

The African Charter on Human and Peoples' Rights and ouster clauses under the military regimes in Nigeria: Before and after September 11

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Summary

*Military governments in Nigeria adopted numerous decrees that ousted the jurisdiction of courts. This article investigates the role of the African Charter in challenging such ouster clauses. Despite being incorporated into Nigerian domestic law in 1983, much uncertainty still surrounds the status of the African Charter on Human and Peoples' Rights. The author criticises the decision in *Abacha v Fawehinmi*, in which the Nigerian Supreme Court held that the African Charter cannot be superior to the Constitution and upheld the validity of ouster clauses. With reference to case law in the United States, the author highlights the threats to human rights posed by anti-terrorist laws in the world after 11 September 2001.*

1 Introduction

The African Charter on Human and Peoples' Rights¹ (African Charter or Charter) was passed by a resolution of the Organisation of African Unity

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¹ OAU Doc CAB/Leg/67/3/Rev 5. See text in (1981) 21 *International Legal Materials* 58 and Schedule to the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act, Cap 10, Laws of the Federation of Nigeria, 1990.

(OAU) in 1981. The Charter came into force on 21 October 1986, after it was ratified by a majority of member states of the OAU.² The Charter is an African attempt to define and protect human rights at continental level.

Since the adoption of the African Charter, some African Countries have had military regimes while others have been under civilian regimes — all with varying human rights records. In an article published in 1999, Viljoen examined the domestic enforcement of the African Charter in 16 African countries.³ He finds that there was a growing awareness of the Charter during the 1990s and that there are sporadic references to the African Charter by the courts in several countries, but that none is as decisive as that of Nigeria.⁴ Viljoen finds a link between the frequency and innovative use of the Charter by the local judiciary and the arguments put forward by counsel.⁵ Another influential factor is the varying status that the Charter enjoys within the municipal laws of African countries. In some countries, treaties, once ratified, are enforceable by the domestic courts without any further need for incorporation by legislation.⁶ In other countries, once treaties are incorporated into domestic laws, they are at par with other domestic legislation.⁷ There are even some countries where treaties supercede domestic legislation.⁸

The ouster of jurisdiction of courts in matters concerning human rights is a regular feature of dictatorial regimes. Heads of military regimes in Nigeria made it quite clear that they were military regimes and not democratic governments.

11 September 2001 witnessed unprecedented terrorist attacks on America. Terrorists hijacked planes which they later crashed into the Pentagon and the World Trade Centre. A third attack aimed at the White House failed. Thousands of lives were lost. Americans were aghast. The

² F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1.

³ As above. These countries are Algeria, Benin, Botswana, Cape Verde, Congo, Ghana, Malawi, Namibia, Nigeria, Senegal, South Africa, Tanzania, Togo, Tunisia, Zambia and Zimbabwe.

⁴ Viljoen cited examples from Benin, Botswana, Ghana, Namibia, South Africa, Tanzania, Zambia and Zimbabwe.

⁵ Viljoen (n 2 above) 11 & 12.

⁶ This is the position in Namibia, where the Constitution provides: 'All existing international agreements binding on Namibia shall remain in force, unless and until the National Assembly, acting under article 63(2)(d) hereof, otherwise decides' (art 143), and 'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding on Namibia under this constitution shall form part of the law of Namibia' (art 144).

⁷ Eg, in *Chafukwa Chichana v The Republic* (1996) 1 LRC 1 (cited by Viljoen (n 2 above) 6), the Malawi Supreme Court declined to apply the African Charter in the case on the grounds that the Charter has not been incorporated into local law by any local statute in Malawi.

⁸ Eg Benin: See art 147, 1991 Constitution of Benin, cited in Viljoen (n 2 above) 2.

Bush administration declared a world-wide war against terrorism. This war against faceless enemies introduced new dimensions to ouster clauses and draconian legislation. The ripples generated by the actions of the American government have had a great impact all over the world.

This paper consists of two parts. The first examines the extent to which courts in Nigeria have been able to use the African Charter as a response to draconian legislation, particularly in the case of ouster clauses. The second part examines the impact of September 11 on draconian legislation and the ouster of jurisdiction of courts.

2 The African Charter and ouster clauses in Nigeria

2.1 Background

The African Charter was incorporated into the domestic legislation of Nigeria in 1983 during the civilian government of Alhaji Shehu Shagari. It was done through the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act.⁹ About ten months after the President signed the Act, the military overthrew the civilian government.

Since independence, the government of Nigeria has been mainly in the hands of the military.¹⁰ These military regimes were not known for their respect for human rights, nor for any respect for the sacredness of the independence of the judiciary. They used all the means at their disposal to evade, circumvent and pervert the legal procedures that ensured the rule of law. Ouster clauses were particularly useful to the military in this regard.

The problem with decrees¹¹ was that many touched on the rights of citizens. The military government had no qualms or inhibitions to use bills of attainder.¹² *Ad hominem* laws were made retrospective in order to deprive persons of their properties without any process of hearing. Although ouster clauses are not exclusive to military regimes in Nigeria, the overwhelming majority were enacted during military regimes.¹³ The use of ouster clauses prevented persons aggrieved by the actions of a military government from seeking redress in the courts. By barring

⁹ 2 of 1983. This Act came into effect on 17 March 1983 and is now contained in Cap 10, Laws of the Federation of Nigeria, 1990.

¹⁰ Between 1960 and 1999, the military regimes were: Ironsi (Jan–July 1966); Gowon (1966–1975); Murtala (1975–1976); Obasanjo (1976–1978); Buhari (1985–1986); Babangida (1986–1993); Abacha (1993–1998); and Abubakar (1998–1999), while the civilian administrations were Balewa (1960–1966); Shehu Shagari (1979–1983) and the few months of the interim administration of Shonekan (1993).

¹¹ Statutes (legislation) passed by the military governments at federal level were referred to as decrees. Such decrees that are still in force are now styled 'Acts'.

¹² A Bill of Attainder: Extinction of civil rights and capacities by legislation.

¹³ See G Fawehinmi 'Ouster of court's jurisdiction by statutes' in ES Olarinde *et al* (eds) *Contemporary issues in the Nigerian legal system* (1997) 67.

access to the courts, the military became a totalitarian government. In a seminal work on ouster clauses, Chief Gani Fawehinmi identifies 'several garbs' in which ouster clauses appear. These include¹⁴ retrospective laws made to protect unconstitutional laws; laws enacted to cover up the failure of leaders to hold consultation or obtain statutory consent, advice or approval required by the legislature; laws to cover up failure to comply with fundamental rights; laws to prevent the use of general process of courts; laws to stop court proceedings and nullify court orders; and laws to prevent the court from committing erring public officers for criminal contempt.

Prof Nwabueze identifies various formulas used, either singly or in combination, by military governments in Nigeria to comprehensively oust the jurisdiction of the courts. He summarises them as follows: Civil proceedings in respect of any act, matter or thing done or purported to be done under the decree were barred; the words 'purported to be done' being most significant indeed. If such proceedings had been instituted before, or after, the commencement of the decree, they were abated, discharged and made void. Any judgment, decision or order of any court given or made in relation to such proceedings had no effect or, where appropriate, was deemed never to have had effect. Specific remedies, *quo warranto*, *certiorari*, *mandamus*, prohibition, injunction or declaration, were barred. Rights guaranteed by the Constitution were excluded, with the additional stipulation that no enquiry was allowed into whether any of those rights had been contravened by anything done or purported to be done under the decree. Persons acting under these decrees were relieved of liability for their acts.

Furthermore, the jurisdiction of the courts was, either by express words or by implication, excluded whenever a special tribunal was established under various decrees for the trial of specified offences.¹⁵

The African Charter was pitted against ouster clauses in a series of cases, ending with *General Sani Abacha and Others v Chief Gani Fawehinmi*.¹⁶

The potential use of the African Charter in this regard lies in the fact that it contains valuable human rights provisions that could be used to challenge decrees which purportedly ousted the jurisdiction of courts. Article 7(1) of the Charter provides thus:

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

¹⁴ n 13 above, 68–69.

¹⁵ BO Nwabueze *The individual and the state under the new Constitution* (1979) 17.

¹⁶ [2000] 4 SCN 401 (Supreme Court) and *Chief Gani Fawehinmi v General Sani Abacha & Others* [1996] 9 NWLR (Pt 475) 710 (Court of Appeal).

- (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.

Once access to court is secured, other provisions of the Charter, such as those against retrospective legislation and those granting the right to other aspects of fair hearing, can be invoked.

The rest of this paper examines the judicial response to the use of the African Charter as a means of controlling legislative excesses of military governments in Nigeria. The position prior to the case of *General Sani Abacha and Others v Chief Gani Fawehinmi* is examined, followed by an analysis of and commentary on the judgments of the Court of Appeal and the Supreme Court in the case.

2.2 The position prior to the *Fawehinmi* judgment

In Nigeria, treaties take effect only when ratified and promulgated into law.¹⁷ Although Nigeria subscribes to the Universal Declaration of Human Rights (Universal Declaration) and other international human rights documents under the auspices of the United Nations (UN) and its agencies, these documents have no force of law in the country because they have not been incorporated into local law. No attempt has therefore been made to use these international human rights instruments in defence of human rights in Nigeria under military regimes.

However, particularly since the mid-1980s, the courts have upheld the need for the country to discharge its international obligations. In *Reinsurance Corp v Fantaye*,¹⁸ the Supreme Court held that courts in Nigeria must give effect to treaties binding on the Federal Government. Again, in *Chief JE Oshevire v British Caledonia*,¹⁹ the Court of Appeal, relying on the case of *Aeroflex v Air Cargo Egypt*,²⁰ held, amongst others, that any domestic legislation in conflict with an international convention is void.

The wider question as to the relationship between international law and municipal law was eventually narrowed down to the question of the status of the African Charter within the Nigerian legal system. Although the African Charter is an international convention, it is applicable in

¹⁷ Sec 12 1999 Constitution of the Federal Republic of Nigeria, formerly sec 12 1979 Constitution.

¹⁸ [1986] 1 NWLR (Pt 14) 113.

¹⁹ [1990] 7 NWLR (Pt 163) 489.

²⁰ Decided by the Court of Appeal of Paris on 25 March 1986 and reported in the *Uniform Law Review Biannual* 1987 Vol 2 669, published by (UNIDROT) International Institute for the Unification of Private Law in Rome.

Nigeria only as a local legislation.²¹ Two approaches to this issue were taken by the High Court when the matter first came up.²² The first considered the issue as one of a conflict between municipal and international law, and which should be resolved in favour of international law.²³ The second approach rejected the contention that the African Charter is enforceable as part of Nigerian law. The Supreme Court settled the issue raised in the second approach when it held in *Ogugu v The State*²⁴ that the Charter had become part of Nigerian domestic laws and that²⁵

[t]he enforcement of its provisions like all other laws falls within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto . . . by the several High Courts depending on the circumstances of each and in accordance with the rules, practice and procedure of such courts.

The issue raised in the first approach remained, to the very last, very controversial.

Normally, the Constitution is supreme.²⁶ However, whenever the military seized power, their very first legislative act was the suspension of the Constitution. This was done by an enabling decree, which proclaimed its own supremacy.²⁷

The supremacy of decrees was established in the early years of military intervention in Nigeria. In the celebrated case of *Lakanmi and Another v the Attorney-General (Western State) and Others*,²⁸ the Supreme Court attempted to establish the supremacy of the unsuspended parts of the 1963 Constitution over decrees promulgated by the then military government. The appellants in the case contended that their assets were unlawfully confiscated under the Forfeiture of Assets (Release of Certain

²¹ International treaties are not enforceable in Nigerian courts unless they have been specifically enacted into law by the National Assembly: sec 12(1) Constitution of the Federal Republic of Nigeria, 1999. The African Charter has been enacted into law in Nigeria via the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10, Laws of Federation of Nigeria, 1990. See the further discussion on this point below.

²² See the review of the attitude of Nigerian courts to the African Charter in Viljoen (n 2 above) 8.

²³ *The Registered Trustees of the Constitutional Rights Project (CRP) v President of the Republic of Nigeria* (1994) 4 *Journal of Human Rights Law and Practice* 218 and *Richard Akinola v General Babangida & Others* (1994) 4 *Journal of Human Rights Law and Practice* 250.

²⁴ [1994] 9 NWLR (Pt 366) 1.

²⁵ n 24 above, 26–27.

²⁶ Secs 1(1) & (3) Constitution of the Federal Republic of Nigeria 1979 (now secs 1(1) & (3) 1999 Constitution).

²⁷ Eg see sec 6 Constitution (Suspension and Modification) Decree No 1 of 1966 and sec 2 Constitution (Suspension and Modification) Decree No 1 of 1984, now Cap 64, Laws of the Federation of Nigeria 1990.

²⁸ (1971) UILR 201.

Forfeited Properties, Etc). (Validation) Decree, which decree, they argued, was in effect a legislative judgment, violating the provisions of the 1963 Constitution. The respondents relied on the Constitution (Suspension and Modification) Decree 1966.²⁹ The Second Schedule to the Decree provided that the provisions of decrees 'shall prevail over those of the unsuspended parts of the Constitution'.

Justice Ademola CJN, delivering the judgment of the Court, gave judgement in favour of the appellants. His Lordship held that the decree violated the principle of separation of powers enshrined in the 1963 Constitution. His Lordship concluded that '[t]he Decree is nothing short of legislative judgment, an exercise of judicial power. It is in our view *ultra vires* and invalid.'³⁰

The military did not react well to this decision. Another decree was immediately promulgated, which not only proclaimed the supremacy of decrees over the Constitution, but also nullified the effect of the judgment in the case.³¹ The judiciary has since disowned *Lakanmi's* case and from 1970 onwards, the supremacy of decrees over all other laws became a well-established fact in Nigeria.

Confronted with a variety of ouster clauses, the judiciary, apart from occasional heroic stances, was by its own admission powerless.³² The oft-quoted declaration of this judicial helplessness is *Wang Ching Yao and 4 Others v Chief of Staff Supreme Headquarters*,³³ where the Court of Appeal stated that 'on the question of civil liberties, the law courts of Nigeria must as of now blow muted trumpets'.³⁴ From this judgment on, the judiciary retreated completely from any critical consideration of ouster clauses and became accustomed to washing their hands clear of such cases.³⁵ It became a judicial heresy to think of setting aside the provisions of any decree. So much so that in 1987, a judge of the High

²⁹ Decree No 1 of 1966.

³⁰ n 28 above, 222.

³¹ Federal Military Government (Supremacy and Enforcement of Powers) Decree No 28 of 1970. See comments in A Ojo 'Public law, the military government and the Supreme Court' in AB Kasunmu (ed) *The Supreme Court of Nigeria* (1977) 90; A Ojo 'The search for a *Grundnorm* in Nigeria — The *Lakanmi* case' 1971 (20) *International and Comparative Law Quarterly* 117–136 and Nwabueze (n 15 above) 15–18.

³² See S Amadi 'Access to justice' (1999) 1 *Human Rights Newsletter* 3–5.

³³ Reported in G Fawehinmi *The law of habeas corpus* (1986) 437. This decision attracted and has continued to attract a lot of criticism. See M Ozekhome 'Decrees, ouster clauses and judicial ineptitude' (1989) *Law and Practice* 6; IE Sagay 'The decline of judiciary as an effective and independent third arm of government' (1991) *The Lawyer* (Ekpoma) 92; and YO Alli 'Privative clauses in Nigerian laws and the attainment of justice in our courts' (1998) 4 *The Jurist* (Unilorin) 56.

³⁴ Fawehinmi (n 33 above) 447, *per* Ademola JCA.

³⁵ For examples, see *Osadebay v AG Bendel State* (1991) 1 NWLR (Pt 169) 533; *Okeke v AG Anambra State* (1992) 1 NWLR (Pt 215) 60; *Zamani Lekwot & Others v Judicial Tribunal on Civil Disturbances in Kaduna State & Another* (1993) 2 NWLR (Pt 276) 410 and *Okoroafor v Miscellaneous Offences Tribunal* (1995) 4 NWLR (Pt 387) 59.

Court felt secure enough as to rebuke counsel for 'quoting with obvious relish certain outrageous statements made by Ademola CJN in *Lakanmi's* case'.³⁶ In *Labiya v Anretiola*,³⁷ the Supreme Court enunciated the hierarchy of laws in Nigeria under military regimes as follows:³⁸

Thus on the 31st December, 1983, the status of the laws in the order of superiority would seem to be as follows —

- 1 Constitution (Suspension and Modification) Decree 1984;
- 2 Decrees of the Federal Military Government;
- 3 Unsuspended provisions of the Constitution 1979;
- 4 Laws made by the National Assembly before 31/12/83 or having effect as if so made;
- 5 Edicts of the Governors of a State;
- 6 Laws enacted before 31 December, 1983 by the House of Assembly of a State, or having effect as if so enacted.

This decision regarded decrees as supreme in Nigeria.³⁹ However, in the early 1990s, another trend started emerging. Bold judges started a direct attack on ouster clauses.⁴⁰

In October 1990, Longe J delivered a landmark judgment in *Mohammed Garuba and Others v Lagos State Attorney General and Others*.⁴¹ The applicants in the case were sentenced to death on a charge of robbery by a Robbery and Firearms Tribunal. They filed an appeal in the High Court claiming that they were unfairly sentenced to death since they were below the age of 16 years at the time of their trial and conviction. Meanwhile, they brought an application for an interim injunction restraining the respondents from executing them, pending their appeal. Section 10(3) of the Robbery and Firearms (Special Provisions) Act under which they were tried provided that

[t]he 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 in pursuance of this Decree shall not be enquired into in or by any court of law.

Longe J, after tracing the history of human rights from the Magna Carta 1215 to the Bill of Rights 1689, Thomas Paine's *The right of man*, and finally to the Universal Declaration, held that the right to life is an age-old right. His Lordship made use of the African Charter, along this line:⁴²

³⁶ *Dr Onaguruwa v Babangida & Another*, reported in (1994) 4 *Journal of Human Rights Law and Practice* 42.

³⁷ (1992) 8 NWLR (Pt 258) 139.

³⁸ n 37 above, 162, quoted with approval in *Zamani Lekwot* (n 35 above) 410. See comments in AA Oba 'Hierarchy of laws in Nigeria under military regimes: *Labiya v Anretiola & Others*' (1995) 4 *Kwara Law Review* 116.

³⁹ See *Zamani Lekwot* (n 35 above).

⁴⁰ See an earlier review of some of these cases in Viljoen (n 2 above) 7–11.

⁴¹ Reported in (1994) 4 *Journal of Human Rights Law and Practice* 205.

⁴² n 41 above, 215.

The African Charter on Human Rights, of which Nigeria is a signatory, is now made into our law by Act 1983 cited by learned counsel for applicants. Even if its aspect in our Constitution is suspended or ousted by any provision of our local law, the international aspect of it cannot be unilaterally abrogated . . . As [Justice Eso warned us], by signing international treaties, we have put ourselves on the window of the world, we cannot unilaterally breach any of the terms without incurring some frowning of our international friends.

Apart from emphasising that Nigeria needs to convince the world that it 'adjudicates according to law and procedure recognised in civilised nations', His Lordship did not advance any further arguments in support of this novel use of the African Charter.

In *The Registered Trustees of the Constitutional Rights Project (CRP) v The President of the Federal Republic of Nigeria and Others*,⁴³ the African Charter was again successfully used against ouster clauses in decrees. In this case, the Court affirmed the relevance of the African Charter. Although it was submitted that the Charter is applicable in Nigeria as local legislation and therefore should take its place in the hierarchy of laws in Nigeria, as enunciated in *Labiya's case*, Onalaja J (as he then was), deciding the case, advanced two reasons based on the African Charter to defeat the submission. The first was that, even assuming that Cap 10⁴⁴ is a decree, there is a conflict between it and the decrees ousting the jurisdiction of the court. The judge held that 'any decree, edict, act or law, which ousts the jurisdiction of courts, is construed strictly and narrowly' and that 'where the interpretation is capable of two meanings, the decree is to be interpreted in the manner which retains or preserves the jurisdiction of the court'.⁴⁵ The second reason was that Cap 10 is a treaty which has been ratified by the Nigerian government, and, since Nigeria retains its membership of the OAU, Cap 10 is binding on the federal military government.⁴⁶

Apart from the use of the African Charter, the courts have resorted to other measures to curb the legislative excesses of military administrations. In *Guardian Newspapers Ltd and Others v Attorney General*,⁴⁷ the Court of Appeal pushed the assault on draconian decrees further. In this case, the federal military government proscribed by a decree⁴⁸ all the titles published by the appellant in connection with the annulment of the June 1993 elections. The appellants sued in the Federal High Court.

⁴³ n 23 above.

⁴⁴ 'Cap' means chapter. In official compilations of statutes in Nigeria, each legislation forms a chapter described as 'Cap'. The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is contained in ch 10 of the Laws of Federation of Nigeria, 1990, hence it is simply referred to in judgments as 'Cap 10'.

⁴⁵ n 23 above, 245.

⁴⁶ n 23 above, 244.

⁴⁷ (1995) 5 NWLR (Pt 398) 703.

⁴⁸ *Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree No 8 of 1994*.

While the suit was pending, the federal government enacted another decree,⁴⁹ ousting the jurisdiction of the Court to adjudicate on the case. The Federal High Court, relying on this decree, declined jurisdiction. On appeal to the Court of Appeal, the decision of the trial court was reversed. Ayoola JCA (as he then was), delivering the judgment of the Court of Appeal, held that 'the instrument described as Decree No 8 of 1994 has all the attributes of legislative punishment and is not an exercise of legislative power but of judicial power', and that⁵⁰

[i]f the instrument described as Decree No 8 of 1994 is not a decree within the intendment of Decree 107 of 1994 (*sic*), it is evident that both ouster clauses are incapable of affecting the jurisdiction of the court below.

This was the state of the law before the case of *Chief Gani Fawehinmi v General Sani Abacha and Others*.

2.3 *Chief Gani Fawehinmi v General Sani Abacha and Others*

The facts of the case are that the appellant was arrested and detained by the respondents representing the then military government in the country. The appellant challenged his detention by suing in the Federal High Court. The respondents raised a preliminary objection arguing that the jurisdiction of the Court to hear the case had been ousted by the State Security (Detention of Persons) Decree⁵¹ and Constitution (Suspension and Modification) Decree.⁵² The appellant contended that the Court had jurisdiction to hear the case. He relied on the provisions of the African Charter, which have been enacted locally in Nigeria as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.⁵³ The Charter forbids arbitrary arrests and detention, and gives any person so detained a right of access to court.⁵⁴ The trial judge upheld the objection of the respondents. The appellant thereafter appealed to the Court of Appeal. The Court of Appeal, without referring to the bold initiative of Onalaja J in *The Registered Trustees of the Constitutional Rights Project* case, bravely dealt with the formidable issues highlighted above.⁵⁵ The Court of Appeal reversed the decision of the trial court and held that the jurisdiction of the court cannot be ousted by any decree in view of the provisions of the African Charter embodied in

⁴⁹ Federal Military Government (Supremacy and Enforcement of Powers) Decree No 12 of 1994.

⁵⁰ 746 and 751 respectively of the judgment, n 47 above. This decision was later reversed on appeal by the Supreme Court in *Attorney General v Guardian Newspapers Ltd & Others* [1999] 5 SCNJ 324.

⁵¹ Decree No 2 of 1984, as amended.

⁵² Decree No 107 of 1993.

⁵³ Cap 10 Laws of the Federation of Nigeria, 1990.

⁵⁴ See art 7 African Charter, quoted above.

⁵⁵ *Chief Gani Fawehinmi v General Sani Abacha & Others* [1996] 9 NWLR (Pt 475) 710.

Cap 10. However, the appellant received no compensation because the Court held that he had used the incorrect procedure in commencing his suit at the trial court. The appellant further appealed to the Supreme Court. The respondent also cross-appealed.

This appeal was heard by a full court of the Supreme Court consisting of seven justices.⁵⁶ The complexity of the various legal issues involved in the appeal was reflected in the difficulty the justices had in agreeing with each other. Of the seven justices on the panel, three dissented.⁵⁷ The majority allowed the cross-appeal and remitted the case to the Federal High Court for hearing before another judge. The minority dismissed both the appeal and the cross-appeal. What is interesting about the majority judgment is the decision of Uwaifo JSC. His Lordship disagreed with the majority on the issue of ouster clauses. This judgment is therefore crucial for anyone attempting to make sense out of the discordant opinions expressed by the judges on the issues in the appeal.

The issues relevant to us are those relating to the supremacy of decrees, ouster clauses and the appropriate procedure for enforcement of the African Charter.

2.3.1 Supremacy of decrees

The Court of Appeal combined the issue of supremacy of decrees with the status of the African Charter. The Court conceded that provision of a treaty could not be enforced in municipal courts in Nigeria unless there is an enactment giving effect to the treaty.⁵⁸ This, however, was what Cap 10 had done. The Court held that, whilst Cap 10 is a local enactment, it does not belong within the hierarchy of local legislation in Nigeria. The Court held that 'the provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in *Labiya v Anretiola . . .*'.⁵⁹ Having upheld the superiority of Cap 10 to all decrees, it was no longer difficult for the Court of Appeal to tackle the ouster clause.

The Supreme Court had no difficulty regarding the status of the African Charter within the Nigerian legal system. Their Lordships unanimously reversed the decision of the Court of Appeal on this issue. Their Lordships held that the African Charter cannot be superior to the Constitution. They held that in Nigeria, with regard to treaties, the principle of incorporation applies. Thus, since the African Charter has been domesticated by an Act of the National Assembly, it takes its

⁵⁶ *General Sani Abacha & Others v Chief Gani Fawehinmi* [2000] 4 SCN] 401.

⁵⁷ The majority consisted of Ogundare (who read the lead judgment), Iguh, Uwaifo and Ejiwumi JJ SC. The dissenting justices are Achike (who read the lead minority judgment), Belgore and Mohammed JJ SC.

⁵⁸ n 55 above, 756 of the judgment.

⁵⁹ n 58 above, 746–7.

position as an Act of the National Assembly. Uwaifo JSC had some particularly harsh words for the Court of Appeal in respect of the position the justices of the Court of Appeal had taken:⁶⁰

With the utmost respect to Musdapher JCA, it is an inexcusable judicial disrespect or arrogance to deny the subsistence of the hierarchical order of superiority of Nigerian laws as adumbrated by the Supreme Court in the *Labiya* case . . . Notwithstanding that the African Charter is a legislation with international flavour . . . [t]he elevation of the African Charter to a 'higher pedestal' and the denial of the continued validity or authority of the *Labiya* case by the lower court is totally absurd, untenable and unwarranted.

Yet the 'international flavour' theory of the Court of Appeal was not without effect on other justices of the Court. For example, Ogundare JSC agreed with the Court of Appeal that the Charter possesses 'a greater vigour and strength' than any other domestic statute.⁶¹ His Lordship was, however, quick to point out that that is not to say that the Charter is superior to the Constitution.⁶²

2.3.2 Ouster clause

The Court of Appeal again relied on the 'international flavour' of Cap 10. It held:⁶³

[N]otwithstanding 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 12 of 1994 cannot affect its operation in Nigeria.

The Court concluded therefore that the ouster clauses contained in decrees could not stand in the face of the Charter, which prohibits ouster clauses.

The justices of the Supreme Court disagreed on this issue. The majority avoided the issue of the efficacy of the ouster of the jurisdiction of the court by Decree No 2 of 1984, as amended by Decree No 11 of 1994. They held that, since the detention order was not tendered at the trial court, there was nothing before the Court to show that the decrees applied to the case. This omission, they held, was fatal to the respondent's case on the issue. The minority, led by Achike JSC, held that the ouster clauses in the decrees applied to the case. Achike JSC went further to say that the Court cannot look into the reasons of the detention since the ouster of its jurisdiction is complete. Belgore JSC and Mohammed JSC agreed strongly with him.⁶⁴ Uwaifo JSC, though with the majority, joined the minority on this point, holding that the decrees

⁶⁰ n 56 above, 483–4 of the judgment. Contrast this with the sympathetic approach of Uwaifo JSC 450–1 455.

⁶¹ n 60 above, 422–3.

⁶² n 60 above, 423.

⁶³ n 55 above, 746–7 of the judgment.

⁶⁴ n 56 above, 504–505 & 508 respectively of the judgment,.

applied and that the failure to tender the detention order was not fatal to the respondent's case.⁶⁵

It would appear, therefore, that the view expressed in the minority judgment on this point is, in fact, the decision of the Court, because together with Uwaifo JSC, the tally becomes four to three in favour of upholding the decree's ouster of the jurisdiction of the court.

2.3.3 Procedure

In spite of the above, the Court of Appeal allowed a procedural matter to deprive the appellant of the fruits of his litigation. The Court held that the appellant cannot enforce his rights under the African Charter by the procedure under the Fundamental Rights (Enforcement Procedure) Rules.⁶⁶ Their Lordships held that the rules used are applicable only to fundamental rights under the Constitution.⁶⁷ The result was that the appeal was allowed in part, that is, in respect of the substantive law, while the relief sought by the appellant was denied.

The Supreme Court roundly castigated the Court of Appeal on this issue. The Court held that there was nothing wrong in using the Fundamental Rights (Enforcement Procedure) Rules. Iguh JSC further pointed out that it is not correct to say that the Applicant brought the action under the Fundamental Rights (Enforcement Procedure) Rules only. According to His Lordship, the application was brought under both the Rules and the African Charter.⁶⁸

2.4 Comment

Three and half years passed between the judgment of the Court of Appeal and that of the Supreme Court. During the interim, three things happened. The first was that the judgment of the Court of Appeal was followed by High Courts and the Court of Appeal in the cases before them.⁶⁹

The second was that the decision of the Court of Appeal was the subject of many diverse comments. The judgment of the Court of Appeal was received with mixed feelings. It attracted favourable comments from many.⁷⁰ *The Guardian* newspaper, in its editorial, called it a 'landmark judgment'.⁷¹ Others criticised the Court for holding that

⁶⁵ n 64 above, 486.

⁶⁶ Statutory Instrument No 1 of 1979.

⁶⁷ n 55 above, 748.

⁶⁸ n 56 above, 435.

⁶⁹ See eg *Comptroller of Nigerian Prisons v Adekanye & Others* [1999] 10 NWLR (Pt 623) 400 and *Chima Ubani v Director of State Security Services & Another* (1999) 1 NWLR (Pt 625) 129.

⁷⁰ See AA Oba 'A bold step in defence of human rights in Nigeria: Chief Gani Fawehinmi v Gen Sani Abacha & Others' (1997) 1 *Journal of International and Comparative Law* 152.

⁷¹ See Editorial Comment, *The Guardian* 1997-01-07.

the African Charter was superior to the decrees and the Constitution.⁷² Again, the refusal of the Court to allow the use of Fundamental Rights (Enforcement Procedure) Rules, 1979, to enforce the provisions of the African Charter drew hostile remarks.⁷³ The Supreme Court was influenced by these comments, particularly the adverse ones.

The third thing that happened was that the decision of the Court of Appeal in *Attorney General v Guardian Newspapers Ltd and Others*⁷⁴ was overturned on appeal by the Supreme Court. The judicial effort of the Court of Appeal was rendered useless by the Supreme Court, which unanimously reaffirmed the supremacy of decrees and the validity of ouster clauses contained in the decrees. According to the Court, our law reports are 'replete' with decisions upholding ouster clauses.⁷⁵ The decision of the Supreme Court has now put in a proper perspective the judicial efforts of the Court of Appeal. A re-examination of the issues in light of the decision of the Supreme Court shows that the praises showered on the Court of Appeal for its decision in *Fawehinmi v Abacha* were well deserved and that some of the criticisms were quite unmerited.

2.4.1 Status of the African Charter

The Court of Appeal was severely criticised for holding that the African Charter was superior to the decrees. However, some support this finding. They argue that where there is a conflict between a domestic statute incorporating a treaty as Cap 10 and another domestic statute (be it an Act or a decree), the former should prevail.⁷⁶ This is now largely a moot question. Whether or not the African Charter is superior to the Constitution is now an important practical question under the current democratic regime. The simple answer is that the Constitution is the supreme law of the land.⁷⁷ Although there are similar rights under both the African Charter and the Constitution, there are also some important differences. The African Charter contains some socio-economic rights

⁷² UO Umzurike 'The application of international human rights norms to Nigeria' (1997) 18 *The Advocate* 36-37 and E Ojukwu 'Is *Fawehinmi v Abacha* a correct decision?' (1997) 1 *Legal Practice Notes: Human Rights Law* 21 27-29.

⁷³ F Falana '*Fawehinmi v Abacha* — Where the Court of Appeal erred' (1997) 1 *Social Justice* 7; Ojukwu (n 72 above) 21 & CC Nweke 'Human rights and sustainable development in the African Charter: A juridical prolegomenon to an integrative approach to Charter rights' (1997) 1 *Abia State University Law Journal* 1.

⁷⁴ [1999] 5 SCNJ 324.

⁷⁵ n 74 above, *per* Wali JSC at 388.

⁷⁶ UU Chukwumaeze '*Chima Ubani v Director of State Security Services and Another: Implication*' (1999) 6 *Abia State University Law Journal* 6-10 and AG Olagunju '*Abacha v Fawehinmi: Between monism and positivism — An exposition of the application of international treaty in Nigeria*' (2001) 4 *LASU Law Journal* 101-111.

⁷⁷ Sec 1 1999 Constitution (n 17 above).

that are not justiciable under the Constitution.⁷⁸ It has been suggested that there can be no conflict between the Cap 10 and the Constitution, since Cap 10 has merely 'strengthened' the fundamental rights embodied in the Constitution and that socio-economic rights under the African Charter are similarly not 'justifiable', notwithstanding the 'mandatory nature of the language used in the Charter'.⁷⁹ This argument is premised on the reasoning that socio-economic rights in human rights documents are never meant to be justiciable.⁸⁰

2.4.2 Ouster clauses

The judgment of the Court of Appeal had a tremendous effect on ouster clauses. The decision of the Supreme Court in the *Attorney General v Guardian Newspapers Ltd and Others* and *Abacha v Fawehinmi* put an end to the euphoria spreading across the Court of Appeal. It is disappointing that, in *Attorney General v Guardian Newspapers*, all the seven justices of the Supreme Court that heard the appeal held that the courts are helpless in the face of ouster clauses in decrees. The African Charter was not considered in the appeal. However, in *Abacha v Fawehinmi*, the Supreme Court declared the African Charter ineffective against decrees generally and ouster clauses in decrees in particular. Having rejected the superiority of the African Charter over decrees, the Supreme Court had nothing else to fall back on. The Court had to submit to the decrees. It is now crystal clear that even the sternest critic of the decision of the Court of Appeal will now have to admit the superiority of the position of the Court of Appeal over the decision of the Supreme Court in terms of responsiveness to the problems of human rights violations in Nigeria.

2.4.3 Procedure

Before the appeal reached the Supreme Court, the decision of the Court of Appeal received very strong criticism on the issue of the procedure for the enforcement of the provisions of the African Charter in Nigeria. Femi Falana, a human rights activist who was counsel to the Appellant in the case, commented angrily on this aspect of the case:⁸¹

⁷⁸ See in particular the fundamental objectives and directive principles of state policy contained in ch 2 of the 1999 Constitution. Sec 6(6)(c) of the Constitution says that those provisions are not judicially enforceable; see *Okogie & Others v The Attorney General of Lagos State* (1981) 2 NCLR 337.

⁷⁹ MO Unegbu 'Resolving the dilemma of hierarchy between the African Charter and the Nigerian Constitution' (1999) 6 *Abia State University Law Journal* 19.

⁸⁰ n 79 above, 18–19, citing the examples of the International Covenant on Economic, Social and Cultural Rights, 1966, the Inter-American Convention on Human Rights and the European Social Charter, 1961.

⁸¹ Falana (n 73 above) 8.

Having critically read the celebrated case of *Fawehinmi v Abacha* (1996) 9 NWLR (PT 475) 710, it is painfully difficult to fathom the basis of the lavish encomiums that have been poured on the eminent panel of jurists that decided the case. In other words, one can assert without any fear of contradiction that the decision is a major setback in the struggle for the judicial enforcement of the African Charter. Surprisingly, the judgment has, in one fell swoop, thrown our growing human rights jurisprudence into a sea of confusion.

He argued that, in spite of the appellant's procedural error at the trial court, the Court of Appeal should have invoked the principle *ubi jus ibi remedium*⁸² to award the relief sought by the appellant.⁸³

In spite of this criticism, the boldness of the Court of Appeal in the appeal should be recognised. Again they could have blown again 'a muted trumpet'. Rather, they chose to confront the decree. Even then, the decision, given as it was during the height of the Abacha regime, had to be tactical. The Court confronted the decree but not the dictator. The Court was quick to point out that it was merely giving effect to government policy. According to the Court:⁸⁴

It must be stated that liberty in the context of modern times has now assumed a far broader conception than before and it increasingly demands protection. This Court shall take judicial notice of recent laws by way of decrees and statutory instruments and see to it that human rights of Nigeria citizens are well protected. This informed the establishment of the Human Rights Commission and the recent appointment of a panel to review the cases of people detained under Decree No 2 of 1984. As the government itself is making a serious effort to attenuate the rigors of Decree No 2, a decree not promulgated by the present regime, it is only fair that the Court should in its construction duly compliment the effort of the government to see that the fundamental rights of the citizen is not tampered with.

Such appeals to the sentiments of the military leadership were fairly common in many 'bold' judgments delivered during the military era.⁸⁵ After all, judges were wise to the fact that the military were in government not by the democratic process but through the power flowing from the barrels of their guns.

⁸² 'Where there is a right, there is a remedy' in L Rutherford & S Bone (eds) *Osborn's concise law dictionary* (1993).

⁸³ As above.

⁸⁴ 766-7 of the judgment of the Court of Appeal (n 55 above).

⁸⁵ See eg *Richard Akinola v Gen Babangida* (n 23 above), where the Court used the status of Nigeria in the international scene as leverage: '. . . And quite recently too, Nigeria has been elected to have a permanent seat at the Security Council of the United Nations organisation, the highest making [*sic*] body of the world. This country has to keep its international obligations' at 268 *per* Hunposu-Wusu]; and *Punch Nigeria Ltd & Another v Attorney-General of the Federation*, reported in (1994) 4 *Journal of Human Rights Law and Practice* 15: 'Military regimes by their very nature do not possess more than a nodding acquaintance with democracy. We must appreciate that it is not part of their tradition to impugn superior orders, let alone disobey them. That is why they deserve our sympathy in their abrupt but premeditated conversion from stratocracy to democracy. All the same, it is to be expected that government will

It would again be grossly unfair to the courageous judges of the Court of Appeal to suggest that they used the procedural point as an escape route. On the contrary, the courts have on many occasions emphasised that litigants must comply with the rules and procedure relating to commencement of actions.⁸⁶ The Court of Appeal had held in several cases before *Fawehinmi v Abacha* that it is not proper to enforce a right not created by the Constitution by means of the procedure prescribed by the Fundamental Rights (Enforcement Procedure) Rules.⁸⁷ The Supreme Court, too, had endorsed this position before and even after its decision in *Abacha v Fawehinmi*.⁸⁸

The Fundamental Rights (Enforcement Procedure) Rules, by which the appellant in *Fawehinmi's* case sought to enforce the provisions of the African Charter, were made pursuant to section 42 of the 1979 Constitution. They were specifically meant for the enforcement of 'fundamental rights'⁸⁹ enunciated under Chapter 4 of the 1979 Constitution. Admittedly, the African Charter and Chapter 4 of the Constitution both deal with human rights, yet it is clear that the African Charter is a separate document, which does not form part of the provisions of Chapter 4 of the Constitution. A perusal of the African Charter shows that the Charter covers a wider scope than the Constitution in many respects. The Fundamental Rights (Enforcement Procedure) Rules cannot therefore be applicable in the enforcement of the rights provided

aspire to meet its own laws, including court's decisions. This expectation is all the more significant now that Nigeria is contemplating to invoke the jurisdiction of the World Court over the claim made by the Republic of Cameroon to the Bakassi peninsula which has always been regarded as part of Nigeria territory. Otherwise submission to the jurisdiction of a supranational judicial organ by Nigeria will only be accepted with mixed feelings, if not outright scepticism, in view of the consistent history of defiance of her own domestic laws. More importantly, persistence disobedience of court orders puts the moral authority of the government itself into question'; and in *Mohammed Garuba & Others v Lagos State Attorney General & Others* (n 41 above): 'It is only when [human rights are protected] that [the country] can convince the world that we adjudicate according to law and procedure recognised in civilised nations' (*per Longe* J at 215).

⁸⁶ See eg *Obajimi v AG Western Nigeria* (1967) 1 All NLR 31; *Doherty v Doherty* (1968) NMLR 241; *LEDB v Awode* (1955) NLR 80; *Ademiluyi & Another v ACB Ltd* (1965) NMLR 21; *NBN Ltd v Alakija* (1978) 2 LRN 78; *Molokwu v COP* (unreported), but see *Fawehinmi* (n 33 above) 96; *Minister of Internal Affairs v Shugaba* (1982) 3 NCLR 915, 944 and *Ogugu v State* (n 24 above) 20 26.

⁸⁷ *Zamani Lekwot* (n 35 above) 410. See also *Kokoro-Owo v Local Government Service* [1995] 6 NWLR (Pt 404) 760 (CA).

⁸⁸ See *Ndigwe v Ibekendu* [1987] 7 NWLR (Pt 558) 486; *Osazuwa v Edo State Civil Service Commission* [1999] 10 NWLR (Pt 622) 290; *University of Nigeria Teaching Hospital Management Board v Nnoli* [1994] 8 NWLR (Pt 363) 376; *Nnamdi Azikwe University v Nwafor* [1999] 1 NWLR 116 and *Dongtoe v Civil Service Commission, Plateau State* [2001] 4 SCNJ 131.

⁸⁹ Not all human rights are 'fundamental rights' under the Constitution: *Merchant Bank Ltd v Federal Minister of Finance* (1961) All NLR 578; *Asemota v Yesufu* (1982) 3 NCLR 419 and *Ransome-Kuti v Attorney-General Federation* (1985) 2 NWLR 211.

by the African Charter via Cap 10. A further argument is that even the fundamental rights provisions under the 1999 Constitution (which are virtually *in pari materia* with those under the 1979 Constitution) cannot be enforced through the Rules made pursuant to the powers conferred under the 1979 Constitution, without a law so directing the use of the 1979 Rules for this purpose.⁹⁰

It is not difficult to understand the rationale for the complaint against the decision of the Court of Appeal on the issue of procedure. The Fundamental Rights (Enforcement Procedure) Rules are supposed to provide quick,⁹¹ reliable and result-oriented means of challenging human rights violations.⁹² The 'regular' process which the Supreme Court insisted on in *Ogugu's* case and which was adopted by the Court of Appeal in *Fawehinmi's* case is a notorious time and money wasting procedure, which necessarily entails long, drawn-out litigation. Such a procedure is definitely not suitable for enforcing human rights, where in almost every case time is of crucial importance. However, this is not the end of the matter.

By affirming the use of the Fundamental Rights (Enforcement Procedure) Rules when enforcing the provisions of the African Charter, the Supreme Court has not in reality added much. In practical terms, the Rules are only slightly better than the regular process as they, too, have been overwhelmed by the frightening apathy, the lethargic indifference and the administrative bottlenecks and technicalities that have made litigation in Nigeria a long gamble. The case of *Badejo v Minister of Education*,⁹³ which took eight years from the date of filing at High Court to its determination by the Supreme Court, provides a good illustration of the delay that characterises the operation of the Rules.⁹⁴

⁹⁰ See further arguments along this line in UU Chukwumaeze 'Enforcement of fundamental rights under the 1979 rules: A wrong procedure' (2001) 4 *LASU Law Journal* 96.

⁹¹ According to Odunowo J in *Punch Nigeria Ltd and Another v Attorney-General of the Federation* (n 85 above) '... the essence of this present procedure is to afford any applicant a fast, cheap and less cumbersome remedy in an application of this nature' at 26, and see also Bello CJN in *Peter Nemi v The State* (1994) 10 SCNJ 1 18.

⁹² Under the Fundamental Rights (Enforcement Procedure) Rules, 1979, the court has very wide powers which are not fettered by undue technicalities. Order 6 Rule 1 of the Rules provide that: 'At the hearing of any application, motion, or summons under these rules, the court or judge concerned may make such orders, issue such writs, and give such directions as it or he may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental rights provided for in the Constitution to which the complainant may be entitled.' See comments on how the courts can take advantage of this rule in order to secure human rights in C Obiagwu 'The all powerful Order 6 Rule 1' *Human Rights Newsletter* January-March 1998, Vol 1 No 2 36.

⁹³ [1996] 9-10 SCNJ 51.

⁹⁴ In the case an application was filed on behalf of a primary school pupil to enforce her fundamental rights to freedom from discrimination in the 1988 Admission to the

If applicants seeking to enforce their rights under the Charter are prevented from using the Rules, they may file their action by originating summons.⁹⁵ This route is the least cumbersome of the 'regular' procedures. The procedure has been used effectively in many cases filed after the decision in *Ogugu's case*.⁹⁶ Applicants may also use the procedure under the *habeas corpus* law in cases of wrongful detention.⁹⁷ The two procedures are similar to those under the Fundamental Rights (Enforcement Procedure) Rules in that they are designed as fast and less technical alternatives to other procedures under the regular High Court Rules. However, under the Fundamental Rights (Enforcement Procedure) Rules, the court has a wider power with respect to the orders it can make and remedies it can give — and here lies their clear superiority over the High Court Rules.⁹⁸

2.4.4 Unrealised potential and lost opportunities

One wonders what would have happened if the possibilities opened up by the Court of Appeal were exploited to the fullest. It would have been interesting to challenge the legality of a military regime on the basis of its incompatibility with some of the provisions of the African Charter. For example, article 13(1) of the Charter gives the right to participation in government:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with provisions of the law.

Article 20(1) guarantees the right to self-determination:

All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

Are *coups* and military governments consistent with these provisions?

Federal Government Colleges. There were no disputes as to the facts and thus no oral evidence was necessary. The application, dated 29 September 1988, was decided by the High Court on 4 November 1988. The appeal went to the Court of Appeal and further to the Supreme Court where judgment was finally delivered on 20 September 1996. Even then, the judgment of the Supreme Court was most distressing. The court unanimously held that the trial court erred in striking out the application. However, there was controversy as to the order the Supreme Court should make in the circumstances. The majority held that since the application had been overtaken by events, there was no usefulness in ordering a retrial by another court. The minority preferred to make an order of retrial.

⁹⁵ See Order 1 Rule 2(2) and Order 6, Kwara State High Court (Civil Procedure) Rules, 1987 and A Aguda *Practice and procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* (1980) 18–19.

⁹⁶ Such as *CRP v President* (n 23 above).

⁹⁷ *Habeas corpus* laws applicable in the southern states. For example, the *Habeas Corpus Law*, Cap 58, Laws of Lagos State of Nigeria, 1994.

⁹⁸ See Order 6 Rule 1, Fundamental Rights (Enforcement Procedure) Rules, 1979 (quoted in n 92 above) and Obiagwu (n 92 above) 36.

3 The impact of the 'war against terrorism' on ouster clauses

In reaction to the September 11 attacks on America, the Bush administration launched a war against terrorism. It invaded Afghanistan and later Iraq, acts that many considered violations of international law.⁹⁹ It started a new regime of detention without trial. Persons suspected of terrorist acts are arrested and detained indefinitely without trial and without access to lawyers, friends and relatives. The USA Patriot Act,¹⁰⁰ enacted in 2001, gave legal backing to a wide range of human rights abuses against citizens generally, and aliens in particular.¹⁰¹ Since January 2002, alleged members of the Taliban and al-Qaeda, and other citizens of some 38 nations¹⁰² suspected of being terrorists, are being detained indefinitely by the American government at Guantanamo Bay, without any accountability to the UN or any of its agencies or to the regular domestic courts.¹⁰³ The government has indicated that the detainees will eventually face military tribunals which would be conducted in secrecy away from public scrutiny.¹⁰⁴ Meanwhile, the suspects are denied visits by friends, relatives and lawyers. They do not even have the right to counsel of their choice. They are provided with counsel by the government. There is no private communication between the accused and his lawyer as security officials monitor all communications between them. The standard of proof before the tribunal would be considerably lower than what obtains even in military trials.

⁹⁹ O Burkeman & J Borger 'War critics astonished as US hawk admits invasion was illegal' *The Guardian* 2003-11-20 at <http://www.guardian.co.uk/Archive/0,4271,,00.html> (accessed 31 July 2004); J Lobel 'Midweek perspectives: An American assault on international law' at <http://www.post-gazette.com/search/Default.asp> (accessed 31 July 2004); and ME O'Connell 'The myth of preemptive self-defence' paper dated August 2002 submitted to the American Society of International Law Task Force on Terrorism, available at <http://www.asil.org> (accessed 31 July 2004).

¹⁰⁰ PL 107-56, 115 Stat 272 (2001). The full title is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act).

¹⁰¹ The Act authorises, amongst others, gross violations of the right to privacy in the course of gathering information by security agents; arbitrary detention and expulsion of aliens, and secret *ex parte* applications to courts. See review of the Act in C Doyle *The USA Patriot Act: A legal analysis* (Congressional Research Service [CRS] Report for Congress, Code RL31377) 2-23 41 49-51.

¹⁰² JCK Daly 'Revealed: the nationalities of Guantanamo' — United Press International at <http://www.upi.com/view.cfm?StoryID=20040204-051623-5923r> (accessed 31 July 2004).

¹⁰³ See 'United States: Guantanamo two years on US detentions undermine the rule of law' *Human Rights Watch* 2004-01-09 at <http://www.hrw.org/english/docs/2004/01/09/usdom6917.htm> (accessed 31 July 2004).

¹⁰⁴ n 103 above, for accounts of the proposed military tribunal.

The tribunal can act on evidence obtained under torture. There is no appeal from the decisions of the tribunal. These are, by international human rights standards, gross violations of the right to a fair hearing. Many have expressed their anxiety and concern regarding these practices to the Bush administration. Even volunteer military lawyers assigned to defend the accused persons have protested the trial conditions as being unfair, and some have withdrawn in protest.¹⁰⁵

The legality of the Guantanamo detentions has also been challenged in American courts. In *Hamdi v Rumsfeld*,¹⁰⁶ which concerns an American citizen who was captured in Afghanistan and detained at Guantanamo, the trial court held that Hamdi is entitled to contest the factual basis of his arrest and detention before a court. The Court therefore ordered the government to turn over numerous materials for an *in camera* review to support Hamdi's detention. The Court of Appeal reversed this decision, stressing that, because it was undisputed that Hamdi was captured in an active combat zone, no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the government's assertions was necessary or proper. It also concluded that Hamdi is entitled only to a limited judicial inquiry into his detention's legality under the war powers of the political branches, and not to a searching review of the factual determinations underlying his seizure.¹⁰⁷ On appeal to the Supreme Court, the Court held that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decision maker. The Court also held that he has a right to unmonitored meetings with his counsel.

In *Al-Odah v United States*¹⁰⁸ and *Rasul v Bush*,¹⁰⁹ the Court of Appeal upheld the decisions of trial court's declining jurisdiction in the *habeas corpus* proceedings filed by aliens on the ground that Guantanamo is outside the territory of America. The Court relied on the Supreme Court decision in *Johnson v Eisentrager*,¹¹⁰ which precluded regular courts in America from exercising jurisdiction over enemy aliens detained outside

¹⁰⁵ CNN.com — Military lawyers objected to tactics at Guantanamo at <http://www.cnn.com> (accessed 2 June 2004) and J Meek 'US fires defence team' *The Guardian* 2003-12-03 at <http://www.guardian.co.uk/guantanamo/story/0,13743,1098618,00.html> (accessed 31 July 2004).

¹⁰⁶ Decided on 28 June 2004. Forthcoming in 542 US (2004). See the slip judgment at <http://www.supremecourtus.gov/opinions/03pdf/03-6696.pdf> (accessed 31 July 2004).

¹⁰⁷ *Hamdi v Rumsfeld* 316 F 3d 450, 475 (United States Court of Appeals for the Fourth Circuit, 2003).

¹⁰⁸ 321 F 3d 1134 (United States Court of Appeals for the District of Columbia Circuit) (2003) WL 22070725 (10 November 2003).

¹⁰⁹ *Al-Odah v United States & Rasul v Bush* 215 F Supp 2d 55 (DC 2002).

¹¹⁰ 339 US 763 (1950).

the sovereign territory of the United States. According to the Court of Appeal, lower courts are bound to follow this decision, unless the Supreme Court overrules it. But in *Falen Gherebi v George Walker Bush and Donald H Rumsfeld*,¹¹¹ another circuit of the Court of Appeal reached a different decision. The Court of Appeal distinguished *Johnson v Eisentrager* on the facts and held that the United States exercises territorial sovereignty over Guantanamo, which is under the sole jurisdiction and control of the United States government. The Court concluded that *habeas corpus* lies in the case. The Court was emphatic in its condemnation of the action of the government:¹¹²

However, even in times of national emergency — indeed, particularly in such times — it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike. Here, we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement. We hold that no lawful policy or precedent supports such a counter-intuitive and undemocratic procedure, and that, contrary to the government's contention, *Johnson* neither requires nor authorizes it. In our view, the government's position is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law.

The applicants in *Al-Odah* and *Rasul* appealed to the Supreme Court. The Supreme Court agreed to hear the two appeals which were later consolidated.¹¹³ By a majority of six to three, the Supreme Court reversed the decisions of the Court of Appeal and held that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.¹¹⁴ The minority was of the view that *Johnson v Eisentrager* applied and found no basis to overrule the 'a half century-old decision'.¹¹⁵ They held that exigencies of war and national security might justify suspension of *habeas corpus*. According to them, 'there are times when military exigency renders resort to the traditional criminal process impracticable'.¹¹⁶

¹¹¹ 352 F 3d 1278 (United States Court of Appeals for the Ninth Circuit) 18 December 2003.

¹¹² 8–9 of the judgment at <http://www.caselaw.findlaw.com/dataz/circis/9th/0355785P.pdf> (accessed 31 July 2004).

¹¹³ *Rasul v Bush*, decided on 28 June 2004. Forthcoming in 542 US (2004), but see the slip judgment at <http://www.supremecourtus.gov/opinions/03pdf/03-334.pdf> (accessed 31 July 2004).

¹¹⁴ n 113 above, *per* Stevens J, 4–17.

¹¹⁵ n 113 above, *per* Scalia J, 1.

¹¹⁶ n 113 above, 8–9.

Consequent upon the Supreme Court decision that detainees can challenge their detention, military tribunals are being constituted to hear the detention cases. One of the Tribunals commenced hearing in August 2004, in the case of three Guantanamo detainees.¹¹⁷ They are the first set of detainees to face trial. The tribunal is to decide whether the detainees are properly classified as 'enemy combatants', in which case they can be detained indefinitely without charges. For the first time since they were detained, they were allowed access to counsel.¹¹⁸ Given the nature of military tribunals generally, and this one in particular, no one can seriously expect any respect for the human rights of the detainees. Military tribunals, no doubt, cannot qualify as the 'neutral decision maker' required by the Supreme Court in *Hamdi*. There were now suits pending in civil court challenging the competence and legality of the tribunal.¹¹⁹

Even in civil court, the prospects for those detained at Guantanamo are not bright.¹²⁰ They face many logistic problems. For example, how do they secure the attendance of witnesses far away in Afghanistan if required for their defence? Then there are several judicial pronouncements which do not favour their case.

First, in *MKB v Marden*,¹²¹ the Supreme Court approved of secret trials. In this case, the appellant — a person of Middle East descent residing in America — was arrested and detained after the September 11 attacks. The case against him was that, in the course of his duties as a waiter in a restaurant, he served two of those who later participated in the attacks. He filed *habeas corpus* proceedings in the trial court. His application in the trial court and subsequent appeals at the Court of Appeal were conducted entirely in secret at the request of the United States government. He appealed to the Supreme Court, where he challenged the

¹¹⁷ These are Martin Mubanga (Briton), and former UK residents, Bisher al-Rawi and Jamil e Banna. See BBC NEWS 'US holds first Guantanamo hearing' at <http://news.bbc.co.uk/2/hi/americas/3916987.stm> (accessed 31 July 2004).

¹¹⁸ BBC 'Lawyer to visit Guantanamo trio' at <http://news.bbc.co.uk/2/hi/americas/3568702.stm> (accessed 31 July 2004).

¹¹⁹ G Holland 'Lawyers seek to block Guantanamo hearings' Associated Press Writer Washington (AP) at http://www.fsnews.findlaw.com/articles/ap_stories/a/w/1152/8-2-2004/20040802161503_32.html (accessed 31 July 2004).

¹²⁰ See generally E Cassel '*Hamdi, Padilla and Rasul v Rumsfeld and Bush*. Who really won?' at <http://www.counterpunch.org/cassel06292004.html> & www.globalpolicy.org/empire/terrorwar/liberties/2004/0629gitmoruling.htm (accessed 31 July 2004).

¹²¹ Docket 03-6747 2004 US LEXIS 1553. See details of the case in W Richey 'Secret 9/11 case before high court' *The Christian Science Monitor* 30 October 2003 <http://www.csmonitor.com/2003/1030/p01s02-usju.html> (accessed 31 July 2004); W Richey 'Supreme Court decision may limit access to terror cases' *The Christian Science Monitor* at <http://www.globalpolicy.org/wtc/liberties/2004/0224access.htm> (accessed 31 July 2004) and W Richey 'Supreme Court OK's holding of secret trials' at <http://www.commondreams.org/headlines04/0224-05.htm> (accessed 31 July 2004).

secret hearing. A coalition of news and public interest organisation sought to join the suit as interested persons after the existence of the suit came to public knowledge through a docket error in the lower court.¹²² The Supreme Court refused to intervene in the case. Most significantly, the Supreme Court also conducted the appeal in secret and did not disclose any reason for its decision.¹²³

Second, in *Rumsfeld v Padilla*,¹²⁴ the Supreme Court placed emphasis on territorial jurisdiction of courts. The case concerns an American citizen, Jose Padilla (aka Abdullahi Al Muhajir), who was arrested on a material witness warrant in Chicago two years ago. He was accused of planning to detonate a dirty bomb. By a five to four decision, the Supreme Court ruled against him because the application at the trial court was filed at the wrong court. What happened was that two days before he filed the case, the government classified him as an 'enemy combatant' and transferred him from civilian prison in New York to military custody in South Carolina. This was without the knowledge of his government-appointed attorney, who was not allowed access to him throughout. Thus, by the time the suit was filed in New York, he was no longer under the jurisdiction of the named respondents and was outside the jurisdiction of the court. The case shows that the ouster of the jurisdiction of courts can be effected by simply moving the detainees from one prison to another so that the applicant and his attorney would not be in position to know the proper parties to sue and the proper venue to file a suit.¹²⁵ With this administrative device, cases can effectively be put beyond judicial review.

Last, and more significant, is the decision in *Hamdi*, where the Supreme Court upheld the authority granted by Congress to the President to detain anyone involved in fighting with al-Qaeda or the Taliban. The authority granted when Congress voted for war in Afghanistan continues as long as the war lasts. Although the Taliban has been overthrown in Afghanistan, the United States still maintains substantial military presence in Afghanistan and thus the administration

¹²² This case was inadvertently put on the court's docket due to a clerical error and the existence of the suit thereby came to public knowledge: 'Secrecy is compounded as Supreme Court refuses to hear an appeal in *MKB v Warden Silha* Bulletin Winter 2004 Pt 1 15 at <http://www.silha.umn.edu/bulletin.htm> (accessed 31 July 2004).

¹²³ As above.

¹²⁴ Decided on 28 June 2004. Forthcoming in 542 US (2004). See the slip judgment at <http://www.supremecourtus.gov/opinions/sliplist/s542pt2.html> (accessed 31 July 2004).

¹²⁵ Cassell (n 120 above). Some have suggested that Hamdi's transfer to military custody was not intended to frustrate the suit since he was transferred to the place where all other al-Qaeda suspects were being held: '*Rumsfeld v Padilla*' at <http://www.law.duke.edu/publiclaw/supremecourtonline/editedCases/rumvpad.html> (accessed 31 July 2004).

argues that the war is not yet over.¹²⁶ Thus, any one classified as an 'enemy combatant' can be detained until 'the war is over'. The Supreme Court, in *Hamdi*, held that the standard of proof required of the government in defending this classification is not high.¹²⁷ There is no presumption of innocence in favour of the detainees. The government can proffer hearsay evidence. Once the government meets the minimal proof, the onus shifts to the detainee to show that he is not an enemy combatant. Thus, the detainees should, even in civil courts, expect no more than a perfunctory or nominal hearing.¹²⁸

The United States government's example, and its insistence that other countries join the fight against terrorism on terms similar to its own, have provided many governments across the world with an impetus to the crack down on rebels and political opponents. Anti-terrorism legislation authorising a wide range of human rights abuses has sprung up across the world.¹²⁹ African nations are not exempted from this development. African countries that have enacted anti-terrorist legislation include Cameroon, Ghana, The Gambia, Kenya, Namibia, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.¹³⁰

In Nigeria, the police suggested the resurrection of the defunct anti-terrorism squad created by the late General Sani Abacha, but this suggestion was rejected by the government. This decision is commendable, as the anti-terrorist squad had a poor reputation when it was in existence. According to Rotimi Sankore, a human rights campaigner:¹³¹

¹²⁶ There are ongoing operations in Afghanistan involving 20 000 United States troops: J Abizaid, Department of Defence, General Abizaid Central Command Operations Update Briefing, 30 April 2004, <http://www.defenselink.mil/transcripts/2004/tr20040430-1402.html> (accessed 8 June 2004).

¹²⁷ n 106 above, *per* O'Connor J, 27.

¹²⁸ Cassell (n 120 above).

¹²⁹ See an overview of the position world-wide in Human Rights Watch 'In the name of counter-terrorism: Human rights abuses worldwide — A Human Rights Watch Briefing Paper for the 59th session of the United Nations Commission on Human Rights 25 March 2003' at <http://www.hrw.org/un/chr59/counter-terrorism-bck.htm> (accessed 24 April 2004) and the overview of the position in commonwealth countries in D Bascombe 'Anti-terrorism legislation in the commonwealth: A briefing paper for the Commonwealth Human Rights Initiative' May 2003 available at <http://www.bond.org.uk/networker/dec03/warrights.htm> (accessed 31 July 2004).

¹³⁰ See generally Bascombe (n 129 above); E Sall 'Africa: Human rights after September 11, 2001' (Paper for Swedish NGO Human Rights Foundation International Council Meeting, and seminar on 'War on Terrorism or War on Human Rights' Stockholm// Houses of Parliament, 26–30 September 2003): <http://www.humanrights.se/engelska/eng.index.htm> (accessed 31 July 2004), and S Ellis & D Killingray 'Africa after September 11, 2001' (2002) 101 *African Affairs* 5–8.

¹³¹ R Sankore 'Anti-terror legislation and democracy in Africa' <http://www.peace.ca/antiterrorlegislationafrica.htm> (accessed 31 July 2004).

In all its years of existence, not a single terrorist was arrested or prosecuted. Instead, it was used to terrorise the media, human rights community, the pro-democracy movement and other real or imagined enemies.

Nigeria has, however, enacted an Economic and Financial Crimes Act.¹³² The Act criminalises, amongst others, financing of terrorism and participation in terrorism.¹³³ The activities of the Commission established under the Act are subject to the supervision of regular courts. Despite the Act, Nigeria remains on the Financial Action Task Force (FATL) blacklist to 'ensure that the country's remaining anti-money laundering deficiencies are corrected'.¹³⁴

4 Conclusion

The Nigerian Court of Appeal had much praise poured on it for its decision in *Fawehinmi v Abacha*. It is clear, however, that the true glory in the matter belongs to Justices Longe and Onalaja, whose courageous and imaginative decisions in *Garuba* and the *CRP* cases, respectively, dealt staggering blows to draconian decrees. Perhaps greater applause should go to the counsel in the *CRP* case, whom the Court itself commended for shedding 'new light and horizon on the African Charter'.¹³⁵ Again, this may be the result of the interactions of human rights non-governmental organisations in Nigeria with similar organisations across the world and intellectual support derived therefrom.¹³⁶

The military in Nigeria has retreated into the barracks. Had the Supreme Court followed the bold path blazed by the Court of Appeal, we would have been able to say clearly that whether the military comes back or not, they will forever live under the shadow of *Fawehinmi v Abacha*. The judgment of the Supreme Court has deprived us of this. Rather, both the majority and dissenting judgments of the Court have emboldened any would-be *coup* plotter with the knowledge that his administration will be beyond accountability for human rights violations in domestic courts. The lesson from Nigeria is that domestic human rights legislation may not be enough to stop massive human rights violations and this makes a strong case for concerted action by the international community and intervention by supra-national courts.

¹³² See the Economic and Financial Crimes Commission Act 2002.

¹³³ n 132 above, sec 14.

¹³⁴ 'Cutting off the flow of dirty money' (2004) 11 *CrossRoad Magazine* at <http://Nigeria.usembassy.gov/wwwhxmay04f.html> (accessed 31 July 2004). Nigeria and Egypt are the only African countries on the list: J Godoy 'Nigeria listed as money laundry' at http://www.news24.com/News24/Africa/News/0,2-11-1447_1491795,00.html (accessed 31 July 2004).

¹³⁵ n 23 above, 249 of the judgment of the Court of Appeal.

¹³⁶ See J Hatchard 'A question of humanity: Delay and the death penalty in commonwealth courts' (1994) 20 *Commonwealth Law Bulletin* 316.

International law is now being used in municipal courts to challenge violations of human rights. In particular, there has been a growing awareness of the African Charter in some African countries since the 1990s.¹³⁷ This trend is expected to continue. Human rights abuses do not start nor end with military regimes. The constitutions of some African countries, such as the Ugandan Constitution, 1995, under which Museveni's administration operates, contain grave derogations from internationally accepted human rights norms.¹³⁸ Even the Nigerian Constitution¹³⁹ does not cover all the human rights contained in the African Charter and other international human rights documents. The wider scope of the human rights provisions in the African Charter offers a challenge to the governments and the judiciary of Nigeria, Uganda and other African states. The legislature in these states should assist in the protection of human rights by enacting legislation that will make enforceable in their domestic courts the international human rights documents to which their countries have subscribed. The Nigerian National Assembly should make the African Charter enforceable through the Fundamental Rights (Enforcement Procedure) Rules. This will settle, finally, the controversy as to the appropriate procedure for enforcing the provisions of the African Charter in Nigerian courts.

We do not have any words of comfort for any one contemplating a military *coup* in Nigeria or in any other African country. The atmosphere is simply not congenial from legal and political perspectives. The weaknesses in enforcing the African Charter on the domestic front in most African countries do not preclude the Charter's enforceability at international *fora*. The world is moving towards stronger accountability at the international level.¹⁴⁰ Already, there are international criminal courts trying crimes against humanity.¹⁴¹ The potential of the African Charter has taken a new turn with the coming into force of the Protocol

¹³⁷ See generally Viljoen (n 2 above).

¹³⁸ Eg, art 23 of the Ugandan Constitution 1995 allows the detention for up to 360 days without trial of persons suspected of committing offences triable only by the High Court, while arts 69–75 of the Constitution legitimise the movement system as an alternative to the multi-party system. The movement system is based on a 'no-party system', which in practice allows no opposition parties to operate. See, generally, P Bouckaert *Hostile to democracy — The movement system and political repression in Uganda* (1999).

¹³⁹ Constitution of the Federation of Nigeria 1999.

¹⁴⁰ MK Sinha 'Human Rights Committee: A precursor of an international court of human rights' (2001) 41 *Indian Journal of International Law* 622.

¹⁴¹ See, generally, HJ Steiner *International human rights in context: Law, politics, morals — Text and materials* (1996) 1021–1109 and J Hassan 'The current trials of war criminals: Prospects and problems' (1997) *LIV Punjab University Law Journal* 53.

Establishing the African Court on Human and Peoples' Rights.¹⁴² It is imperative that this Court is constituted as soon as possible.

It is important also that the UN and human rights organisations condemn, in very clear terms, draconian legislation that is now emerging across the world under the guise of the 'war against terrorism'. Terrorism, in any form or under any guise, should be condemned in the strongest terms, but the 'war against terrorism' should not be at the cost of human rights. Terrorists are human beings, notwithstanding the repugnant aversion their actions provoke. The modern international human rights system is premised on the belief in a set of inalienable rights due to all human beings, simply by virtue of their being human beings. The world laboured hard to get this far in the search for internationally acceptable and enforceable human rights standards. The human rights norms now embodied in international treaties and other documents are still facing strong challenges from proponents of cultural relativism.¹⁴³ The uncontrolled war against terrorism has sounded a war cry for dictators and repressive governments across the world. Unless the international community reacts strongly and decisively, this may as well sound a death knell for the credibility of the international human rights system.

¹⁴² The Protocol establishing this Court was unanimously adopted by the OAU (now the African Union) Assembly of Heads of State and Government in June 1998. See text in (1997) 9 *African Journal of International and Comparative Law* 953–961. The Protocol came into effect on 26 December 2003 after the nation of Comoros became the 15th African Union country to ratify the Protocol: Amnesty International 'Establishing an African Court on Human Rights' news release issued by the International Secretariat of Amnesty International, AI INDEX AFR 01/004/2004 issued on 22 January 2004. Other countries that have ratified the Protocol are Algeria, Burkina Faso, Burundi, Côte d'Ivoire, The Gambia, Lesotho, Libya, Mali, Mauritius, Rwanda, Senegal, South Africa, Togo and Uganda.

¹⁴³ See eg MJ Perry 'Are human rights universal? The relativist challenge and related matters' (1997) 19 *Human Rights Quarterly* 461–509.