agreement with him that the main appeal must fail. In international relations nation parties resolve several aspects by treaties and protocols some of which either exist already in their domestic statutes or are adopted into domestic laws by acts of parties mentioned. Whilst Nigeria in her 1979 Constitution had a part exclusively devoted to Fundamental Human Rights some of which are more explicit than the African Charter on Human and Peoples\' Rights, the Country none the less went ahead to incorporate the Charter into her domestic laws by an Act of Parliament it referred to as \"This Act may be cited as the African Charter on Human and Peoples\' Rights (Ratification and Enforcement) Act\", The Act then sets out as a Schedule the Articles of the Charter.

The difference between that Act (Chapter 10, Laws of the Federation of Nigeria 1990) and Fundamental Rights in the Constitution is that no method was prescribed for enforcing the Rights there under. There is provision in the Charter for a Commission to be set up, but since 19th January 1981 when the Charter was made in Banjul, The Gambia, no Commission has been set up. The Commission itself by the nature of the Articles is a monitoring and research body rather than a judicial body with enforcement powers.

By their nature, treaties are abided with in good faith, especially through a prolonged treaty practice and most invariably through the habit of transforming some aspect of treaties from JUS STRICTUM into JUS AEQUUM, But many treaties are naturally destroyed by circumstances that change the nature of contracting parties or change of circumstance of the subject-matter of the treaty no more existing. But of recent are new developments, especially in newly emerging countries with a problem of constitutional and political stability. Nigeria is a typical example. it has been subjected to many coups d \'etat than constitutional and democratic governance. Thus when the African Charter on Human and Peoples\' Rights was by Parliament adopted into Nigerian Statutes with commencement date on 17th day of March 1983. the country was under a democratically elected government. The Fundamental Rights in the 1979 Constitution certainly gave effect to the Charter before that: Federal Parliament formally adopted it. Thus H Article I or Chapter I of the Charter reading:

\"The member States of the Organization of African Unity parties to the present Charter shall recognize the rights.

duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them,\" anticipated not only domestic law reflecting the rights, duties and freedoms enshrined in the Charter but if possible Constitutional provisions.

By the end of 198:1 there came in the Military via the usual coup d\'etat suspending the Parliament (Legislature) and taking over both the Executive and Legislative powers of the State. The Judiciary was left untouched but the Funda'mental Rights in the Constitution were suspended. As the Military incursion into governance was through the force of arms and succeeding thereby it was their style to make their decrees by which they govern superior to the Constitution. The net result is clear. Whereas the Constitution was the fountain of all laws where any other law is in conflict with it, it is void. the Military Decrees now became superior to the Constitution.

It is therefore clear that once the Military regime got entrenched in govern'ance it is natural for self-preservation to promulgate decrees that curtail liberties, a very unfortunate legal situation. Thus early in 1984 State Security (Detention of Persons) Decree was promulgated. Each successive Military regime adopted or modified the decree known popularly as Detention Decree. The respondent was hold under this Decree except four clear days before the Order was signed.

As the Decrees of the Military regimes always contain ouster clauses to bar interference by the judiciary the judiciary made earlier skirmish in 1970 in Lakanmi\'s case but the Military descended heavily on judiciary by Decree No. 28 of I 970called Supremacy Decree. The only way to stop these Military overwhelm'ing curtailment of freedoms is to make their coup fail. but once they are in control it was a futile effort to adjudicate where jurisdiction is clearly ousted by Decree.

Thus the coup d\'etat of 1981 December and the Constitution (Suspension and Modification) Decree of 1984 put into abeyance the Fundamental Rights in the Constitution, which as I have said earlier is a forerunner of the adoption of the Charter and of course the Charter itself by implication. Coup d \'etat a treasonable offence but that is only when it fails. The Charter. just as the Fundamental Rights in the 1979 Constitution was by implication suspended. If the Charter was not suspended even by implication, it would have run counter to the Decree of the Military which in essence makes the Charter void. This amounts to breach of treaty obligation by Nigeria, which is a political rather than a judicial act. In countries which have Constitutions albeit. under a dictatorship, the municipal law and the Constitutions are held in superior status than any international law like a treaty. Sometimes municipal statute on the same subject-matter like the treaty in issue is preferred by municipal courts. The net result in many cases is that municipal Courts may not automatically apply treaties entered into between their State and foreign States if those treaties would modify domestic laws. However. if the domestic laws in question are modified to accommodate the articles of the treaties municipal courts will enforce them, not because they are treaties but for the reasons only that they have become parts of municipal laws,

At any rate Section 1 (2) (b)(i) of Federal Military Government (Supremacy and Enforcement of Power) Decree No.12 of 1984 providing:'

\"No civil proceedings shall lie or be instituted in any Court for or on account of or in respect of any act. matter or thing done or pursuant to any Decree or Edict and if such proceedings are instituted before un or after the commencement of this Decree the proceedings shall abate. be discharged and made void\".

ousts any jurisdiction by Court including the adopted Charter which was an existing law as of the time the action leading to this appeal was instituted.

I therefore I agree with my learned brother Achike JSC that the detention of the respondent, other than for the first four Jays not covered by Detention Order in question could not 9k challenged in any court of law. The cross-appeal fails on this. The four days not covered by the Detention Order could then be tried as ordered by the Court of Appeal. I therefore dismiss the main appeal as well as the cross-appeal. I make no order as to costs. I also dismiss the cross-appeal for the above reasons and the reasons in the judgment of Achike JSc.

MOHAMMED. J.C.S (Dissenting on the Cross-Appeal): I agree with the opinion of)\' Lord Achike. JSc. in the judgment just read. I have had the privilege of reading the judgment. In draft before now. I only wish to emphasize on the appellants\' issues I and 2 and the cross-appeal. Those issues read as follows:

\"1. Whether the Court of Appeal applied the principle of international law correctly when it held that in signing the treaty on Africa Charter. Nigerian attempted to fulfill an international obligation which it voluntarily entered into and agreed to be bound and that Government cannot be allowed under international law to contract out of its international obligations by local legislation.

2. Whether the Court of Appeal was right in holding that African Charter CAP 10 Laws of the Federation is not inferior to the Decrees of the Federal Military Government on the ground according to the Court below that the legislation has

international flavour and accordingly the ouster clause contained in the Decrees cannot operate to oust the jurisdiction of the court in matters touching on African Charter\".

The respondent. cross-appellant. Chief Gani Fawehinmi. was arrested and detrained on the 30th day of January, 1996 under the orders of Inspector General of Police. The respondent questioned the action of the Inspector-General of Police in a suit filed in the Federal High Court, Lagos Judicial Division. He sought for a declaration that his arrest and detention constituted a violation of his fundamental rights guaranteed under Sections 31. 32 and 38 of 1979 Constitution and articles 4,5,6 and 12 of the African Charter on Human and Peoples\' Rights (Ratification and Enforcement) Act. Cap. 10. Laws of the Federation of Nigeria 1990. He held that the arrest and detention were illegal and unconstitutional. Secondly. he sought for a declaration that his detention and continued detention without being taken before a court on a charge constituted a gross violation of his fundamental rights guaranteed under the Constitution and African Charter on Human and Peoples\' Rights. The learned Counsel, Chief Gani Fawehinmi, sought for a mandatory order from the court to direct the appellants, in this appeal. to release him forthwith. In the alternative Chief Gani Fawehinmi H applied for:

\"AN ORDER OF MANDAMUS compelling the respondents to forthwith arraign the applicant before a properly constituted court or tribunal as required by section :n of 1979 Constitution of the Federal Republic of Nigeria 1979 as preserved by Decree 107 of 1993 and Article 7 of the African Charter on Human and Peoples\' Rights (Ratification and Enforcement) Act, Cap 10 Laws of the Federation 1990.

AN INJUNCTION restraining the respondents. whether by themselves or by their officers. agents. servants, privies or otherwise howsoever from further arresting, detaining or in any other manner infringing on the fundamental rights of the applicant. N 10.000,000.00 (Ten Million Naira) damages for the unlawful and unconstitutional arrest and/or detention of the applicant.

It is not a matter of dispute on the material facts of this case that the African Charter on Human and Peoples\' Rights is an international treaty. Nigeria has ratified the Treaty and incorporated it into Nigerian Law - See Cap 10 Laws of the Federation of Nigeria, 1990.

I will now consider the submissions made in respect of issue I. Learned Counsel for the appellants submitted quite correctly that a treaty between two or more sovereign states derives its binding force and effect from international law. The basis of the binding force of a treaty as a contract is agreement and the recognition given to agreements between states in international law as a law creating pact - Pacta Sunt Servanda. An \"act of state\" is essentially an exercise of sovereign power and hence cannot be challenged controlled or interfered with by municipal courts. What the learned counsel wants to emphasize here is that as against a state-party to a treaty in its relations to another state-party under international law the State cannot escape from its treaty obligations by pleading a contrary provision in its existing municipal law or by adopting a new legislation inconsistent with those obligations.

Learned counsel is right in the submission above. But a State is always at liberty if it deems desirable due to domestic circumstances or international considerations to legislate a law inconsistent with its treaty obligations. I agree that such an exercise will be without prejudice to any remedies available against the state in international law at the insolence of the other states who ratified the treaty. Once the slate decides to exercise such right through a legislation the courts in that country are bound to follow the promulgated law. In Macarthys Ltd. v. Smith (1979) 3 All ER 325 at 329 Lord Denning M.R. held as follows.

\"11\' the time should come when our Parliament deliberately passes an Act with the intention of repudiating a Treaty or any provision in it or intentionally of acting inconsistently with it and says so in expenses terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament\".

In considering the submissions of both counsel on issue 2 I will say that in incorporating African Charter on Human Rights this country (Nigeria) provided that the treaty shall rank at par with other ordinary municipal laws. In other words, this country did not expressly stale that the treaty after its ratification and embodiment into our municipal laws had attained a status superior to our constituting or other municipal laws. With respect to the opinion of the court below it cannot be right to hold thus:

\"The provisions of the Charter are in a class of their own and do not fall within the classification uf the hierarchy of laws in Nigeria in order of superiority as enunciated in Labiyi v. Anretiola (1992) 8 NWLR (Pl.258) 139. It seems to me that the learned trial judge acted erroneously when he held that the African Charter contained in Cap 10 of the Laws of the Federation of Nigeria 1990 is inferior to Decrees of the Federal Military Government. It is common place, that no Government will be allowed to contract out by local legislation, its international obligations. It is my view, that notwithstanding the fact that Cap, 10 was promulgated by the National Assembly in 1983, it is a legislation with international t1avour and the ouster clauses contained in Decree No. 107 of the 199\'.\'1 or No. 12 of 1994 cannot affect its operation in Nigeria while the decrees of the Federal Military Government may override other municipal laws. they

cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matter pertaining to human rights under the African Charter. They are protected by the International law and the Federal Military government is not legally permitted to legislate out of its obligations\".

The decision of the Court of Appeal would elevate the African Charter above the Constitution. This will then be a violation of the provisions of the supremacy of our Constitution. It is axiomatic that the Decree ousting the jurisdiction of the court is superior to the Constitution. See Lakanmi & Anor .v . Attorney Genera/ (West) & 01\".1. ()\\)70) NSCC 143 and Labiyi v Anretiola (1\\)92) 8 NWLR (Pl.258) 139 at 160.

Turning to the cross-appeal it is my respectful view that the Military Administration by enacting Decree No.2 of 1984 and suspending Chapter IV of the Constitution which dealt with Fundamental Human Rights had intended to curtail any right of access to courts against any breach of the Fundamental Human rights of Nigerians by Military Government: It is therefore wrong to say that a citizen could still challenge the action of the Military Government by resorting to African Charter un Human and Peoples\' Rights which is now part of our ll1unicipallaws. In any event the Federal Military Government (Supremacy and Enforcement of Powers) Decrees No. 12 of 1994 has clearly ousted the jurisdiction of courts to determine any claim by any individual against. the Military Government\'s action. Section I (2) (b) (i) of Decree No. 12 of 1994 provides:

\"No civil proceedings shall lie or be instituted in any court for or on account of or wil1 respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before or after the commencement of this Decree the proceedings shall abate, be discharged and made void\".

It will therefore be an exercise in futility to send this case back to the Federal High Court to rehear the claim of the Respondent/Cross-appellant for damages for his unlawful arrest and detention. The High Court's jurisdiction has been ousted by the provisions of that Decree. I agree however, that the cross-appellant can claim for the days which were not covered by the order of the appellants detaining him.

For these reasons and fuller reasons in the judgment of Achike, JSC, which I adopt as mine, both the appeal and the cross-appeal fail and are dismissed. Each party to bear own costs.

IGUH, J.S.C.: I have had the privilege or reading in draft the judgment just delivered by my learned brother, Ogundare. J.S.C and I am in complete agreement that while the main appeal is devoid of substance and must therefore fail, the cross appeal is clearly meritorious and ought to be allowed.

I need to stress, in the first place, that the African Charter on Human and Peoples\' Rights was duly adopted by Nigeria in 1983 by the enactment of the African Charter on Human and Peoples\' Rights (Ratification and Enforcement) Act. 1983, Cap. j 0, Laws of the Federation of Nigeria, 1990. As a result, the rights and obligations therein covered under the said Charter became fully and legally enforceable in Nigeria as any other municipal or domestic law of the land.

In the second place, it is crystal clear that whereas the provisions of Chapter IV of the Constitution of the Federal Republic of Nigeria, 1979 which deals with fundamental human rights were expressly suspended for the purposes of the State Security (Detention of Persons) Act by Section 4 thereof, the provisions of the African Charter on Human and Peoples\' Rights (Ratification and Enforcement) Act, 1983, Cap. 10, Laws of the Federation of Nigeria, 1990 were left undisturbed and therefore unaffected.

Section 4 of the State Security (Detention of Persons) Act provides as follows:

\"4. (I) No suit or other legal proceedings shall lie against any person 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.

It is plain that while the said section 4 of the State Security (Detention of Persons) Act expressly suspended Chapter IV of the Constitution of Nigeria, 1979, it in no way repealed, abrogated or suspended the African Charter on Human and Peoples\' Rights (Ratification and Enforcement) Act, 1983, Cap. 10, Laws of the Federation of Nigeria, 1990, In my view, the law makers, if they had intended to suspend or repeal the African Charter on Human and Peoples\' Rights (Ratification and Enforcement) Act, 1983 along with Chapter IV of the Constitution of the Federal Republic of Nigeria, I