

**SUPREME COURT OF NIGERIA**  
28TH APRIL, 2000. SC.45/1997  
**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,**  
**U. MOHAMMED, A. I. IGUH, O. ACHIKE,**  
**S. O. UWAIFO, A. O. EJIWUNMI, JJSC**

1. GENERAL SANI ABACHA  
2. ATTORNEY GENERAL OF THE FEDERATION  
3. STATE SECURITY SERVICE ..... APPELLANTS  
4. INSPECTOR-GENERAL OF POLICE  
AND  
CHIEF GANI FAWEHINMI ..... RESPONDENT

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**ADMINISTRATIVE LAW** - Judicial review - Detention order - Subjective discretion - Section 1 (i) of Decree No. 11 of 1994 - From that provision there is no obligation on the authority issuing detention orders - To disclose reasons in the manner he exercises his subjective discretion.

**CONSTITUTIONAL LAW** - Constitution - Supremacy of - The Constitution is the supreme law of the land - It is the grundnorm.

**CONSTITUTIONAL LAW** - Treaty - Incorporation - Sections 1 and 12 (1) of the 1979 Constitution - By those provisions a treaty enacted into law in Nigeria is circumscribed in its operational scope and extent - As may be prescribed by the legislature.

**EVIDENCE** - Document - Admissibility - Detention order - Is a public document - In the absence of the original copy - Its certified copy becomes admissible in evidence.

**EVIDENCE** - Judicial notice - Detention order - The court cannot take judicial notice of a detention order - Unless it can be subsumed as a subsidiary legislation.

**FUNDAMENTAL RIGHTS** - African Charter - Enforcement Procedure  
- Any procedure which will enable an aggrieved person to approach the court for the redress - Of a violation of human rights guaranteed by the African Charter - Can be evoked.

**FUNDAMENTAL RIGHTS** - African Charter - Enforcement procedure  
- The Fundamental Rights (Enforcement Procedure) Rules under chapter 4 of the 1979 Constitution for enforcing fundamental rights - Are applicable by extension to the provisions of the African Charter.

**JUDGMENTS** - Ratio decidendi - Appellate Courts - It is the leading judgment that is regarded as the judgment of the court.

**JUDICIAL PRECEDENT** - Appellate Courts - Bindingness of the ratio decidendi - It is the ratio contained in the leading judgment - That constitutes the authority for which the case stands.

**JUDICIAL PRECEDENT** - Stare decisis - Doctrine of precedent - The decision on a given issue of law handed down by the Supreme Court - Is not only superior but binds all subordinate courts.

**JURISDICTION** - Courts - Ouster of jurisdiction - For the court's jurisdiction to be ousted - It must be clearly shown that a particular action falls within the ouster clause - That is not so in the present case.

**JURISDICTION** - Ouster of jurisdiction - African charter - Was never suspended or repealed - By any of the Constitution (suspension and Modification) Decrees enacted between 1983 and 1999 - The courts jurisdiction to give full recognition and effect - To the African charter remained unimpaired.

**JURISDICTION** - Ouster of jurisdiction - Federal Military Government (Supremacy and Enforcement of Powers) Decree No 12 of 1994 - Human rights - Claims - Where there is nothing in the claims that calls in ques-

*tion the validity of any decree - Decree No 12 of 1994 would not apply.*

**INTERNATIONAL LAW** - African Charter - Classification - African Charter is an international law incorporated into the Nigerian body of municipal laws - And it remains at par with other municipal legislations.

**INTERNATIONAL LAW** - Sovereignty - Treaty - Obligations - A state's treaty obligations can be neutralized by enacting a new legislation inconsistent with those obligations - But this is without prejudice to any remedies available against the recalcitrant state in international law.

**INTERNATIONAL LAW** - Treaty - Incorporation - Municipal laws - A treaty which has been incorporated into the body of the Municipal laws - Ranks at par with the municipal laws.

**INTERNATIONAL LAW** - Treaties - Rights and obligations - Treaties may create rights and obligations between citizens and the member states - And between the ordinary citizens themselves.

**INTERNATIONAL LAW** - Treaty - The meaning of a treaty.

**INTERNATIONAL LAW** - Treaties - Unincorporated treaties - Cannot change any aspect of Nigerian Law - Even though Nigeria is a Party to those treaties.

**INTERNATIONAL LAW** - Treaty - Vis-a-vis contract - The difference between a treaty and a contract.

**INTERPRETATION OF STATUTES** - Detention order - State Security (Detention of Persons) Decree No. 11 of 1994 - From communal reading of the Decree with the various amendment Decrees - The true intent of the Decree is to empower the Inspector General of Police with the authority to issue a detention order

**LEGISLATION** - *African Charter - And the Constitution - Classification - African Charter is inferior to the Constitution and the Decrees.*

**LEGISLATION** - *Subsidiary legislation - What it connotes - And when detention order can be subsumed as a subsidiary legislation.*

### **FACTS**

The respondent as applicant, filed an application at the Federal High Court, Lagos challenging his arrest and detention by the appellants as respondents to the application. The application, by motion ex-parte for leave to enforce his fundamental rights, was brought pursuant to section 42 (1) of the Constitution of the Federal Republic of Nigeria 1979, Order 1 Rule 2 (1) (2) and (6) and Orders 4 and 6 of the Fundamental Rights (Enforcement Procedure) Rules 1979 and inherent jurisdiction of the Court, as preserved by the 1979 Constitution. The reliefs sought by the applicant were two declarations that his arrest and detention constitute a violation of his fundamental rights guaranteed under the 1979 Constitution and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Cap. 10, Laws of the Federation of Nigeria, 1990; a mandatory order to compel the respondents to release the applicant; an injunction; and damages of N10 million.

The respondent, a legal practitioner, was arrested without warrant at his residence on Tuesday January 30, 1996 at about 6. am. by six men who identified themselves as operatives of the State Security Service (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. Hence he filed an application and sought the aforesaid reliefs. The appellants filed a Notice of Preliminary Objection, challenging the jurisdiction of the Federal High Court to entertain the action of the respondent by the combined effect of the provisions of section 4 of State Security (Detention of Persons) Decree No. 2 of 1984 (as amended), the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 2 of 1994 and the Constitution (Suspension

and Modification) Decree No 107 of 1993. And particularly, that, the 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 from learned counsel appearing for the parties in the course of which a detention order dated 3/2/96 and signed by the Inspector-General of Police, by which the respondent was detained, was shown to the court and counsel for the respondent.

The learned trial judge in a reserved ruling upheld the objection and further held that the procedure adopted by the respondent was improper. Consequently, he declined jurisdiction and struck out the suit. Dissatisfied with the ruling, the respondent appealed to the Court of Appeal Lagos Division, which unanimously allowed the appeal in part and remitted the case back to the trial court to consider the issue of the consequences of the detention for the four days period which was not covered by the detention order. Both parties being aggrieved by the decision of the Court of Appeal appealed to the Supreme Court. In the main appeal the appellants raised three issues while the respondent raised two issues. In the cross-appeal, the respondent/cross-appellant raised four issues. One of the issues was successfully challenged by the appellant as incompetent and it was consequently struck out.

**ISSUES FOR DETERMINATION:**

*"1. Whether the Court of Appeal applied the principle of international law correctly when it held that in signing the treaty on African Charter, Nigeria attempted to fulfil 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.*

3. *Whether the Court of Appeal having concurred with the decision of the trial Federal High Court declining jurisdiction to entertain the respondent's application for the enforcement of rights guaranteed under the African Charter on Human and Peoples Rights Cap 10 Laws of the Federation of Nigeria 1990 because of the procedure adopted thereof, to wit, procedure by way of Fundamental Rights (Enforcement) Procedure Rules 1979, adjudged by both Courts as incorrect was right -*

(i) *in not striking out the application right away; and*

(ii) *in remitting the application to the Federal High Court to consider the consequences of the detention of the respondent for the period of four days not covered by the Detention Order.*

"1. *Whether going by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 and its various amendments, particularly as amended by Decree No. 11 of 1994, the Inspector-General of Police is competent to issue and sign a detention order and whether if the answer to this question is in the affirmative, he can be compelled to disclose the reasons for issuing same.*

2. *Whether the court below was right to have held that the procedure adopted by the trial court in taking judicial notice of the detention order was proper.*

3. *Whether the procedure adopted by the Cross-appellant in this case in enforcing the articles of the African Charter on Human and Peoples' Rights was proper.*

**[SEE EDITOR'S NOTE AT P. 997 ON THE PREVIOUS CA PRINCIPLE OF LAW NOW OVERRULED]**

**HELD** (Unanimously dismissing the main appeal per lead judgment of **ACHIKE JSC**, and allowing the cross appeal by a majority opinion on an issue per **Ogundare JSC**)

**H Treaty - The meaning of a treaty**

1. A treaty is a compact, an agreement or a contract - bilateral or multi-lateral - between sovereign states (two or more) whereby they establish or seek to establish a relationship between themselves governed by inter-

national law. (p. 896 C)

***Treaty - vis-a-vis contract***

2. A treaty, therefore, in a broad sense, is similar to an agreement under the civil law. The difference between an ordinary civil contract (or agreement) and a treaty is that while the former is an arrangement between individuals and derives its bindingness from municipal or domestic law of a state, a treaty on the other hand derives its binding force and effect from international law. See Article 2 of the Vienna Convention of May 23, 1969 which came into force on January 27, 1980. Thus, ordinarily, a treaty binds only states parties to it just as a contract binds only individuals who are parties thereto. There is therefore no justification for over-simplification of a treaty in terms of a contract. Under strict customary international law, individuals are not subjects of international law nor were municipal or domestic courts called upon to control or administer treaty obligations between sovereign states. See Walker v Baird (supra) and Sobhuza v Miller (supra). That, however, is not the true position today of treaty obligations between independent nations under international law. Within limits today, we are familiar with provisions of a treaty that create benefits in favour of individuals of a state party to the treaty. Thus the classic example of privity of contract under municipal law, exemplified by the authority of Ikpeazu v A.C.B. (Supra) which ordinarily will deny individuals of a state party to a treaty the right to maintain an action on a treaty on the ground that such individuals are not parties to the treaty are completely untenable. (pp. 896 D/897 A)

***Treaties - Unincorporated treaties***

3. Unincorporated treaties cannot change any aspect of Nigerian law, even though Nigeria is a party to those treaties. Indeed, unincorporated treaties have no effect upon the rights and duties of citizens either at common law or statute law. They may however indirectly affect the rightful expectation by the citizen that governmental acts affecting them would observe the terms of the unincorporated treaties. See the recent Privy Council Opinion in Higgs & anor v Minister of National Security &

ors. Judgment was handed down on 14/12/99, per The Times of 23/12/99. (p. 896 G)

***Treaties - Rights and Obligations***

- B 4. From the above plethora of judicial authorities, it is crystal clear today that treaties may create rights and obligations not only between member states themselves, but also between citizens and the member states, and between the ordinary citizens themselves. It is therefore clear that the over-simplification of the word treaty in terms of ordinary contract as the term is understood in municipal law, and as submitted by the learned C counsel for the appellants, is very restrictive and unacceptable. (p. 898 A)

***Constitution - Supremacy of***

- D 5. The Constitution is the supreme law of the land; it is the grundnorm. Its supremacy has never been called to question in ordinary circumstances. (p. 898 H)

E ***Constitutional Law - Treaty***

- F 6. The combined effect of sub-sections (1) and (3) of section 1 and section 12(1) of the 1979 Constitution leaves one in no doubt, not only about the pride of place of the Constitution but brings to the glare that a treaty enacted into law in Nigeria is circumscribed in its operational scope and extent as may be prescribed by the legislature. (p. 899 F)

***Treaty - Incorporation***

- G 7. The general rule is that a treaty which has been incorporated into the body of the municipal laws ranks at par with the municipal laws. (p. 900 E)

***Judicial Precedent - Stare decisis***

- H 8. By the time-honoured doctrine of precedent as it operates in Nigeria and all common law countries, the decision on a given issue of law handed down by the apex court, which for us in Nigeria is the Supreme Court, is not only superior but binds all subordinate courts, including all courts



exercising appellate jurisdiction. It is the law that a decision of a court of competent jurisdiction, no matter that it seems palpably null and void, unattractive or insupportable remains good law and uncompromisingly binding until set aside by a superior court of competent jurisdiction; see Babatunde & anor v Olatunji & anor (2000) 2 NWLR (Pt. 646) 557, and Ezeokafor v Ezeilo (1999) 6 S.C. (Pt. 11) 1. 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 Labiya case. This posture of the lower court is more startling in the absence of any convincing reason given for that far-reaching proposition of the law when the doctrine of precedent, stare decisis, of great antiquity, embedded in the English common law, and indeed, an integral part of our law which is anchored in good reason, logic and common sense and has not been demonstrated to be manifestly out of step with modern development in law should be blown away by a side-wind. There is therefore no basis whatsoever for the lower court not to have followed the decision in Labiya case. (p. 901 D)

### ***African Charter - Classification***

9. Notwithstanding that the African Charter is a legislation with international flavour, it is, for all intents and purposes, simply an international law incorporated into the Nigerian body of municipal laws, and like such international-incorporated treaties, it remains at par with other municipal legislations. The elevation of the African Charter to a "higher pedestal" and the denial of the continued validity or authorities of Labiya case by the lower court is totally absurd, untenable and unwarranted. (p. 902 B)

### ***Legislation - African Charter***

10. The appellants' contention that the African Charter is inferior to the Constitution and the Decrees is supportable. To hold otherwise is to erect an indefensible barrier into an enactment by introducing words that are not there, more so when no ambiguity has been shown to exist which may warrant introducing such extraneous construction in aid of clarify-

ing any ambiguity. I shall therefore decline to read either in the African Charter or Cap 10 LFN 1990 that incorporated the African Charter into our law words that are not there ascribing any superiority to the African Charter vis-a-vis other municipal legislations. (p. 902 D)

**B** *Sovereignty - Treaty*

11. The assumption of voluntary surrender of state's sovereignty by a state party to a treaty, within limits, is well-recognized in international law. Consequently, it is an exception rather than the rule for a state party to a treaty to contract out and defeat the legitimate operation of a treaty to which it is a signatory by derogating from the treaty through passing a municipal law inconsistent with the treaty. Since a state at any moment, despite the provisions of a treaty that it is a signatory to, is at liberty to withdraw its involvement in the treaty, it follows that a state's treaty obligations can be neutralized by enacting a new legislation inconsistent with those obligations. But this is without prejudice to any remedies available against the recalcitrant state in international law at the instance of the other states parties to the treaty. Invariably, this is a political decision involving such sanctions that the other states signatory to the treaty may deem fit to impose. See A. H. Robertson Human Rights in National and International Law, (1968 ed.) p. 12, Ian Browlie, Principles of Public International Law (4th ed.) J. G Starke, Introduction to International Law, 9th ed. pp 413-415, and Macarthy Ltd. v Smith (1979) 3 All E.R. 325 at 329 pg. 22. (p. 903 H)

***Fundamental Rights - African charter***

G 12. I cannot agree more with learned cross-appellant's counsel that Ogugu v State (supra) is a good authority that the African Charter, having been duly incorporated into our municipal laws, it would follow that the procedural provisions set out in the Fundamental Rights (Enforcement Procedure) Rules under Chapter 4 of the 1979 Constitution for enforcing fundamental rights enshrined in the Constitution, are applicable, by extension, to the provisions of the African Charter. (p. 907 B)

***African charter - Enforcement procedure***

13. Beside the procedure under the Fundamental Rights (Enforcement Procedure) Rules, it is clear to me that any procedure which will enable an aggrieved person to approach the court for the redress of a violation of human rights guaranteed by the African Charter, more so in the absence of any express provision for enforcement under the African Charter, can be evoked. Today, the courts make less fuss about complaints based solely on adjectival law that tend only to impede the attainment of justice. I am encouraged to so hold by the maxim ubi jus, ibi remedium (where there is a right there is a remedy.) Besides, before the Fundamental Rights (Enforcement Procedure) Rules were prepared complaints of abuse of fundamental rights under the Constitution were appropriately dealt with, and were not allowed to be defeated by technical submissions of absence of formal procedural rules. (p. 907 E)

***Judgments - Ratio decidendi***

14. Where a single judge presides, the situation does not admit of any difficulty; the judgment of that court is what may be discerned as the ratio decidendi or rationes decidendi of that case in contrast to the passing remarks, otherwise referred to as obiter dictum or obiter dicta made by the court in the course of preparing the judgment. The problem, such as the one raised in this appeal, arises when three Justices (as is usually the case in the Court of Appeal) or five Justices (as is usually the case in the Supreme Court) preside over a case or an appeal wherein one of the Justices is assigned the responsibility to write the leading Judgment and others, under the mandatory provision of the Constitution, are obliged to render either their concurring or dissenting judgments. In such a situation, it is the leading judgment that is, in legal circles, regarded as the judgment of the court. The other judgments may respectively be a two word judgment, e.g "I concur" or judgments longer or shorter than the leading judgment. (p. 910 B)

***Judicial precedent - Appellate courts***

15. The point of jurisprudential interest and of considerable interest in

this appeal is the relationship of the bindingness of the ratio decidendi or rationes decidendi contained in the leading judgment on the one hand, and the other concurring judgments, on the other hand. Are they at par or are some superior to others?. The jurisprudence and practice of law in this country appears to be tolerably clear: it is the ratio or the rationes contained in the leading judgment that constitutes or constitute the authority for which the case stands. All other expressions contained in the concurring judgments, particularly those not addressed in the leading judgment are obiter dictum or dicta, obiter dicta in the leading judgment as well as in the concurring judgments may be of persuasive effect in other occasions. This is my understanding of Idise case. I do not, with respect, find Bolaji v Bamgbose (supra) helpful. (p. 910 F)

**D Interpretation of statutes - Principle of**

16. I agree with learned cross-appellant's view that where a statute tends to encroach on, curtail or abridge the freedom or liberty of an individual, that statute is generally construed very strictly and narrowly against anyone claiming benefit therefrom. (p. 914 G)

**Rule of construction - Judicial modification**

17. It is also a well-known rule of construction that where a statute in its ordinary meaning and grammatical construction some clear absurdity would result, some effort would be made by the court to avoid the absurdity by modifying the structure of the sentence or the meaning of the words. There is no doubt whatsoever that interpreting section 1 (a) of Decree No. 11 of 1994 strictly, as promulgated and without any judicial modification, will result in an absurdity which the law-maker cannot be presumed to have intended. It is quite clear to me that there was an obvious oversight on the part of the law-maker in amending Decree No. 24 of 1990 without providing for the substitution of the Vice-President with the office of Chief of General Staff so that when the amendment Decree No. 11 of 1994 was promulgated the provisions of its section 1 (a) would have tallied with the intendment of the legislature and in turn avoid the absurdity under Decree No. 11 of 1994 of inserting the phrase

"or the Inspector-General of Police" after a non-existent office. Therefore, section 1 (a) of Decree 11 of 1994 should be construed as follows. By inserting immediately after the words "Vice-President" the words "or the Inspector-General of Police" wherever they occur in the Decree because that was the general intention of the law-maker. (p. 914 H) B

### ***Interpretation - Harmonious approach***

18. It seems to me that the suggested constructional approach by judicial modification of a statute to supply a seeming omission of word or words in a statute and thereby avert the absurdity that would follow a literal interpretation of the statute can also be achieved by reading the whole of the decree together or harmoniously, particularly if this will assist the court in deciphering the legislative intention in relation to the statute in order to effectuate it as the court has judicial responsibility to interpret a statute according to its true intent. As Nnaemeka-Agu, JSC succinctly put it in Nwosu v Imo State Environmental Sanitation Authority (supra) at p. 724: C D

*"I believe that an indubitable offshoot of the principle of construction that the court must seek out the legislative intention and give effect to it that every statute must be construed according to its tenor."* (p. 916 D) E

### ***Interpretation of statutes - Detention order***

19. Undoubtedly, it is evident from communal reading of the State Security (Detention of Persons) Decree No. 11 of 1994 along with the State Security (Detention of Persons) decree 1984, as amended by the amendment Decrees of 1984, 1986, 1988 and 1990, would leave no one in doubt that the true intent of Decree No. 11 of 1994 is to empower the Inspector-General of Police with the authority to issue detention order independently with another person. If for any reason that other person cannot perform that function that cannot in any way affect the powers sought to be conferred on the Inspector-General of Police in this regard since the word "or" in the context of section 1 (a) of Decree No. 11 of 1994 is unmistakably disjunctive in its meaning. In the result, whether F G H

by invoking the harmonious rule of construction or by judicial modification to supply or fill in an apparent case of obvious oversight or omission in order to avoid absurdity which the legislature was presumed not to have intended, I turn in an affirmative answer to Issue No. 1 and hold  
 B that the Inspector-General of Police is competent and empowered to issue and sign a detention order, under Decree No. 2 of 1984 as variously amended. (p. 916 G)

*Administrative law - Judicial review*

C 20. I am unable to discover from close reading of section 1(1) of Decree No. 11 of 1994 any obligation in the authority issuing detention orders to disclose reasons in the way and manner he exercises his subjective discretion. Contrary to the submission by learned cross-appellant's counsel  
 D that the Decree, as amended, has spelt out conditions or circumstances which must exist before the Inspector-General of Police can issue a detention order, I have searched, in vain, to discover the said conditions-precedent. Clearly learned counsel is reading implied conditions  
 E into the lucid and unambiguous provisions of section 1 (1) of Decree No. 11 of 1994. This cannot be right in the absence of any authority to do so. (p. 919 F)

*Evidence - Document*

F 21. A detention order, at best, is a public document. In the absence of the original copy its certified copy becomes admissible in evidence. (p. 922 D)

*Evidence - Judicial notice*

G 22. While a court can take judicial notice of any law, the same cannot be said of a detention order, which as we have earlier observed, can at best be ranked as a public document. Its authenticity or otherwise can only  
 H be properly considered by the court after it has been duly admitted in evidence. Alternatively, the court can take judicial notice of detention order if it can be subsumed as a "subsidiary legislation" or a "subsidiary instrument". (p. 922 F)

**Legislation - Subsidiary legislation**

23. What is a subsidiary legislation and can a detention order be so subsumed? The legal status of a detention order had been considered by the Court of Appeal in at least two cases. First, in Wang Ching - Yao case, The next case was Abdulumuni Yaro Saidu v. C.O.P. (unreported), suit B No. CA/K/1/87 of 10th November, 1987. Here, the question of inadmissibility of photocopies of detention orders tendered in evidence at the trial court was answered by the Court of Appeal in the affirmative. A consideration of the poser, what is a subsidiary legislation, was given by the Court of Appeal, coram Maidama, Ogundere & Achike (JJCA). In my C leading judgment of the Court in that case, I observed:

*"Generally, the term subsidiary legislation is used to connote any enactment, that is legislation made under an enabling law. The term subsidiary legislation may therefore be used interchangeably with the term D "subsidiary instrument". Now "subsidiary instrument" means any "order, rules, regulation, rules of court or byelaws made either before or after the commencement of this Act - (this Act herein is a reference to the Interpretation Act, 1964) - in exercise of powers conferred by an act". E (see section 27 (1) of the Interpretation Act, 1964) The term "Order" in this context is a term applied to instruments, made under statutory powers embodying directions, commands or mandates which are of general character (underlining mine) as distinct from specific instructions to which F the term "directions" is applied: (See Halsbury's Statutory Instruments Vol. 1 of 1972 page 6). In my view, the hall-mark of an "order" which makes it cognizable as a "subsidiary instrument" or "subsidiary legisla- G tion" lies in the generality of its application in contradistinction to a mere specific direction which in ordinary parlance, but definitely not in the legal sense, may be referred to as an order. An "order" as a subsidiary legislation must be seen as a statutory instrument, for example, S. 1. 17 of 1984, Customs Tariff (Import prohibition (No. 2) order of 1st April, 1984 is made under powers conferred under section 7 of the Customs H Tariff (consolidation) Act 1983. Furthermore, this order may be cited as the Customs Tariff (Import prohibition) No. 2) Order 1984. Clearly, the detention order, Exhibit A does not exhibit any similarity to a statutory*

*instrument or subsidiary legislation in the manner it was made nor can it be said to be an instrument of such general application. From the foregoing I think that any detention order made by the relevant authority under Decree No. 2 of 1984 cannot be subsumed under subsidiary legislation or subsidiary instruments, not being an order of a general character. In my view this court cannot take judicial notice of such order under section 73 (1) (a) and (b) of the Evidence Act."*

In the result, guided by the foregoing, I am clearly of the view that the trial court was in error to have taken judicial notice of the detention order. (p. 922 H)

### **PER OGUNDARE JSC**

#### ***Ouster of jurisdiction - African Charter***

24. The Respondent has argued strenuously against the position taken by their lordships, I, 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.(1) 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 purposes of the Act, no mention was made of Cap. 10 which was then already in existence. I would think that Cap. 10 remained unaffected by the provisions of Section 4 (1). A treaty is not deemed abrogated or modified by later statute unless such purpose has been clearly



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 in the Schedule to this Act shall, subject as thereunder 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 African Charter. That is, the plenitude of the Government of Nigeria cannot do anything inconsistent with the Charter. Section 1 was never suspended or repealed by any of the Constitution (Suspension and Modification) Decrees enacted between 1983 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 (1) & (2) 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. 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. (p. 938 H)

### ***Jurisdiction - Ouster of jurisdiction***

25. 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 1994 ousted the jurisdiction of the Courts in this matter. My

simple answer is that the Decree would not apply. As earlier observed in this judgment, Cap. 10 is preserved by sections 16 and 17 of Decree No. 107 of 1993. By virtue of the preamble to Decree No. 12 of 1994 and section (1) thereof, Cap. 10 is equally preserved by the said Decree. I can find nothing in the claims of the Respondent that calls in question the validity of any decree. 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 part of the proceedings in this case. Nor was it evidence on which the Court could act. (p. 942 D)

### ***Jurisdiction - Courts***

26. Ouster of court's jurisdiction is not a matter of course. For the Court's jurisdiction to be ousted it must be clearly 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 am not impressed by the views expressed by them on the failure of the Appellants to tender in evidence the detention order they relied on. The conclusion I reach is that on the record before us, Decree No. 12 of 1994 does not apply. (p. 944 D)

### **NOTABLE POINTS OF INTEREST** **ACHIKE JSC**

*1. Action predicated on an executive act under Decree No. 2 of 1984 is void*

Thus by section 1 (2) (b) (i) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994, it is provided:

*"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."*

Since, as we have stated earlier herein, that an incorporated treaty, like the African Charter, ranks at par with other municipal legislations, it is clear that respondent's action, predicated on the executive act of the Inspector-General of Police under Decree No. 2 of 1984, as amended by Decree No. 11 of 1994, is void. It will surely be foolhardy for any Court to overlook the far-reaching and devastating effect of the above provisions of section 1 (2) (b) (i) on the jurisdiction of the court. (p. 905 A)

## *2. Power to issue detention order can be wielded arbitrarily*

It is quite clear that the provisions under section 1(1) of Decree No. 11 of 1994 give the Inspector-General of Police a free and unfettered power to reach his conclusion, relying on such data and information that he may deem fit in being satisfied that any particular person's act is prejudicial to state security. No reasons are given by the detaining authority to anyone as to how a detainee is or constitutes himself in acts detrimental to state security. Put tersely but frankly, it is manifest that the powers vested in the detaining authority can be wielded arbitrarily and capriciously without any remedy or right to seek a review of the decisions of the detaining authority. Indeed, the Decree was further shielded by the ouster clause in section 4 of the same Decree. Learned cross-appellant's counsel has urged that the phrase "if the Chief of Staff is satisfied" should be interpreted to mean "if the Chief of Staff has adequate reasons in fact to be satisfied". With utmost respect to counsel, I am unable to accept this; it is an unwarranted encrustment on the plain and unambiguous provisions of the statute. In any event, the in-built ouster clause under section 4, as it were, shields the arbitrariness in which the power of the detaining authority is shrouded. It is pertinent to remember that the relevant time of the operation of these Decrees was during the military regime, a time that provision of the 1979 Constitution had been substantially suspended and when judicial powers of the state had been radically eroded and in-

clusion of ouster of the jurisdiction of courts of law in statutes became the rule rather than the exception. It is against this background that the plenitude of subjective discretionary power conferred on the detaining authority could be better appreciated. (p. 920 F)

B

*3. A Detention order should be subjected to the strict rules of admissibility of documentary evidence*

Although the Court of Appeal disapproved of this informal procedure, nevertheless it held that it was of no moment to now argue at the appeal stage that the detention order was not formally admitted in evidence, bearing in mind the access both parties had to the order and the use to which it was put by them, more so as it did not occasion any miscarriage of justice. While endorsing the lower court's conclusion on the informal way the detention order was introduced at the trial, it must be strongly denounced and much to be discouraged. In future, such issue should be thoroughly tested and thrashed out at the court of trial under the strict rules of admissibility of documentary evidence and not postponed to post-mortem consideration when the case is on appeal. (p. 924 G)

### **BELGORE JSC**

*4. How to stop the military from curtailing freedom*

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 1970 called Supremacy Decree. The only way to stop these Military overwhelming 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. (p. 927 E)

*5. When municipal law may be preferred to international law*

In countries which have Constitutions, albeit, under a dictatorship, the municipal laws and the Constitutions are held in superior status than any international law like a treaty. Sometime a 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. (p. 928A) B

### **OGUNDARE JSC**

6. *When an international treaty entered into by Nigeria becomes binding* C  
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). D*

(See now the re-enactment in section 12 (1) of the 1999 Constitution). Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our E courts. See the recent decision of the Privy council in Higgs & Anor. v. Minister of National Security & Ors. The times of December 23, 1999 (p. 934 E)

7. *How to resolve a conflict between a statute with international flavour F and a domestic statute*

No doubt Cap. 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the G 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" H than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr. Adegboruwa, learned counsel for the Respondent. Nor can its international flavour prevent the National Assembly, or the Federal Mili-

tary Government before it to remove it from our body of municipal laws by simply repealing Cap. 10 Nor also is the validity of another Statute 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 repealed by Congress in like manner; and whether such modification or repeal is wise or just is not a judicial question. (p. 935 F)

8. *S.267 of the 1979 Constitution is inapplicable where the official concerned was sued in his official capacity*

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 sub section (2) of section 267

*"(2) The provisions of subsection (1) 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."* (p. 947 G)

**IGUHJSC**

9. *Ouster clause in a Decree - When it will not apply*

In the present case, no material facts were deposed to by the appellants in answer to the affidavit in support of the respondent's originating summons to bring their case within the purview of either Decree No. 107 of 1993 or Decree No. 12 of 1994. I think both courts below were clearly in error to have invoked both Decrees in holding that there was no jurisdiction in the trial Federal High Court to entertain the respondent's claims. (p. 957 D)

**UWAIFOJSC**

10. *Definition of Treaty*

I think it is useful to remember that the relevant law on the matter is now

generally governed by the Vienna Convention on the Law of Treaties of 1969. The convention was based upon draft articles proposed by the International Commission and was adopted at the Vienna Conference on the Law of Treaties. According to the convention "treaty" means an international agreement or by whatever name called, e.g. Act, charter, B concordant, convention, covenant, declaration, protocol or statute, concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation: see Halsbury's Laws of C England, 4th edn., vol. 18, para. 1769 and 1769n8, page 918. (p. 968 E)

#### 11. *The meaning and essence of Act of state doctrine*

Act of State doctrine is a doctrine denying to municipal courts (1) the D jurisdiction to pass judgment upon the validity or legality of the acts of a foreign state and (2) the right to challenge executive statements of their own government on the conduct of foreign affairs. As observed by Chief Justice Fuller of the United States Supreme Court in Underhill v. Hernandez (1897) 168 U.S. 250, "Every sovereign state is bound to re- E spect the independence of another sovereign state and the courts of one state will not sit in judgment on the acts of another done within its own territory." (p. 968 H)

#### 12. *The purport of the African Charter*

The African Charter as far as Nigeria is concerned, is not purely a matter of public international law (or international customary law per se) regu- F lating the relationship between member states which are signatories to it. G It is an understanding between some African states concerned to protect and improve the human rights and dignity of their citizens and other citizens within the territorial jurisdiction of their countries, to the commitment of which, that understanding has been translated into a legal obligation by adopting the Charter as a domestic law. In our own case, it H is the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act earlier referred to which is the domestic law. (p. 969 B)

*13. The necessity of applying the African Charter in a civilized manner*

It seems to me that where we have a treaty like the African Charter on Human and Peoples' Rights and similar treaties applicable to Nigeria, we must be prepared to stand on the side of civilized societies the world over in the way we consider and apply them, particularly when we have adopted them as part of our laws. To my mind, this remains a valid attitude whether in military or civilian government. This will necessarily extract from the judiciary, so much so in a military regime, its will and resourcefulness to play its role in the defence of liberty and justice. The judiciary must not be seen as assisting those who step on liberty and justice to effectively press them down. Of course, if its role is completely taken away or abrogated in any particular situation, it will be obvious that no blame can be laid at its door for the infraction of human rights and liberties in question in any given situation. I subscribe to every view which supports the attitude that "we cannot afford to be immuned (sic) from the progressive movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understanding as well as in the respectable and respected voices of our other learned brethren in the performance of their adjudicating roles in other jurisdictions" to use the words of Aguda JCA in Attorney-General of Botswana v. Unity Dow (1998) 1 HRLRA 1 at 127-128. [HRLRA is Human Rights Law Reports of Africa]. (p. 972 C)

*14. A statute will not be interpreted so as to violate a rule of international law.*

There is therefore a presumption that a statute (or an Act of Parliament) will not be interpreted so as to violate a rule of international law. In other words, the courts will not construe a statute so as to bring it into conflict with international law. Thus it was observed in Bloxham v. Favre (1883) 8 P. D. 101 at 107 (adopting the opinion expressed in Maxwell on Interpretation of Statutes) that -

*"every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established principles of international law."*



The application of this principle does not imply that a statute will be declared ultra vires as being in contravention of a treaty or of an international law, or that the treaty is superior to the national laws ( a completely erroneous concept), but that the courts would desist from a construction that would lead to a breach of an accepted rule of international law: See Cheney v. Conn Airways (1968) 1 All ER 779; Corocraft Ltd. v. Pan-Am Airways (1969) 1 Q. B. 616. (p. 976 G)

#### 15. *African Charter vis-a-vis the European Communities Act*

In our own case what is enacted under s. 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act - now in Cap. 10 Laws of the Federation of Nigeria 1990 - is that the provisions of the Charter shall "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." This no doubt is a command similar to that of s. 3 (1) the European Communities Act 1972. To reinforce the continued applicability of Cap. 10, the Constitution (Suspension and Modification) Decree No. 107 of 1993, ss. 16 (1) E and 17 preserved it. It is the nuances with which to place Nigeria vis-a-vis Britain comparatively in the way their circumstances should be related in these matters having regard to the prevailing legal and political systems at the time that could be an issue. But the call to judicial duty in both remains, and we must make the very best of our situation. (p.978 F)

#### 16. *Principles pertaining to the African Charter*

Therefore I proceed on the basis and upon the understanding that at the time the cross-appellant was arrested, the appellants recognized and acknowledged that the African Charter, adopted by Cap. 10 of the Laws of the Federation of Nigeria, and affirmed by Decree No. 107 of 1993, was in full force. From the principles and the Laws already discussed above the following basic concepts ought to be established, namely (a) the African Charter is a special genus of law in the Nigeria legal and political system; (b) the Charter has some international flavour and in that sense it cannot be amended or watered down or sidetracked by any Nigerian law;

(c) the effect of the Charter in Nigeria may be completely obliterated by an express repeal of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. I do not think to pay due regard to the African Charter, even though it is now part of our municipal law, will be in conflict with the decision of this court in Labiye v. Anretiola (1992) 8 NWLR (pt. 258) 139. Obviously the African Charter now falls within the category of Laws made by the National Assembly. But like the experience under the European Communities Act, 1972 in regard to the policy towards the European Economic Communities Treaty, by comparison; the African Charter cannot also be submitted, as I hope I have shown, to the sheer vagaries of any other municipal or domestic law. We cannot be so different from other countries in this matter. (p. 979 D)

D 17. *Why a majority view emerged in favour of allowing the appeal*

Before ending this judgment, I need to add that the cross-appeal was very contentious. The judgment of my learned brother Achike JSC which I had the privilege of reading in advance expresses the consensus view on the appeal. But the dismissal arrived at by him of the cross-appeal, the reasons for which I respectfully acknowledge he has painstakingly stated in the clearest possible manner, was initially a majority position while on the other hand I held a minority view to allow the cross-appeal. After I made a draft of this judgment available, it appeared the merit of the cross-appeal became crystal clear and so the majority view emerged in favour of allowing the cross-appeal. (p. 986 E)

G 18. *The trial court has jurisdiction to entertain the suit*

From the totality of the discussion of both the appeal and the cross-appeal, the central question is whether the trial court has jurisdiction to entertain the suit. This was what was sought to be determined by the preliminary objection raised against the suit. My judgment is that the trial court has jurisdiction to entertain the suit and to reach appropriate decisions upon the reliefs sought. I therefore dismiss the appeal and allow the cross-appeal. I accordingly order that the suit be remitted to the Federal High Court to be heard and determined by another judge in re-

spect of all the reliefs sought. (p. 987 A)

### **REPRESENTATION**

Chiesonu Okpoko Esq., Legal Officer, Federal Ministry of Justice for the appellants B  
 Ebun-Olu Adegboruwa Esq., with Mohammed Fawehinmi for the respondent.

### **CASES REFERRED TO**

Ibidapo v Lufthansa Airways (1996) 4 NWLR (Pt. 498) 124 at p. 150 C  
 Salaman v Secretary of State for India (1906) 1 K. B. 603 at 639  
 Walker v baird (1892) A. C. 491 at p. 497  
 Sobhuza II v Miller (1926) A C 518, pp 522 - 524  
 Ikpeazu v. A.C.B. (1965) NMLR 374 D  
 Labiyi v Anretiola (1992) 8 NWLR (Pt. 258) 139  
 Cook v. U. S. 288 U. S 102  
 Garden Cottage Foods Ltd. v Milk Marketing Board (1984) A. C 130 at p. 144 E  
 Oshevire v British Caledonian Airways Ltd. (1990) 7 NWLR (Pt. 163) 507 at 519  
 A-G Botswana v Unity Dow (1988) H R R A  
 New Patriotic Party (NPP) v The Inspector-General of Police, Ghana & ors No. 4/93 F  
 Fajinmi v The Speaker Western House of Assembly (1962) 1 All NLR (Pt. 1) 205  
 Ogugu v The State (1994) 9 NWLR (Pt. 366)1 at pp 26-27  
 Higgs v Minister of National Security G

### **STATUTES & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1979; SS. 1 (1) (3), 6 (6) (b), 12 (1), 42, 219, 236 (1), 259 and 267 H  
 Fundamental Rights (Enforcement Procedure) Rules 1979; 0.1 r 2 (1) (2) & (6) and 48 O.6  
 African Charter on Human and Peoples' Rights (Ratification and Enforce-

ment) Act, Cap. 10 Laws of the Federal of Nigeria, 1990; SS. 1  
State Security (Detention of Persons) Decree No 2 of 1984 (as amended)  
SS. 1 (1) and 4  
State Security (Detention of Persons) (Amendment) Decree No. 11 of  
B 1994; SS. 1  
Constitution (Suspension and Modification) Decree No. 107 of 1993;  
SS. 16 (1) & (2) and 17  
Federal Military Government (Supremacy and Enforcement of Powers)  
C Decree No. 12 of 1994; S. 1 (2) (b) (i)

**ARTICLES & BOOKS REFERRED TO**

Seidle - Hovenveltern, Ignaz, "Transformation or Adoption of Interna-  
tional Law into Municipal Law" (1963) 12 I. C. L. Q 90 at PP. 111 - 112  
D and 115  
Robertson, A. H, Human Rights in National and International Law, (1968  
ed.), P. 12  
Brownlie, Ian, Principles of Public International Law (4th ed.)  
E Starke, J. G; Introduction to International Law, 9th ed. pp 413 - 415  
Thornton, G. C; Legislative Drafting, p. 303  
Halsbury's Laws of England, (4th ed) Vol. 51 paras. 3. 05 & 14 pp. 378  
- 379 & 388

F

**LEAD JUDGMENT BY ACHIKE JSC**

The respondent, a human rights activists, was arrested at his  
residence on Tuesday, January 30, 1996 and by virtue of a Detention  
order dated the 3rd day of February, 1996 and signed by the Inspector-  
G General of Police purportedly pursuant to powers conferred on him by  
the State Security (Detention of Persons) Decree No. 2 of 1984, as  
amended, which authorized the arrest and detention of any person be-  
lieved by the authorities to have been "concerned in acts prejudicial to  
H state security."

On the 1st day of February, 1996, the respondent, as applicant,  
filed an application at the Federal High court, Lagos challenging his arrest  
and detention by the appellants, as respondents to the application. The

application, by motion ex-parte for leave to enforce his fundamental rights, was brought pursuant to section 42 (1) of the Constitution of the Federal Republic of Nigeria 1979, Order 1 Rule 2 (1) (2) & (6) and Orders 4 & 6 of the Fundamental Rights (Enforcement Procedure) Rules 1979 and Inherent Jurisdiction of the Court, as preserved by the 1979 Constitution. The reliefs sought by the applicant were:

*"1. A Declaration that the arrest of the Applicant, Chief Gani Fawehinmi at his residence at 9 A Ademola Close G.R.A, 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 & Peoples' Rights (Ratification and Enforcement) Act, Cap. 10, Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.*

*2. A declaration that the detention and continued detention of the Appellant without charge since Tuesday January 30, 1996 when the Applicant was arrested by the officers, servants, agents, privies of the Respondent at his residence 9 A Ademola Close, G.R.A., 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 & People's Rights (Ratification and Enforcement) Act, Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.*

*3. A mandatory Order compelling the Respondent, whether by themselves or by their officers, agents servant, privies or otherwise how-ever 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 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.*

4. *An Injunction restraining the Respondents, whether by themselves or by their officers, agents, servants privies or otherwise however from further arresting, detaining or in any other manner infringing on the fundamental rights of the Applicant.*

B 5. *N10,000.000.00 (Ten million Naria) damages for the unlawful and unconstitutional arrest and/or detention of the Appellant -Chief Gani Fawehinmi."*

C The appellants filed a Notice of Preliminary Objection, challenging the jurisdiction of the Federal High Court to entertain the action of the respondent by the combined effect of the provisions of section 4 of State Security (Detention of Persons) Decree No. 2 of 1984 (as amended), the Federal Military (Supremacy and Enforcement of Powers) Decree No. 2 of 1994 and the Constitution (Suspension and Modification) Decree No. D 107 of 1993, particularly 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.

E The learned trial judge, Nwaogwugwu, J declined jurisdiction in that the procedure adopted by the respondent was improper and struck out the suit.

F Dissatisfied with the ruling, the respondent appealed to the Court of Appeal, Lagos Division which, in allowing the appeal partially, held as follows:

G 1. *That the learned trial judge was in error in holding that the African Charter embodied in Cap. 10 of the Laws of the Federation 1990 is inferior to the Decrees of the Federal Military Government.*

2. *That the Decrees of the Federal Military Government cannot oust the jurisdiction of the court when called to do so in relation to matters pertaining to Human Rights under the African Charter.*

H 3. *That the learned trial Judge was right in declining jurisdiction in that the procedure followed in initiating the suit was improper.*

4. *That the case be remitted to the trial court to consider the consequences of the detention for four days of the respondents which period was not covered by the detention order.*

5. *That the arrest and detention of the respondent on the facts adduced clearly breached the provisions of the African Charters. The contracting parties to the African charters are obliged to established some machinery for the effective protection of the terms of the Charter.*

Undoubtedly, the main appeal before us can be summarized as B one against the judgment of the Court of Appeal, Lagos Division, wherein it partially allowed the appeal and remitted the case to the trial court to consider the consequences of the detention of the respondent for the four days not covered by the detention order.

The appellants and the respondent filed and exchanged briefs of C arguments

The appellants identified three issues for determination, viz,

"1. *Whether the Court of Appeal applied the principle of inter- D national law correctly when it held that in signing the treaty on African Charter, Nigeria attempted to fulfil 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 interna- E tional obligations by local legislation.*

2. *Whether the Court of Appeal was right in holding that Afri- can 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 F 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.*

3. *Whether the Court of Appeal having concurred with the deci- G sion of the trial Federal High Court declining jurisdiction to entertain the respondent's application for the enforcement of rights guaranteed under the African Charter on Human and Peoples Rights Cap 10 Laws of the Federation of Nigeria 1990 because of the procedure adopted thereof, to wit, procedure by way of Fundamental Rights (Enforcement) H Procedure Rules 1979, adjudged by both Courts as incorrect was right -*

- (i) *in not striking out the application right away; and*
- (ii) *in remitting the application to the Federal High Court to*

*consider the consequences of the detention of the respondent for the period of four days not covered by the Detention Order.*

Recasting Issues 1 and 2 above, in the form of questions:

B *"(i) What is the nature of a treaty or agreement between two or more sovereign states, such as the African Charter on Human Rights particularly as regards its force and applicability?*

C *(ii) Where a treaty or agreement between two or more sovereign states is incorporated into the municipal law of a contracting state by its Constitution or municipal legislation does it have force or effect greater or higher than of the Constitution or the municipal law because of "its international flavour"? Further, in the particular case of Nigeria as country ruled by an absolute Military Government whose Decrees are Supreme over the unsuspended provisions of the Constitution 1979 and D over all the other pre-existing laws, does the African Charter as incorporated into Nigeria's municipal law by legislation of National Assembly Cap. 10 LFN 1990 have a force or effect greater or higher than that of a Decree so that a Decree cannot oust the jurisdiction of the Court in re- E spect of its provisions?*

For the respondent, the following two main issues for determination were formulated:

F *"1. Whether it is permissible for a state party to a multilateral treaty to promulgate municipal legislations that are inconsistent with its obligations under the treaty.*

Alternatively

G *2. Whether the African Charter on Human and Peoples' Rights as adopted by Nigeria is inferior or superior to municipal laws promulgated by the Government of Nigeria.*

H *3. Whether the Court of Appeal was right in remitting the case back (sic) to the trial court to consider the consequences of the detention of the respondent for the period of four days not covered by the detention order."*

At the oral hearing, Mr. Chiesonu Okpoko, learned Legal Officer for the appellants, cites the case of Ibidapo v Lufthansa Airways (1996) 4 NWLR (Pt. 498) 124 at p. 150 in support of his contention that the



principle of international law will not override domestic laws and further submits that the provisions of the African Charter of Human and Peoples' Rights set out in Cap 10 of the laws of the Federation of Nigeria are not superior to the State Security (Detention of Persons) Decree No. 2 of 1984, as amended, having been incorporated into the Nigeria law should be treated as any other law. He finally urges us to allow the appeal. B

Mr. Ebun-Olu Adegboruwa, learned counsel for respondent, submits that the main issue in the appeal is to determine the status of the African Charter vis-a-vis the domestic law. Learned counsel submits that once an international treaty, like the African Charter, is adopted by local legislation, the adoptive state is not competent to modify the treaty as incorporated into the domestic law; reliance was placed on Starke and Brownlie, Principles of Public International Law, p. 29. Thus, according to counsel, Nigeria cannot legislate by ouster clause to derogate from the operation of the African Charter under Cap. 10. Referring to Article 10 of the African Charter, counsel emphasis that there is the need for adoptive state to exhaust all local remedies before any recourse is made to the African Charter. He also submits that Ibidapo case cited by counsel for the appellants is not apposite and urges us to dismiss the appeal. C D E

Counsel refers to the Preliminary Objection which necessitated the filing of a Reply brief to address the issue raised therein. In adopting the respondent's brief in the cross-appeal, counsel urges us to allow same. F

Mr. Okpoko, of counsel, formally adopted the cross-respondents' brief.

In his final address, Mr. Adegboruwa, of counsel, submits that an international treaty adopted by this country is superior to all her domestic laws, including the Constitution, and refers to section 12 of the 1979 Constitution. G

First we turn to the main appeal. There is very little to choose between appellant's and respondent's sets of issues for determination. Nevertheless, I wish to adopt the appellants' issues for the determination of this appeal. In order to avoid undue repetition, I would take appellants' Issues 1 and 2 together as they seem to encompass respondent's Issues No. 1 H

Issue No. 1

Whether the Court of appeal applied the principle of international law correctly when it held that in signing the treaty on African Charter, Nigeria attempted to fulfil 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.

Learned counsel for the appellants, Mr. Okpoko, in his oral argument, as well as placing reliance on the appellants' brief, submits that a treaty between two or more sovereign states is a contract, and is exactly of the same nature as a contract between two or more individuals and the only difference between them is that while the treaty derives its binding force and effect from international law, a contract between individuals derives its bindingness from municipal law. As a result, according to learned counsel, a treaty binds only the state-parties thereto. In consequence, counsel further submits that a treaty does not bind individuals or other states who are parties to it nor does it have any effect in municipal law. Counsel identifies a treaty as an example of an "act of State" and not a subject of municipal law and cannot be "challenged, controlled or interfered with by municipal courts. Its sanction is not that of law but that of sovereign power" and stipulations in a treaty "are entirely beyond the cognisance of municipal courts because they do not administer treaty obligations between independent states," per Fletcher Moulton, L. J. in Salaman v Secretary of State for India (1906) 1 K. B. 603 at 639. Reference was also made to Walker v Baird (1892) A. C. 491 at p. 497 and Sobhuza II v Miller (1926) A C 518, pp 522 - 524; so also Halsbury's Laws of England, Vol. 18, 4th ed. (1977) para 1413. Learned counsel further submits that a state-party to a treaty is competent and at liberty to enact laws that are inconsistent with its treaty obligations, but this is without prejudice to any remedies available against it in international law at the instance of the other state-parties to the treaty. It is counsel's further submission that municipal law does not recognize inherent superiority of the provisions of a treaty or the rules of customary international law over those of municipal law since the country will subvert the sover-

eignty of each state. It is also counsel's submission that the principles of international law adumbrated herein cannot apply in the instant case as the parties are not states and it is not a claim by one nation against another for breach of a treaty between them, more so as the treaty enacted into law by Cap. 10 of the Laws of the Federal Republic of Nigeria 1990 (hereinafter referred to as Cap. 10 LFN 1990) was between the members of the Organization of African Unity of which Nigeria is one but that did not empower the respondent to see the Federal Military Government for breach of any of the provisions of the treaty, replying on the authority of Ikpeazu v. A.C.B. (1965) NMLR 374. Learned counsel, in conclusion, urges us to hold that the lower court was in error when it applied the principles of international law in the interpretation of the municipal law between two citizens of a state as that court lacked the competence to pronounce on the international matter before it.

Issue No. 2

This issues seeks to determine the judicial status of a treaty in municipal law that has been incorporated into a domestic or municipal law.

Rationalizing from the principles of international law adumbrated by the Court of Appeal in its judgment, it held, inter alia, first that Cap. 10 LFN 1990 is not inferior to the Decrees of the Federal Military Government, and secondly that the provisions of the said Cap. 10 LFN 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 determined by the Supreme Court in Labiya v Anretiola (1992) 8 NWLR (Pt. 258) 139 and therefore the ouster clause in Decrees of the Federal Military Government cannot oust the jurisdiction of the Court in relation to the African Charter. It is counsel's further submission that a treaty is not applicable in domestic law unless it is adopted or transformed into the statute enacted by the legislature of the state, and the Nigeria approach in relation to the African Charter was by adoption as stipulated in the 1979 Constitution, section 12 which provides that "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." Counsel refers to Articles 1 of

the Cap. 10 FNL to establish that the Federal Government applied the principle of adoption in giving effect of African Charter in its domestic law. Accordingly, counsel submits that an adopted treaty ranks at par with the municipal or domestic legislations or laws and could be modified or abrogated by domestic enactments. In this regard, learned counsel refers to a similar practice in the United States of America wherein courts in that country resort to treaties as they would do so Acts passed by Congress, and calls in aid several decisions of the Supreme Courts of U. S. including Cook v. U. S. 288 U. S 102, Chae Chan Ping v U. S. (Chinese Exclusive Case) 130 US. 581. Counsel also submits that the decision of the lower court in this regard ran contrary to the principles stated above, particularly the Supreme Court decision in Labiya v Anretiola (Supra) and there is no basis for the lower court's assertion that the African Charter has been elevated to a higher pedestal. Learned counsel further submits that the analogy of surrender of parliamentary supremacy by British Parliament by virtue of the effect of European community Act., 1972 is misconceived as it relates to the Nigerian situation which is not a member of the European Community Union where, to some extent in respect of certain specific matters, sovereignty lies with the Union. The Organization of African Unity cannot be compared with the European Union, counsel further submits, and calls in aid the work of ECS Wade and Bradlyon, Constitutional and Administrative Law (11th ed. by Bradlyon) at p. 73.

In summary, counsel urges us to hold that the African Charter contained in Cap 10 LFN is not superior to Decrees nor can it override ouster clauses contained in Decrees in matter touching on African Charter.

Mr. Adegboruwa, learned respondent's counsel, replied to appellant's Issues Nos 1 and 2 together which, as earlier noted, encompass the respondent's issue No. 1 Counsel identifies a "treaty" (as defined under Article 2 of the Vienna Convention of May 23, 1969, and which came into force on January 27, 1980) as an agreement whereby two or more states establish or seek to establish a relationship between themselves governed by international law. He submits that the broad

definition of a treaty as defined by appellants' learned counsel in terms of a mere contract would lead to over simplification of that term in international law and that definition may only be appropriate to domestic law and relationship between individuals. Counsel also submits that the principle of privity of contract as it applies in domestic law does not govern international law because rights enure to individuals under a treaty concluded on their behalf by a member state and may be available for enforcement in a municipal court; he refers to Garden Cottage Foods Ltd v Milk Marketing Board (1984) A. C 130 at p. 144

It is learned counsel's further submission for the respondent, which was upheld by the lower court, that the appellant being agencies of a state-party to the African Charter could not promulgate the State Security (Detention of Persons) Decree No. 2 of 1984 which provides for an indefinite detention of a person in custody without trial and also the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994, which denies a person right to civil proceedings for anything done under a Decree where such rights are protected under the African Charter. Put very succinctly, counsel's submission is that the ouster clauses erected in those Decrees could not rob the respondent of rights protected or guaranteed under the African Charter; in support of this proposition he relies on the authority of Oshevire v British Caledonian Airways Ltd (1990) 7 NWLR (pt. 163) 507 at 519. Counsel further cites the Botswana Case of A-G Botswana v Unity Dow (1988) H R R A page 1 and the Ghana case of New Patriotic Party (NPP) v The Inspector-General of Police, Ghana & ors No. 4/93 delivered on 30/11/93) where even though Botswana and Ghana were yet to adopt any specific legislation incorporating the African Charter into the municipal laws of those countries, nevertheless their municipal courts declared the African Charter to be above their municipal laws.

It is counsel's submission that Nigeria having specifically, by legislation (i.e. Cap 10, LFN 1990), incorporated the African Charter into her domestic laws, the Nigeria Courts ought readily to assume jurisdiction to pronounce on the African Charter rather than decline jurisdiction. Counsel finds support to this submission by reference to section 1 of Cap 10

LFN 1990 and the long title to Cap 10 LFN 1990 i.e. "An Act to enable effect to be given in the Federal Republic of Nigeria to the African Charter on Human and People's Rights.

Counsel further submits that the African Charter having been  
B incorporated into Nigerian Laws does not make it subject to or conditional upon any domestic legislation. Counsel reiterates that the African Charter has been made part of Nigerian laws by the process of incorporation whereby the whole of the African Charter is given effect to under  
C the Nigerian Laws by reproducing the African Charter unedited in the schedule to the municipal law, i.e. in this case, schedule to Cap 10 LFN 1990, in contrast to incorporation of substantive provisions of an international treaty into the municipal law so that the treaty (herein African Charter) is not directly enacted. To counsel, African Charter can only be  
D limited to the extent to which its Charter itself provides any limitation and not subject to the provision of enactments in Nigeria, such as Decree No. 2 of 1984 or Decree No. 12 of 1994 or be suspended by such Decree or Decrees. For the same reason, he also submits that section 12 of the  
E Constitution of the Federal Republic of Nigeria 1979 does not equate a treaty to the same status as municipal legislation which the National Assembly can modify or repeal like any other enactment. Therefore, counsel submits that section 12 of the 1979 Constitution cannot be placed on  
F the same footing as Article 6 clause 2 of United States of American Constitution.

On the issue of supremacy of the 1979 Constitution in relation to treaties, counsel submits that although the supremacy of the Constitution was entrenched by virtue of section 1 of that Constitution, the doctrine of supremacy of the 1979 Constitution is limited to the territorial  
G entity known as Nigeria by reason of its section 1(1). Consequently, counsel argues that the provisions of the Constitution cannot have effect in Ghana, Kenya and other countries within the Organization of African  
H Unity (O.A.U) and therefore the concept of constitutional supremacy is in relation to any other law within Nigeria and not treaties concluded voluntarily with other nations. It is counsel's further submission that in signing a treaty with other nations there is an element of assumed volun-

tary surrender of sovereignty for the purpose only of being bound by the treaty and so Nigeria cannot contract out of its obligation under a treaty. Counsel further submits that the fact that Nigeria is under an absolute Military Government cannot derogate from her international obligation such as under the African Charter nor even suspended the operation of provisions of that Charter or such international treaties that relate to human rights and fundamental freedoms because "a state remains a subject of international law irrespective of whether it is military absolutism, civil democracy or a fascist repression."

#### International Law & Hierarchy of municipal laws

It is also counsel's submission that a state party to a treaty is not permitted to subject the treaty to a hierarchy of superiority along with its municipal legislations as it is an affront to common sense for a state subject to international law to attempt to form a hierarchical pyramid between its municipal legislation and international law. In the result, counsel submits that the decision of the Supreme Court in Labiya v Anretiola (supra) though sound in many respects, nevertheless has no bearing on the status of international law in the municipal circles and therefore the decision of the lower court in this regard cannot be said to be disrespectful or having been handed down per incuriam the Supreme Court's decision in Labiya case.

#### Machinery of enforcement of the African Charter

Learned counsel referred to the decision of the lower court's assertion that the African Charter "is a legislation with international flavour" whose operation in Nigeria cannot be affected by the ouster clause contained in Decree No. 2 of 1984 and that the lower court was right to proceed on the principle that Nigeria being a state party to the African Charter cannot legislate out of its international obligations municipally. Furthermore, counsel submits that by adopting the African Charter under Cap 10 F L N 1990, and which became binding on Nigeria from 21/10/86, Nigeria became enjoined to give effect to rights and freedoms guaranteed by the Charter and this will obviously mean that in the absence of a laid down procedure for enforcement in the Charter, the citizen should be at liberty to approach the court by action for the enforce-

ment of the rights guaranteed to him by the Charter. Counsel calls in aid Fajinmi v The Speaker Western House of Assembly (1962) 1 All NLR (Pt. 1) 205. Concluding, he submits that the same procedure provided for enforcement of fundamental rights under Chapter IV of the 1979 Constitution could be adopted for the enforcement of rights guaranteed under the African Charter, and relies on Ogugu v The State (1994) 9 NWLR (Pt. 366)1 at pp 26-27.

It seems to me that our starting point is to identify the nature and judicial status of a treaty in relation to municipal law. The term treaty has been variously identified. Suffice it to say that **a treaty is a compact, an agreement or a contract - bilateral or multilateral - between sovereign states (two or more) whereby they establish or seek to establish a relationship between themselves governed by international law.** A treaty, therefore, in a broad sense, is similar to an agreement under the civil law. The difference between an ordinary civil contract (or agreement) and a treaty is that while the former is an arrangement between individuals and derives its bindingness from municipal or domestic law of a state, a treaty on the other hand derives its binding force and effect from international law. See Article 2 of the Vienna Convention of May 23, 1969 which came into force on January 27, 1980. Thus, ordinarily, a treaty binds only states parties to it just as a contract binds only individuals who are parties thereto. There is therefore no justification for over-simplification of a treaty in terms of a contract. Under strict customary international law, individuals are not subjects of international law nor were municipal or domestic courts called upon to control or administer treaty obligations between sovereign states. See Walker v Baird (supra) and Sobhuza v Miller (supra). This is so because **unincorporated treaties cannot change any aspect of Nigerian law, even though Nigeria is a party to those treaties.** Indeed, **unincorporated treaties have no effect upon the rights and duties of citizens either at common law or statute law.** They may however indirectly affect the rightful expectation by the citizen that government acts affecting them would observe the terms of the



unincorporated treaties. See the recent Privy Council Opinion in Higgs & anor v Minister of National Security & ors, Judgment was handed down on 14/12/99, per The Times of 23/12/99. That, however, is not the true position today of treaty obligations between independent nations under international, law. Within limits today, B we are familiar with provisions of a treaty that create benefits in favour of individuals of a state party to the treaty. Thus the classic example of privity of contract under municipal law, exemplified by the authority of Ikpeazu v A.C.B. (Supra) which ordinarily will deny C individuals of a state party to a treaty the right to maintain an action on a treaty on the ground that such individuals are not parties to the treaty are completely untenable.

Authorities abound today wherein municipal or domestic court is at liberty to apply and enforce a treaty. See Schorsch Meler Gmbi v Hennin (1975) 1 All E.R 152 where, relying on the European Economic Community Treaty, Article 106 and the English European Communities Act, 1972, section 2(1), a German company sued at an English court claiming judgment not in English pounds sterling but in German Deutsche marks, the German company having contended that the ordinary rule of English law (by which an English court could give judgment only in Sterling pound) was incompatible with Article 106 of the Treaty. The trial judge refused the claim and held that the old English common law D cannons of construction applied and that article 106 did not prevail on the rule of common law. The Court of Appeal over-turned the decision and held that the European Economic Act had modified the old English rule of not giving judgment in foreign currency. See also des Gaz Sa v Falks Veritas Ltd (1974) 3 All E.R. 51 and the decision of the Nigeria Court of Appeal in Oshevire v British Caledonian Airways Ltd (1990 7 NWLR (pt. 163) 507 in which that court applied and gave effect to the Warsaw Convention, 1929 as reproduced in the schedule to the Carriage of Goods by Air (Colonies, Protectorates and Trust Territories) Order 1953 - at p. H 168 of the Laws of Federation of Nigeria, 1958 ed. vol. 6. So also in U.A.C (Nig) Ltd v Global Transport S.A. (1996) 5 NWLR (pt. 448) 291 the Court of Appeal gave effect to the Hague Rules. Again, the appli-

cability of the Warsaw Convention 1929 by our Court of Appeal in a fairly recent decision in Ibidapo v Lufthansa Airlines (1997) 4 NWLR (pt. 498) 124 was upheld by the Supreme Court.

**From the above plethora of judicial authorities, it is crystal clear today that treaties may create rights and obligations not only between member states themselves, but also between citizens and the member states, and between the ordinary citizens themselves. It is therefore clear that the over-simplification of the word treaty in terms of ordinary contract as the term is understood in municipal law, and as submitted by the learned counsel for the appellants, is very restrictive and unacceptable. Furthermore, counsel's submissions that a treaty does not bind individuals - not being parties to the treaty nor is a treaty subject of municipal law that can be challenged in municipal courts, (*sic*) supportable.**

Be that as it may, it is common ground that Nigeria, by legislation - Cap 10 of Laws of the Federation of Nigeria 1990 the African charter on Human and Peoples Rights (hereinafter referred to as "African Charter ") has been given effect to under the Nigeria Law by reproducing the African Charter unedited in the schedule to the municipal law (i.e schedule to cap 10 (FN 1990) in contrast to mere incorporation of substantive provisions of an international treaty into the municipal law without the treaty itself being directly enacted. What seems important to underline is the status of the African Charter vis-a-vis the other Nigerian legislations. Both counsel in the appeal hold divergent views on the scope and nature of the local enactments in comparison with the African Charter. Thus while learned appellants' counsel is of the view that the African Charter on incorporation, assumes the character of an ordinary municipal legislation, ranking at par with it, and is therefore not superior to such enactments, learned respondent's counsel is clearly of the view that a treaty, like the African Charter, enjoys a pride of place and cannot be abrogated or modified by domestic enactments nor is the treaty subject to the Constitution.

It is necessary to get our bearings right. **The Constitution is the supreme law of the land; it is the grundnorm. Its supremacy**

**has never been called to question in ordinary circumstances.** For avoidance of doubt, the 1979 Constitution stated categorically in its chapter 1, section 1(1) as follows:

*"1(1) This Constitution is supreme and its provision shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."* B

For purposes of clarity, its section 1(3) goes further to state

*"1(3) If any other law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."* C

It is against these provisions of the Constitution that the African Charter was promulgated. Since its enactment, the African Charter has been accorded legislative force and its section 1 stipulates as follows:

*"As from the commencement of this act, the provisions of the African Charter on Human and people's Rights which are set out in the schedule to this Act shall subject therefore as provided force of law in Nigeria and shall be given full recognition and effect can be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria."* D E

Finally, it is crystal clear that the position of a treaty vis-a-vis the Constitution must conform with the provisions of section 12(1) of the 1979 Constitution which stipulates thus:

*"No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty is enacted into law by the National Assembly."* F

**The combined effect of sub-sections (1) and (3) of section 1 and section 12(1) of the 1979 Constitution leaves one in no doubt, not only about the pride of place of the Constitution but brings to the glare that a treaty enacted into law in Nigeria is circumscribed in its operational scope and extent as may be proscribed by the legislature.** G H

This effect notwithstanding, Pats-Acholonu, JCA, in his concurring judgment (to the leading judgment of Musdapher, JCA) stated pointedly:

*"By not merely adopting the African Charter but enacting it into our organic law, tenor and intendment of the preamble and section seem to vest that Act (i.e. African Charter) with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal." (emphasis supplied)*

B

With the utmost respect to his Lordship, the underlined part of the above excerpt neither readily lends itself to easy comprehension nor is it in consonance with the law. No authority was given in support of this far-reaching proposition. On the contrary, the proposition is manifestly at

C variance with section 12(1) of the 1979 Constitution which stipulates that "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." Indeed, in enacting the African Charter as an Act of our mu-

D nicipal law and as a schedule to the only two sections of the Act, i.e. Cap 10 LFN 1990, a close study of that Act does not demonstrate, directly or

indirectly that it had been "elevated to a higher pedestal" in relation to other municipal legislations. The provisions of the only two sections of

E CAP 10 LFN 1990 incorporating the African Charter into our municipal

law are conspicuously silent on a "higher pedestal" to which the learned Justice of the lower court arrogates to the African Charter vis-a-vis the ordinary laws. **The general rule is that a treaty which has been**

F **incorporated into the body of the municipal laws ranks at par with the municipal laws.** It is rather startling that a law passed to give effect

to a treaty should stand on a "higher pedestal" above all other municipal laws, without more, in the absence of any express provision in the law that incorporated the treaty into the municipal law. See Prof. Ignaz

G Seidle-Hovenveldern, "Transformation or Adoption of International Law into Municipal Law" (1963) 12 Inter and Comp. L. Q. 90 at p. 115, pp 111-112.

H Speaking in the same vein, Musdapher, JCA, in his leading judgment did not help matters either. Said he,

*"The provisions of the (African) 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. (1992)*

8 NWLR (Pt. 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 may be recalled that the hierarchical classification in order of superiority of laws in Nigeria was enunciated by the Supreme Court in Labiya v Anretiola (supra). For ease of reference, the order of superiority as on the 31st December, 1984 runs thus:

1. Constitution (Suspension and Modification) Decree 1984 C
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 Governor of a State D
- 6 Laws enacted before 31st December, 1983 by the House of Assembly of a state, or having effect as if so enacted.

**By the time-honoured doctrine of precedent as it operates in Nigeria and all common law countries, the decision on a given issue of law handed down by the apex court, which for us in Nigeria is the Supreme Court, is not only superior but binds all subordinate courts, including all courts exercising appellate jurisdiction. It is the law that a decision of a court of competent jurisdiction, no matter that it seems palpably null and void, unattractive or insupportable remains good law and uncompromisingly binding until set aside by a superior court of competent jurisdiction; see Babatunde & anor v Olatunji & anor (2000)2 NWLR (Pt. 646) 557, and Ezeokafor v Ezeilo (1999) 6 S.C. (Pt. 11) 1** 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 Labiya case. This posture of the lower court is more startling in the absence of any convincing reason given for that far-reaching proposition of the law when the doctrine of precedent, stare decisis, of great antiquity, embedded in the English common law, and indeed,

an integral part of our law which is anchored in good reason, logic and common sense and has not been demonstrated to be manifestly out of step with modern development in law should be blown away by a side-wind. There is therefore no basis whatsoever for the lower court not to have followed the decision in Labiya case. Had the lower court done so, notwithstanding that the African Charter is a legislation with international flavour, it is, for all intents and purposes, simply an international law incorporated into the Nigerian body of municipal laws, and like such international-incorporated treaties, it remains at par with other municipal legislations. The elevation of the African Charter to a "higher pedestal" and the denial of the continued validity or authorities of Labiya case by the lower court is totally absurd, untenable and unwarranted.

Therefore, the appellants' contention that the African Charter is inferior to the Constitution and the Decrees is supportable. To hold otherwise is to erect an indefensible barrier into an enactment by introducing words that are not there, more so when no ambiguity has been shown to exist which may warrant introducing such extraneous construction in aid of clarifying any ambiguity. I shall therefore decline to read either in the African Charter or Cap 10 LFN 1990 that incorporated the African Charter into our law words that are not there ascribing any superiority to the African Charter vis-a-vis other municipal legislations.

There is a further colouration given to the doctrine of supremacy of the Constitution by the respondent. Contrary to the general and lucid view of the term supremacy of the Constitution as set out in sections 1(1) and (3), learned respondent's counsel ingeniously submits that the doctrine of supremacy of the Constitution is limited in its connotation to the territorial entity known as Nigeria because section 1(1) states, in part, that the "Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria" To counsel, this constitutional provisions makes it clear that the provisions of the Constitution will have no binding force, e.g, in Ghana, Kenya, and with the state members of the Organization of African Unity

In other words, the concept of constitutional supremacy is in relation to "any other law" within Nigeria and not in relation to treaties concluded voluntarily with other nations.

With due respect to learned counsel, I find the submission very strange and unacceptable, so also his hypothesis that the concept of constitutional supremacy under section 1(1) of the Constitution relates to "any other law" within Nigeria and not to treaties. On the contrary, if section 1(1) is read harmoniously with section 1(3) rather than disjointly, as counsel seemingly seeks to do, the concept of constitutional supremacy - as is generally understood - will be placed in focus because section 1(3) stipulates that "any other law" which is inconsistent with the Constitution, the Constitution will prevail and that other law shall to the extent of the inconsistency be void. More importantly, the African Charter having been incorporated into the body of the Nigerian municipal laws cannot be preferentially treated but should rank at par with other municipal legislations and be subordinated to the Constitution.

By extension of constitutional supremacy, respondent's learned counsel touched on voluntary surrender of sovereignty by state member to a treaty for the purpose only of being bound by the treaty. In that regard, it is his submission that a state is not permitted on signing a treaty only to turn around to assert its sovereignty solely for the purpose of defeating the treaty by legislating out of their international obligations. Counsel urges that Nigeria should emulate the state practice of Ghana and Botswana where the courts in those states have affirmed the supremacy of the African Charter over their municipal laws, even in the absence of specific legislation incorporate the African Charter in their respective municipal laws. Learned appellants' counsel holding a view to the contrary, submits that a state party to a treaty is competent and at liberty to enact laws inconsistent with its treaty obligations without prejudice to such remedies available against it in international law at the instance of other state signatories to the treaty.

**The assumption of voluntary surrender of state's sovereignty by a state party to a treaty, within limits, is well-recognized in international law. Consequently, it is an exception rather than**

the rule for a state party to a treaty to contract out and defeat the legitimate operation of a treaty to which it is a signatory by derogating from the treaty through passing a municipal law inconsistent with the treaty. Since a state at any moment, despite the provisions of a treaty that it is a signatory to, is at liberty to withdraw its involvement in the treaty, it follows that a state's treaty obligations can be neutralized by enacting a new legislation inconsistent with those obligations. But this is without prejudice to any remedies available against the recalcitrant state in international law at the instance of the other states parties to the treaty. Invariably, this is a political decision involving such sanctions that the other states signatory to the treaty may deem fit to impose. See A. H. Robertson Human Rights in National and International Law, (1968 ed.) p. 12, Ian Brownlie, Principles of Public International Law (4th ed.) J. G Starke, Introduction to International Law, 9th ed. pp 413-415, and Macarthy Ltd. v Smith (1979) 3 All E.R. 325 at 329 pg. 22.

It remains to observe that the respondent in his brief (at pp. 37-41) in his Issue No. 1 discussed under the sub-title, "Machinery of Enforcement of the African charter." I am clearly of opinion that sub-title neither arose under the grounds of appeal raised by the appellants nor the issues for determination identified by the parties. The law is clear that any consideration in a brief of matters neither predicated on a ground of appeal nor subsumed under any issue for determination would be discountenanced. This shall be the fate of respondent's submission made on the above sub-title.

Notwithstanding the authoritativeness of the decision in Labiya case, about which I have no doubt, it is important to recall that the act being questioned in this appeal is one perpetrated by the Inspector-General of Police i.e. detention of the respondent under State Security (Detention of Persons) Decree No. 2 of 1984, as amended by Decree No. 11 of 1994. Furthermore, it is necessary to remember that section 4(1) of this Decree also contains an ouster clause of the court's jurisdiction. Its section 4(2) suspends the operation of Chapter 4 of the 1979 constitu-



tion, so also sections 219 and 259 of the Constitution. Nevertheless, for avoidance of doubt, a wider and embracing protection was given to acts done by the members of the executive during the period of military regime. Thus by section 1 (2) (b) (i) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994, it is provided:

*"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."*

Since, as we have stated earlier herein, that an incorporated treaty, like the African Charter, ranks at par with other municipal legislations, it is clear that respondent's action, predicated on the executive act of the Inspector-General of Police under Decree No. 2 of 1984, as amended by Decree No. 11 of 1994, is void. It will surely be foolhardy for any Court to overlook the far-reaching and devastating effect of the above provisions of section 1 (2) (b) (i) on the jurisdiction of the court. All in all, despite the appellant's erroneous denial that domestic courts can entertain matters arising under international or multinational treaties, it is clear that the main issues respectively canvassed under appellants' Issues Nos 1 and 2 and respondent's Issue No. 1 should be and the same are hereby resolved in appellants' favour.

### Issue No. 3

This issue which is respondent's Issue No. 2 seeks to answer the question whether the lower court "was right in remitting back (sic) the case to the trial court to consider the consequences of the respondent's detention for four days not covered by the detention order" in the face of its holding that the procedure adopted in the commencement of the said suit was improper.

It will be recalled that the trial High Court Judge declined jurisdiction to entertain the suit partly because of the ouster clause in the State Security (Detention of Persons) Decree No. 2 of 1984, as amended and partly because the procedure for initiating the suit, i.e. under the proce-

B dure expressly set out for redress under the Fundamental Human Rights  
 Enforcement Rules, was erroneous. He accordingly struck out the suit.  
 But on appeal, in his leading judgment, with R. D. Muhammed and Pat-  
 Acholonu, JJCA, concurring, Musdapher, JCA while upholding the va-  
 C lidity of the detention order, ordered that the case be remitted to the trial  
 court for consideration of the claim in respect of the four days not cov-  
 ered by the detention order. It is the submission of appellants' counsel  
 that the lower court having accepted that the trial judge was right to have  
 declined jurisdiction, the only consistent order the lower court ought to  
 D have made was one striking out the suit, otherwise if the suit was remit-  
 ted to the trial court the appellants would still raise a preliminary objec-  
 tion under the Fundamental Human Rights Enforcement Rules 1979 for  
 four days not covered by the detention order, bearing in mind that the  
 application was one for the entire period, whether covered by the deten-  
 tion order or not.

Respondent's counsel submits that the decline to jurisdiction by  
 the trial court based partly on the validity of the detention order and  
 E commencement of the suit by the procedure under section 42 of the  
 1979 Constitution, was improper and erroneous. It is counsel's further  
 submission that the articles of the African Charter are enforceable in  
 Nigerian courts in the same or different manner that municipal legisla-  
 F tions similar to it are enforced; Ogugu v State (1994) 9 NWLR (Pt. 366)  
 1 is cited and relied upon to bring home counsel's submission. He finally  
 calls attention to the fact that the Issue is raised as respondent's Issue  
 No. 3 in the cross-appellant's brief. Learned counsel also says that if the  
 trial court had given the cross-appellant the opportunity of addressing it  
 G on the issue of the enforcement of the African Charter, he would have  
 directed it to the authoritative decision of Ogugu v The State (supra).  
 Counsel also cites Agbakoba v The Director, State Security Services  
 (1994) 6 NWLR (Pt. 351) 475 at p. 500 paras A-B p. 499 para E to  
 H buttress Ogugu case.

It is sensible to take appellants' Issue No. 3 in the main appeal  
 together with the cross-appellant's Issue No. 3; this will avoid unneces-  
 sary repetition. Learned cross-appellant's counsel places a great pre-

mium on the authority of Ogugu v State (supra) as good authority for enforcing the provisions of African Charter by the procedure set out under section 4 of the 1979 Constitution as the cross-appellant did in the case under review. He urges us to so hold.

**I cannot agree more with learned cross-appellant's counsel B that Ogugu v State (supra) is a good authority that the African Charter, having been duly incorporated into our municipal laws, it would follow that the procedural provisions set out in the Fundamental Rights (Enforcement Procedure) Rules under Chapter 4 of the 1979 Constitution for enforcing fundamental rights enshrined C in the Constitution, are applicable, by extension, to the provisions of the African Charter.** As I had highlighted earlier in this judgment, the process of incorporating the African Charter into the body of our domestic laws simply places the Charter at par with all our domestic D legislations and in turn brings the African Charter within the Judicial powers of the courts established under the Constitution. Such judicial powers. Among others are clearly set out in sections (6) (6) (b) and 236(1) of the 1979 Constitution, as well as section 230 of the Constitution as modified E by the constitution (suspension and Modification) Decree 1993, in particular, paragraphs (q), (r) and (s) of the sub-section.

**Beside the procedure under the Fundamental Rights (Enforcement Procedure) Rules, it is clear to me that any procedure F which will enable an aggrieved person to approach the court for the redress of a violation of human rights guaranteed by the African Charter, more so in the absence of any express provision for enforcement under the African Charter, can be evoked. Today, the courts make less fuss about complaints based solely on adjectival G law that tend only to impede the attainment of justice. I am encouraged to so hold by the maxim ubi jus, ibi remedium (where there is a right there is a remedy.) Besides, before the Fundamental Rights (Enforcement Procedure) Rules were prepared complaints H of abuse of fundamental rights under the Constitution were appropriately dealt with, and were not allowed to be defeated by technical submissions of absence of formal procedural rules.**

From the foregoing, it is manifest that the court of Appeal was right to have frowned in the judgment of the trial court in declining jurisdiction to entertain the application because it was brought under inappropriate procedure, i.e under Fundamental Rights (Enforcement Procedure) Rules. Having upheld the propriety of the procedure adopted by the respondent, it is, therefore, clear that the period of four days established and conceded to on both sides which is not covered by the detention order remains inviolate. In the result, the appeal against the order of the lower court's remitting the case to the trial court for consideration of the consequences of the respondent's detention for the said four days fails. Undoubtedly, appellants' Issue No. 3 is the hub or central point of interest in the main appeal. It has collapsed.

All in all, therefore, the appeal fails and the same is dismissed.

D CROSS-APPEAL

This brings us to the cross-appeal. The respondent being dissatisfied with parts of the judgment of the Court of Appeal, as cross-appellant, has appealed against the same on five grounds of appeal and also submits four main issues for our determination, namely:

"1. *Whether going by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 and its various amendments, particularly as amended by Decree No. 11 of 1994, the Inspector-General of Police is competent to issue and sign a detention order and whether if the answer to this question is in the affirmative, he can be compelled to disclose the reasons for issuing same.*

2. *Whether the court below was right to have held that the procedure adopted by the trial court in taking judicial notice of the detention order was proper.*

3. *Whether the procedure adopted by the Cross-appellant in this case in enforcing the articles of the African Charter on Human and Peoples' Rights was proper.*

4. *Whether the 1st Respondent, as Head of State of Nigeria is immuned from civil or criminal actions in all cases.*

It may be observed that Issue No. 4 as postulated is rather too wide, and to some extent speculative and so outside the scope of the

judgment appealed against. It is enough if the issue is re-couched:

*'Whether the 1st Respondent, as Head of State of Nigeria is immuned from civil or criminal action in the circumstances of this case'.*

### Preliminary Objection

The appellants, as cross-respondents, in their brief, first raised B their Notice of Preliminary Objection, as follows:

"(a) for an order striking out ground No. 5 the Notice of appeal as filed by the Cross-Appellant on the 11th day of March, 1997. (See page 241-242 of the record).

(b) for an order striking out issue No. 2 and legal argument arising therefrom, from the Cross-Appellant's brief. (See page 4 of the Cross-Appellant's brief)." C

Thereafter the cross-respondents identified two issues for de-termination, to wit, D

"1. Whether the Inspector-General of Police having regard to Decree No. 2 of 1984 as amended by Decree No. 11 of 1994 is a competent person and/or authority to sign and issue a detention order under the said decree. E

2. Whether the provisions of African Charter on Human and People's Rights can be enforced through the Fundamental Rights (Enforcement Procedure) Rules made pursuant to section 42 of the 1979 Constitution as amended." F

Finally, cross-appellant filed a Reply Brief which was a response to the Notice of Preliminary Objection filed by the cross-respondents.

### Resolution of Preliminary Objection

I shall tackle the points raised under the Preliminary objection G seriatim.

#### (i) Objection to ground 5 of the grounds of appeal

The reason for cross-respondent's prayer that ground 5 be struck out is that the complaint is against the concurring judgment of Pat-acholonu, JCA rather than the leading judgment of Musdapher, JCA. Cross-respondent's counsel calls in aid the decision of this Court in Idise v Williams Int. Ltd (1995) 1 NWLR (Pt. 370) 142 or (1995) 1 SCNJ 120. H Learned counsel to the cross-appellant however stresses that the prin-

ciple in Idise v Williams Int. Ltd (supra) can only come into play when there is a fundamental divergence between the leading and concurring judgments. This, according to the cross-appellant, is not applicable to ground 5 of the cross-appeal. Counsel refers to Bolaji v Bamgbose (1986)

B 4 NWLR (Pt. 37) 632, a judgment of this to buttress his contention.

One may then ask, what is the judgment of the court? **Where a single judge presides, the situation does not admit of any difficulty; the judgment of that court is what may be discerned as the ratio decidendi or rationes decidendi of that case in contrast to the passing remarks, otherwise referred to as obiter dictum or obiter dicta made by the court in the course of preparing the judgment.** The problem, such as the one raised in this appeal, arises when three Justices (as is usually the case in the Court of Appeal) or five Justices (as is usually the case in the Supreme Court) preside over a case or an appeal wherein one of the Justices is assigned the responsibility to write the leading Judgment and others, under the mandatory provision of the Constitution, are obliged to render either their concurring or dissenting judgments. In such a situation, it is the leading judgment that is, in legal circles, regarded as the judgment of the court. The other judgments may respectively be a two word judgment, e.g "I concur" or judgments longer or shorter than the leading judgment.

The point of jurisprudential interest and of considerable interest in this appeal is the relationship of the bindingness of the ratio decidendi or rationes decidendi contained in the leading judgment on the one hand, and the other concurring judgments, on the other hand. Are they at par or are some superior to others?. The jurisprudence and practice of law in this country appears to be tolerably clear: it is the ratio or the rationes contained in the leading judgment that constitutes or constitute the authority for which the case stands. All other expressions contained in the concurring judgments, particularly those not addressed in the leading judgment are obiter dictum or dicta, obiter dicta in the leading judgment as well as in the concurring judgments may be of persuasive effect in

**other occasions. This is my understanding of Idise case. I do not, with respect, find Bolaji v Bamgbose (supra) helpful.**

Accordingly, the preliminary objection to ground 5 of the grounds of appeal succeeds, the said ground of appeal is therefore struck out.

(ii) Objection to Issue No. 2 of the Cross-appellant

The complaint under this objection is direct and straight forward, namely, that Issue No. 2 does not arise from the grounds of appeal in the cross-appeal. Learned counsel calls in aid several legal authorities, including Akilu v Fawehinmi (1989) 2 NWLR (Pt. 102) 122 at 161 and Ibe v State (1992) 7 NWLR (Pt. 244) 642, to buttress his contention. In reply, learned cross-appellant's counsel submits that the objection to Issue No. 2 is not sustainable because Issue No. 2 flows directly from ground 2 of the grounds of the cross-appeal. Furthermore he submits that this becomes clearly obvious when the ground is read together with the particulars. Accordingly, he urges us to discountenance the contention under the second ground of preliminary objection.

I have closely examined the cross-respondents' contention in relation to the second ground of objection. It is exquisitely clear to me, reading the said ground of appeal either alone or together with its particulars, that the gravamen of that ground of appeal is the endorsement by the court of the procedure adopted by the trial court in taking judicial notice of the detention order. I find the second objection not properly-founded and that Issue No. 2 of the cross-appellant's appeal is competent and properly arose from ground 2 of the cross-appeal. The objection lacks merit and is accordingly struck out.

Argument on the Cross-appeal

I prefer the issues for determination identified in the cross-appellants' brief for the resolution of this appeal.

Issue No. 1

Whether going by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 and its various amendments, particular as amended by Decree 11 of 1994, the Inspector-General of Police is competent to issue and sign a detention order and whether if the answer to this question is in the affirmative, he can be compelled to

disclose the reasons for issuing same.

Some background information is obviously useful for proper comprehension of the subtle question raised by the cross-appellant under Issue No. 1 Under the State Security (Detention of Persons) Decree No. 2 of 1984 as originally promulgated, it was the Chief of Staff alone who was conferred with the power to issue detention orders. However, by virtue of the State Security (detention of Persons) (Amendment) decree No. 12 of 1986, the Chief of staff was substituted with the Chief of General Staff or the Inspector-General of Police. Again, by virtue of the State Security (Detention of Persons) (Amendment) Decree of 1988 the Minister of Internal Affairs was named as the third additional authority to issue a detention order. However, by the State Security (Detention of Persons) (Amendment) Decree No. 3 of 1990, the Inspector-General of Police and the Minister of Internal Affairs were removed as authorities empowered to issue detention order Consequent to the controversy generated over the designation of Vice-Admiral Augustus Aikhomu as Vice President or Chief of General Staff, the Federal Military Government (FMG) by yet another amendment, delete the Chief of General Staff and substituted it with Vice-President by virtue of State Security (Detention of Persons) (Amendment) Decree No. 24 of 1990.

On assumption of office by the 1st cross-respondent in November 1993 and by virtue of the Constitution (Suspension and Modification) Decree No. 107 of 1993, section (8) (1) (b), the office of the Chief of General Staff was created and that of Vice-President abolished. It became apparent by reason of the promulgation of Decree No. 107 of 1993, that a vacuum was created with regard to the person who could sign a detention order under Decree No. 24 of 1990. Yet the FMG promulgated the State Security (Detention of Persons) (Amendment) Decree No. 11 of 1994 which provides as follows:

*"1. The State Security (Detention of Persons) Decree 1984 as amended by State Security (Detention of Persons) (Amendment) Decree 1984, 1986, 1988 and 1990 is amended:*

*(a) By inserting immediately after the words "chief of General Staff" the words "or the Inspector-General of Police" wherever they oc-*



*cur in the Decree."*

*(b) By replacing section 2 with the following section: The chief of General Staff or the Inspector-General of Police, as the case may be, shall not later than three months after the date of an order made by him under this decree and every three months thereafter, review, the case of every person, detained pursuant to the order and, if satisfied that the circumstances no longer require the continued detention of the person affected, may revoke the order."*

Relying first on G. C. Thornton, Legislative Drafting, p. 303 learned cross-appellant's counsel submits that a reference to a statute is to be construed as a reference to that statute as amended from time to time. Thus, he further submits that the reference in Decree 11 of 1994 to Decree No. 2 of 1984 is as amended by Decree No. 24 1990 which was the last amendment. Now, counsel further submits, that since Decree No. 2 of 1984 as amended by decree No. 24 of 1990 only recognized the office of Vice-President and not Chief of General Staff and since the office of Chief of General Staff was non-existent and unknown to decree No. 2 of 1984, as amended by Decree No. 24 of 1990, the office of the Inspector-General of Police cannot be inserted after an office that does not exist. To counsel, Decree No. 11 of 1994 has created a lacuna and ought not to be construed liberally in favour of the law-maker who seeks thereby to encroach on the liberty of the cross-appellant. In aid of his submission he relies on Nwosu v Imo State Environment Sanitation Authority (1990) 2 NWLR (Pt. 135) 688 at 733, Jennifer Maduiké v I. G. of Police (1992) 3 NWLR (Pt. 227) 70 at 107, Onuzulike v CDS, Anambra State (1992) 4 NWLR (Pt. 232) 731 at pp. 820-821. It is his further submission, relying on Vickers, sons of Maxim Ltd v Evans (1910) AC 444 at 445 and Thompson v Gould & Co. (1910) AC 409 at 420 that it is a cardinal rule of construction of statute that nothing is to be added or taken away from a statute, and that the lower court was in error in reading into Decree No. 24 of 1990 and Decree No. 11 of 1994 inferences which were not contained therein. Finally, he submits that Decree No. 11 of 1994 was not just inelegant, as Musdapher, JCA held in the leading judgment, but was "ambiguous, ridiculous, defective, anomalous and

absurd and fundamentally and irreconcilably in conflict with Decree No. 2 of 1984 as amended by Decree No. 24 of 1990." He urges that the fundamental defect be resolved in favour of the liberty of the cross-appellant.

B The response of the cross-respondents was concise but lucid. While rejecting the cross-appellant's submission of the Chief of General Staff being non-existent under the amendment of Decree No. 20 of 1984 created by Decree No. 24 of 1990 argued that it is a well settled principle of law that statutes are interpreted or construed to give effect to the  
C intendment of the legislature. Thus the intention of the legislature in promulgating Decree No. 11 of 1994 is to empower the Inspector-General of Police to issue and sign detention orders under State Security (Detention of Persons) decree No. 2 of 1984 as amended. Counsel  
D further submits that the amendment as contemplated in section 1 (a) of Decree No. 11 did not make the existence of the office of the Chief of General Staff a condition precedent for the office of the Inspector-General of Police to exercise the power under the State Security (Detention  
E of Persons) Decree No. 2 of 1984 as amended because a careful perusal of section 1 (a) of Decree No. 11 of 1994 shows that it says "or the Inspector-General of Police and in law the inserting is disjunctive. Therefore, counsel finally submits that the insertion of the office of Inspector-  
F General of Police is totally independent of the offices of the Chief of General Staff or even that of the Vice-President as the case may be. Accordingly, counsel urges us to accept the harmonious interpretation as stated by the lower court because to hold otherwise will make a mockery of commonsense.

G Be that as it may, **I agree with learned cross-appellant's view that where a statute tends to encroach on, curtail or abridge the freedom or liberty of an individual, that statute is generally construed very strictly and narrowly against anyone claiming benefit  
H therefrom. It is also a well-known rule of construction that where a statute in its ordinary meaning and grammatical construction some clear absurdity would result, some effort would be made by the court to avoid the absurdity by modifying the structure of the**

**sentence or the meaning of the words. There is no doubt whatsoever that interpreting section 1 (a) of Decree No. 11 of 1994 strictly, as promulgated and without any judicial modification, will result in an absurdity which the law-maker cannot be presumed to have intended.** It is clear that Decree No. 3 of 1990 which removed the Inspector-General of Police and the Minister of Internal Affairs left the Chief of General Staff as the only signatory for the operation of State Security (Detention of Person (Amendment) Decree No. 12 of 1986 as amended. The result is that when Decree No. 24 of 1990 deleted the Chief of General Staff and substituted it with the Vice-President, the only signatory left for the operation of State Security (Detention of Persons) (Amendment) decree under Decree No. 24 of 1990 was the Vice-President. By the Constitution (Suspension and Modification) Decree No. 107 of 1993 which created the office of Chief of General Staff, this left the operation of Decree No. 24 of 1990 in a limbo as no steps were taken to subsequently amend Decree No. 24 of 1990 whereby the Vice-President, was the surviving signatory for the detention of persons under the original Decree No. 2 of 1984 and which office was implicitly abolished by Decree No. 107 of 1993. This omission was overlooked by the law-maker. It is this oversight that has led to an apparent state of impasse in an effort to construe section 1 (a) of decree No. 11 of 1994, the latest amendment to the original Decree No. 2 of 1984. Indeed, this is the crux of the objection of the cross-appellant in relation to the exercise of power of signing of detention order by the Inspector-General of Police. It has been strenuously submitted on behalf of the cross-appellant that "the moment Decree No. 107 of 1993 was promulgated, nobody in Nigeria had the power under the law to sign detention order as there was no longer a Vice-President.

Learned counsel's submission in this regard is quite interesting but the main question now is whether section 1 (a) of Decree No. 11 of 1994 with the apparent case of omission arising from oversight on the part of the legal draftsman should be allowed to stand in the face of its absurdity or should the court interfere in such a way to avoid the absurdity? **It is quite clear to me that there was an obvious oversight on**

the part of the law-maker in amending Decree No. 24 of 1990 without providing for the substitution of the Vice-President with the office of Chief of General Staff so that when the amendment Decree No. 11 of 1994 was promulgated the provisions of its section 1

B (a) would have tallied with the intendment of the legislature and in turn avoid the absurdity under Decree No. 11 of 1994 of inserting the phrase "or the Inspector-General of Police" after a non-existent office. Therefore, section 1 (a) of Decree 11 of 1994 should be construed as follows.

C By inserting immediately after the words "Vice-President" the words " or the Inspector-General of Police" wherever they occur in the Decree' because that was the general intention of the law-maker.

D It seems to me that the suggested constructional approach by judicial modification of a statute to supply a seeming omission of word or words in a statute and thereby avert the absurdity that would follow a literal interpretation of the statute can also be  
E achieved by reading the whole of the decree together or harmoniously, particularly if this will assist the court in deciphering the legislative intention in relation to the statute in order to effectuate it as the court has judicial responsibility to interpret a statute according to its true intent. As Nnaemeka-Agu, JSC succinctly put it  
F in Nwosu v Imo State Environmental sanitation Authority (supra) pat p. 724:

*"I believe that an indubitable offshoot of the principle of construction that the court must seek out the legislative intention and give  
G effect to it that every statute must be construed according to its tenor ."*

This harmonious approach found favour with the Court of Appeal. Undoubtedly, it is evident from communal reading of the State Security (Detention of Persons) Decree No. 11 of 1994 along with  
H the State Security (Detention of Persons) decree 1984, as amended by the amendment Decrees of 1984, 1986, 1988 and 1990, would leave no one in doubt that the true intent of Decree No. 11 of 1994 is to empower the Inspector-General of Police with the authority to

issue detention order independently with another person. If for any reason that other person cannot perform that function that cannot in any way affect the powers sought to be conferred on the Inspector-General of Police in this regard since the word "or" in the context of section 1 (a) of Decree No. 11 of 1994 is unmistakably disjunctive in its meaning. B

In the result, whether by invoking the harmonious rule of construction or by judicial modification to supply or fill in an apparent case of obvious oversight or omission in order to avoid absurdity which the legislature was presumed not to have intended, I turn in an affirmative answer to Issue No. 1 and hold that the Inspector-General of Police is competent and empowered to issue and sign a detention order, under Decree No. 2 of 1984 as variously amended. D

Whether the Court can inquire into the reasons behind the satisfaction of the Donee of a detention order.

Learned cross-appellant contends that the court is competent to compel the donee of a detention order to disclose the reasons behind his conclusion that a particular person, e.g. the cross-appellant herein, is a security risk. Although section 4 of Decree No. 2 of 1994 has an ouster clause, while section 2 of Decree No. 12 of 1994 forbids the court from inquiring into anything done or purported to be done under a Decree, it is counsel's submission that before Decree No. 12 of 1994 can apply, the respondents must show that they acted within the provisions of Decree 2 of 1984 otherwise the jurisdiction of the court will not be ousted. He calls in aid Madike v. I.G.P. (1992) 3 NWLR (Pt. 227) 70 at 107 and Onuzulike v C.D.S., Anambra State (supra) at pp 820-821. To request the court to subject the issuance of a detention order to judicial review, according to counsel, is not questioning the competence of the respondents to promulgate Decrees No. 2 of 1984 and No. 12 of 1994, rather the court can subject it to judicial review by way of interpretation having regard to the phrase in section 1(1) of Decree No. 2 of 1984, i.e. "if the Chief of Staff is satisfied that any person is or recently has been concerned in acts prejudicial to state security he may by order in writing G H

direct that the person be detained until the order is revoked. To counsel, the use of the words "if", "satisfied" and "may" suggest that the court can look into the adequacy of the reasons that inform the satisfaction of the Chief of Staff, more so that in deciding whether or not to issue a detention order, he is exercising a public function and such scrutiny would show whether or not the Chief of Staff or an issuing authority acts in good faith or on extraneous considerations. To give the issuing authority unbridled powers, if he is satisfied, and thereby keep the persons detained behind the bars in perpetuity without question is to lay a monstrous foundation in which no society can thrive. Counsel submits that there are implied conditions which must be satisfied by the issuing authority for the proper exercise of powers under Decree No. 2 of 1984. These conditions include well-settled rules of natural justice in exercising the power to issue detention order.

Counsel refers to the English case of Liversidge v. Anderson (1942) A. C. 206 as an example where the court declined jurisdiction to question the exercise of discretionary and subjective power such as the one exercisable by the Inspector General of Police. Liversidge case was followed in Nigeria by Wang Ching - Yao & Ors v. Chief of Staff (unreported) Appeal No. CA/L/25/85 of April 1, 1985, per A. Ademola, JCA and a host of other cases. But counsel urges us to depart from the approach under Liversidge case, having regard to modern judicial developments. Finally, he submits that Liversidge case is no longer the law having regard to Nakkuda Ali v. Jayaratne (1951) A. C. 66 at pp 76-77. Padfield v. Minister of Agriculture, Fisheries & Food (1968) A. C. 997 at pp. 1032 - 1033 and Stitch v. A. G. Federation (1986) 5 NWLR (Pt. 46) 1007 at 1025 and, urges that the court should have the power to ascertain whether in the exercise of the discretion to issue out a detention order against a citizen, such as the cross-appellant, the detaining authority ought not to have good reasons in fact to claim satisfaction that the cross-appellant, at the time of his arrest, constituted a threat to state security.

The respondents did not react in any way, either in their brief or during oral hearing, to the second arm of the cross-appellant's Issue No.

1.

The crux of the matter begin contested under the second arm of Issue No. 1 is whether in the exercise of powers conferred on a detaining to issue detention orders, the donee of the said power is under any obligation to disclose the reasons for his conclusion that a particular citizen, B such as the cross-appellant, is a security risk to warrant his confinement by issuance of a detention order. What calls for determination is the operative phrase in the State Security (Detention of Persons) of Decree No. 2 of 1984 section 1(1), (with its various amendment Decrees of C 1986, 1988, 1990 and 1994) which states as follows:

*" ..... if the Chief of Staff is satisfied that any person is or recently has been concerned in acts prejudicial to state security ... he may by order in writing direct that the person be detained ... until the order is D revoked".*

No doubt, the power donated herein is wide and startling. Nevertheless, the inquiry in this regard is whether, directly or by implication, the above provisions place an obligation on the authority issuing detention order to disclose the reasons behind his satisfaction to issue a detention order. It E is indisputable that the issuing authority is, by the tenor of the Decree, vested with expansive power which is both discretionary and subjective. This much, the cross-appellant's counsel readily concedes in his brief of argument. **I am unable to discover from close reading of section F 1(1) of Decree No. 11 of 1994 any obligation in the authority issuing detention orders to disclose reasons in the way and manner he exercises his subjective discretion. Contrary to the submission by learned cross-appellant's counsel that the Decree, as amended, G has spelt out conditions or circumstances which must exist before the Inspector-General of Police can issue a detention order, I have searched, in vain, to discover the said conditions-precedent. Clearly H learned counsel is reading implied conditions into the lucid and unambiguous provisions of section 1(1) of Decree No. 11 of 1994. This cannot be right in the absence of any authority to do so.**

It is, perhaps, desirable at this juncture to consider the landmark decision of the English House of Lords in Liversidge Anderson (supra).

The Defence (General) Regulations, 1939, Regulation 18 b, para. (1) states as follows:

*"If the Secretary of state has reasonable cause to believe any persons to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."*

C In construing these provisions in Liversidge v. Anderson, the House of Lords held, by a majority decision, that the matter is one for executive discretion of the Secretary of State. Accordingly, in the action for false imprisonment, the court cannot compel the Secretary of State to furnish particulars of the grounds on which he had reasonable cause to believe D the plaintiff to be a person of hostile associations or that by reason of such hostile associations it was necessary to exercise control over him. It may be noted that the Defence (General Regulations, 1939, Regulation 18 b, para 1 were made for emergency period in England.

E The principle in Liversidge case was applied in many Nigerian cases where the jurisdiction of courts of law had been muzzled by the inclusion of ouster clauses in statutes. See Wang Ching - Yao & ors v. Chief of Staff (unreported) Appeal case No. CA/L/25/85 delivered on F April 1, 1985, per A. Ademola, JCA and Mohammed v. Commissioner of Police (1987) 4 NWLR (Pt. 65) 420 at 438.

Now let me return to the case in hand. It is quite clear that the provisions under section 1(1) of Decree No. 11 of 1994 give the Inspector-General of Police a free and unfettered power to reach his conclusion, relying on such data and information that he may deem fit in being G satisfied that any particular person's act is prejudicial to state security. No reasons are given by the detaining authority to anyone as to how a detainee is or constitutes himself in acts detrimental to state security. Put H tersely but frankly, it is manifest that the powers vested in the detaining authority can be wielded arbitrarily and capriciously without any remedy or right to seek a review of the decisions of the detaining authority. Indeed, the Decree was further shielded by the ouster clause in section 4 of



the same Decree. Learned cross-appellant's counsel has urged that the phrase "if the Chief of Staff is satisfied" should be interpreted to mean "if the Chief of Staff has adequate reasons in fact to be satisfied". With utmost respect to counsel, I am unable to accept this; it is an unwarranted encrustment on the plain and unambiguous provisions of the statute. In any event, the in-built ouster clause under section 4, as it were, shields the arbitrariness in which the power of the detaining authority is shrouded. It is pertinent to remember that the relevant time of the operation of these Decrees was during the military regime, a time that provision of the 1979 Constitution had been substantially suspended and when judicial powers of the state had been radically eroded and inclusion of ouster of the jurisdiction of courts of law in statutes became the rule rather than the exception. It is against this background that the plenitude of subjective discretionary power conferred on the detaining authority could be better appreciated.

From the foregoing, I turn in a negative answer to the second arm of Issue No. 1.

#### Issue No. 2

Whether the court below was right to have held that the procedure adopted by the trial court in taking judicial notice of the detention order was proper.

It appeared that at the trial the cross-appellant protested the admissibility of the detention order because it was not attached to the respondent's notice of preliminary objection: the order was not exhibited and was not admitted in evidence before the trial court. In the circumstance, there was no detention order for consideration. Be that as it may, the learned cross-respondents' counsel produced it. It was common ground that learned counsel for the cross-appellant not only read it, like the respondents' counsel, but relied on it to show the illegality of the arrest and detention of the cross-appellant for a few days. Thus it is submitted by cross-appellant's counsel that the fact that he, at a point, perused the detention order does not make him "a party to any civil proceedings who knowing of an irregularity, allows the irregular procedure to be adopted". In other words, the ratio in the case of Akhiwu v. The Principal Lotterie Officer Mid-Western Region (1972) 1 All NLR (pt. 1)

229 would not apply not having properly admitted the detention order in evidence, cross-appellant's counsel then submitted that the court was in error to have taken judicial notice of the existence of the detention order unless one was produced from the custody of the detention centre where  
 B the detainee was being kept or a certified true copy hereof was tendered in evidence.

Again, the cross-respondents made no input in respect of this issue in their briefs.

C Except that section 4 of the State Security (Detention of Persons) (Amendment) Decree No. 11 of 1994 had erected an ouster clause stifling the right of a citizen to question a Decree, it seems to me that the handing of the issue of the detention order at the trial was irregular despite the protest at the trial court of the absence of the copy of the detention order by the cross-appellant's counsel. **A detention order, at best, is a public document. In the absence of the original copy its certified copy becomes admissible in evidence.** Clearly, it is not open to  
 D the court to take judicial notice of such a document in the absence of any law authorizing such approach. There is no gainsaying the fact that the  
 E copy of the detention order was a material document to both parties as well as the court. The cross-appellant needed it to establish the illegality of the detention on the one hand, while the cross-respondents can only  
 F properly establish the legality of the detention, on the other hand, by the same document. Although in the absence of the detention order itself, a certified copy thereof ought to have been produced.

Finally, could the court rightly have taken judicial notice of it? I have grave doubt that the court could do so. **While a court can take**  
 G **judicial notice of any law, the same cannot be said of a detention order, which as we have earlier observed, can at best be ranked as a public document. Its authenticity or otherwise can only be properly considered by the court after it has been duly admitted in evidence.** Alternatively, the court can take judicial notice of detention  
 H **order if it can be subsumed as a "subsidiary legislation" or a "subsidiary instrument".** It may then be asked, **what is a subsidiary legislation and can a detention order be so subsumed?** The legal

**status of a detention order had been considered by the Court of Appeal in at least two cases. First, in Wang Ching - Yao case, the question whether photocopies of detention orders, tendered as exhibits, were public documents or subsidiary legislations was answered by Adenekan Ademola, JCA as follows:**

*"The answer to this is a simple one. I do hold that these exhibits (photocopies of detention orders) are not public documents or documents as so understood within the context of the Evidence Act. Nor are they subject to rules of admissibility or weight under the rules of evidence. Their true nature is more of pieces of subsidiary legislation enacted under State Security (Detention of Persons) Decree 1984, (Decree No. 2 of 1984) The orders of detention are "Subsidiary instruments" made in the exercise of powers conferred on the Chief of Staff by Decree No. 2 of 1984. The orders made here, that is Exhibits 4 and 5, and enactments within section 27 (1) of the Interpretation Act 1964, They are not documents public or otherwise. I am enjoined by the positive enactment in section 73 (1) (a), (b) of the Evidence Act to take judicial notice of them and by the provision of section 1 of the suspended part of the constitution to enforce it."*

**The next case was Abdulmumuni Yaro Saidu v. C.O.P. (unreported), suit No. CA/K/1/87 of 10th November, 1987. Here, the question of inadmissibility of photocopies of detention orders tendered in evidence at the trial court was answered by the Court of Appeal in the affirmative. A consideration of the poser, what is a subsidiary legislation, was given by the Court of Appeal, coram Maidama, Ogundere & Achike (JJCA). In my leading judgment of the Court in that case, I observed:**

*"Generally, the term subsidiary legislation is used to connote any enactment, that is legislation made under an enabling law. The term subsidiary legislation may therefore be used interchangeably with the term "subsidiary instrument". Now "subsidiary instrument" means any "order, rules, regulation, rules of court or byelaws made either before or after the commencement of this Act - (this Act herein is a reference to the Interpretation Act, 1964) - in exercise of powers con-*

ferred by an act". (see section 27 (1) of the Interpretation Act, 1964)  
 The term "Order" in this context is a term applied to instruments,  
 made under statutory powers embodying directions, commands or  
 mandates which are of general character (underlining mine) as dis-  
 B tinct from specific instructions to which the term "directions" is ap-  
 plied: (See Halsbury's Statutory Instruments Vol. 1 of 1972 page 6). In  
 my view, the hall-mark of an "order" which makes it cognizable as a  
 "subsidiary instrument" or "subsidiary legislation" lies in the gener-  
 C ality of its application in contradistinction to a mere specific direction  
 which in ordinary parlance, but definitely not in the legal sense, may  
 be referred to as an order. An "order" as a subsidiary legislation must  
 be seen as a statutory instrument, for example, S. 1. 17 of 1984, Cus-  
 D toms Tariff (Import prohibition (No. 2) order of 1st April, 1984 is made  
 under powers conferred under section 7 of the Customs Tariff (consoli-  
 dation) Act 1983. Furthermore, this order may be cited as the Customs  
 Tariff (Import prohibition) No. 2) Order 1984. Clearly, the detention  
 E ment or subsidiary legislation in the manner it was made nor can it be  
 said to be an instrument of such general application.  
 From the foregoing I think that any detention order made by the rel-  
 evant authority under Decree No. 2 of 1984 cannot be subsumed under  
 F subsidiary legislation or subsidiary instruments, not being an order of  
 a general character. In my view this court cannot take judicial notice  
 of such order under section 73 (1) (a) and (b) of the Evidence Act."

In the result, guided by the foregoing, I am clearly of the  
 G view that the trial court was in error to have taken judicial notice  
 of the detention order. Although the Court of Appeal disapproved of  
 this informal procedure, nevertheless it held that it was of no moment to  
 now argue at the appeal stage that the detention order was not formally  
 admitted in evidence, bearing in mind the access both parties had to the  
 H order and the use to which it was put by them, more so as it did not  
 occasion any miscarriage of justice. While endorsing the lower court's  
 conclusion on the informal way the detention order was introduced at the  
 trial, it must be strongly denounced and much to be discouraged. In

future, such issue should be thoroughly tested and thrashed out at the court of trial under the strict rules of admissibility of documentary evidence and not postponed to postmortem consideration when the case is on appeal.

For all I have said, Issue No. 2 is regrettably resolved against the cross-appellant. B

Issues Nos. 3 & 4

While Issue No. 3 was resolved earlier in this judgment in favour of the cross-appellant, Issue No. 4. predicated on ground 5 of the grounds of appeal, was not sustainable as ground 5 of the grounds of appeal was successfully struck out as being incompetent. C

In the final analysis and from the foregoing, the main appeal lacks merit and fails; the same is dismissed. So also the cross-appeal.

On the question on costs I confess that I have some difficulty. D The appellants were successful at the trial court while the cross-appellant succeeded in the Court of Appeal. The two lower courts made their respective orders as to costs in the exercise of their discretion with which this Court cannot interfere. Undoubtedly, this Court has a discretion to E exercise as to the costs of this appeal. The general rule is that costs should follow the event. The appellants lost in the main appeal while the cross-appellant was also unsuccessful in the cross-appeal. The parties' positions in the contest are even. Accordingly, I make no order as to F costs.

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**BELGORE JSC**

I have read in draft after having a conference the judgment of G 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 act H 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 the 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 thereunder. 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 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 a 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 Nigeria 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 the Federal Parliament formally adopted it. Thus Article I of 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 1983 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 Fundamental Rights in the Constitution were suspended. B 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 C the Constitution.

It is therefore clear that once the Military regime got entrenched in governance it is natural for self-preservation to promulgate decrees that curtail liberties, a very unfortunate legal situation. Thus early in D 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 held under this Decree except four clear days before the Order was signed. E

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 1970 called Supremacy Decree. The only F way to stop these Military overwhelming curtailment of freedom 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 1983 December and the Constitution G (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 implications. Coup d'etat is a treasonable offence but that is only H 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 laws and the Constitutions are held in superior status than any international law like a treaty. Sometime a 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 1994 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 on 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 days not covered by Detention Order in question could not be 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.



**OGUNDARE JSC**

The facts of this case are simple enough. The respondent, a legal practitioner, was arrested without warrant at his residence on Tuesday January 30, 1996 at about 6. a. m., by six 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:-

1. *A declaration that the arrest of the Applicant, Chief Gani Fawehinmi at his residence at 9 A 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 & Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.*

2. *A declaration that the detention and the continued detention of the Applicant without charge since Tuesday January 30, 1996 when the Applicant was arrested by the officers, servants, agents, privies of the Respondents at his residence 9 A 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 & People's Rights (Ratification and Enforcement) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.*

3. *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 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. N10,000.000.00 (Ten Million Naria) 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:

*(i) 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 immuned to any legal liabilities in respect of any action done pursuant to the Decree.*

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

*(iii) 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 people's Rights (Ratification and Enforce-*

ment) Act.

Arguments on the preliminary objection were taken from 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 B 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 C (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 D (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 E decrees."*

The learned Judge concluded -

*"In the result, I hold that the jurisdiction of this Court is ousted by Decree No. 2 of 1984 and therefore, it cannot entertain the action. F 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 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 (detention of the) Appellant which is apparently not covered by the or- G der." In coming to this conclusion, the Court of Appeal found:

1. *"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. 12 of 1994, the jurisdiction of the Court is ousted to entertain the Appellant's case."*

2. *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."*

3. *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. 12 of 1994 cannot affect its operation in Nigeria.*

4. *That the provision of Cap. 10 (The African Charter on Human and People's Rights 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.*

5. *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 in right to decline jurisdiction under the circumstances on the basis of the procedure adopted.*

6. *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 Pat-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 decision of the court below relating to -

(i) *Power of Inspector-General to sign and issue a detention order;*

(ii) *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;*

(iii) *Procedure for tendering detention order; and*

(iv) *Immunity of the Head of State.*

Pursuant to the rules of this Court the parties filed and exchanged their respective written briefs of argument. And at the oral hearing of the 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) Statutes of the African Charter vis-a-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 or four days before the detention order was issued but in respect of the entire period of his detention.

#### STATUS OF THE AFRICAN CHARTER

The Organization 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 members States (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 the 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. Trea-*

*ties 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 citizens' rights and duties in common or statute law.*

*They might have an indirect effect upon the construction of B statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty."*

In my respectful view, I think the above passage represents the correct C 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 D 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 powers of the courts. By Cap. 10 the African Charter is now part of the laws of Nigeria and like all other E laws the courts must uphold it. The charter gives to citizens of member states of the Organization 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 con- F tained 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 statute with international flavour. Being G so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute 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 Lord- H ships of the Court below that the Charter possesses "a greater vigour and strength" than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr. Adegboruwa, learned counsel for the Respondent. Nor

can its international flavour prevent the National Assembly, or the Federal Military Government before it to remove it from our body of municipal laws by simply repealing Cap. 10 Nor also is the validity of another Statute 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 repealed 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 exercised 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 No. 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 J.C.A. 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 the administrative law which frowns at abuse or misuse of power. But in Nigeria there are provisions in Decrees such as No. 2 1984 which empower 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 the 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 at 447, I quoted as follows from a paper presented by the Chief Justice of Nigeria at the Sixth International Appellate Judge's Conference, 1991:*

*'Human Rights under a Military Regime may be abberations. 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) 1 NWLR (pt. 214) 60 at 86, UWAIFO, JCA observed as follows:

*'Decree No. 13 of 1984 is an ouster legislation. Once the provisions of a Decree or Constitution ousting the jurisdiction of the Courts on any specific matters are clear and unambiguous, the Courts 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 Appellants."*

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 (detention of the) Appellant which is apparently not covered by the order."*

Muhammed JCA in his own judgment observed:

*"The grundnorm 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 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 or after the commencement of this Decree, the*  
 B *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*  
 C *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."*

D And Pat-Acholonu JCA, 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*

E *'4(1) 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*  
 F *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*  
 G *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*  
 H *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, I, 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.(1) 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 purposes of the Act, no mention was made of Cap. 10 which was then already in existence. I would think that Cap. 10 remained unaffected by the provisions of Section 4(1). A treaty is not deemed abrogated or modified by later statute unless such purpose has been clearly 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 in the Schedule to this Act shall, subject as thereunder 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 African Charter. That is, the

plenitude of the Government of Nigeria cannot do anything inconsistent with the Charter. Section 1 was never suspended or repealed by any of the Constitution (Suspension and Modification) Decrees enacted between 1983 and 1999; it remained in force throughout B 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 C by sections 16(1) & (2) 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.(1) Subject to this Decree or any other Decree made during D the period 31st December 1983 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 Act of the National Assembly or of a Law made by a State House of Assembly or any E other enactment or instrument whatsoever, shall, until that law is altered by an authority having power to do so, continue to have effect with such modifications (whether by way of addition, alteration or omission) as may be necessary to bring that law into conformity with the Constitution F 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 31st 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 G 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 H 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 (1) 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 or after the commencement of this Decree shall until that law is altered by all 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) Vol. 4. NSCC 144; (1962) ANLR Pt. 1 page 206 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 v. The State (1994) 9 NWLR 1, again this Court, per Bello CJN, at pages 26-27 held:

"However, I am unable to agree with Mr. Agbakoba that because neither 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 juris-

*diction, 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 came by way of an action commenced by a writ or by any other permissible procedure such as 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 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, 1993 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 Modification) Decree, no question 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 forming part of this Decree.

2. It is hereby declared also that:

(a) for the efficacy and stability of the Government of the Fed-

eral Republic of Nigeria; and

(b) 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 not be inquired into in any Court of law and accordingly, no provision of, the Constitution shall apply in respect of any such question."

As earlier observed in this judgment, Cap. 10 is preserved by sections 16 and 17 of Decree No. 107 of 1993. By virtue of the preamble to Decree No. 12 of 1994 and section (1) thereof, Cap. 10 is equally preserved by the said Decree. I can find nothing in the claims of the Respondent that calls in question the validity of any decree. The only evidence 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 identified themselves as operatives of the State Security Service (SSS) and policemen invaded our residence at 9 A 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. That thereafter the Applicant was taken away in a light blue Peugeot 504 Station Wagon car with Reg. No. LA 3123 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 crime in any court."*

There was no counter-affidavit impugning the facts 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**  
 B **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.**

C **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 part of the proceedings in this case. Nor was it evidence on which the Court could act - see**

D **Ouster of court's jurisdiction is not a matter of course. For the Court's jurisdiction to be ousted it must be clearly 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 am not**  
 E **impressed by the views expressed by them on the failure of the Appellants to tender in evidence the detention order they relied on. The conclusion I reach is that on the record before us, Decree No. 12 of 1994 does not apply.**

F **From all I have said above, it is crystal clear that the issues raised in the main appeal must be resolved against the Appellants. I unhesitatingly dismiss their appeal. For the same reasons, issue 3 of the cross-appeal is resolved in favour of the Respondent as cross-appellant.**

G **I am now left with Issues 1,2, & 4 of the cross-appeal. Issues 1 raises the question of the competence of the Inspector-General of Police to issue the detention order in this case. Decree No. 2 of 1984 empowered the Chief of Staff to issue a detention order. By amendments to the Decree, the power was given variously to the Chief of General**  
 H **Staff or the Inspector-General of Police [State Security (Detention of Persons) (Amendment) Decree No. 12 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 Gen-**



eral Staff only (State Security (Detention of Persons) (Amendment) Decree No. 3 of 1990) and the Vice President (State Security (Detention of Persons) (Amendment) Decree No. 24 of 1990). The changes in the designation of Chief of Staff 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 have instead the office of the Chief of General Staff - a return to the 1985 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 Vice-President was given that power.

Then came 1994 when another amendment was made to the Decree. The State Security (Detention of Persons) Decree No. 11 of 1994 which came into force on 18th August 1994, provided as follows:

*"1. The State Security (Detention of Persons) Decree 1984 as amended by State Security (Detention of Persons) (Amendment) Decree 1984, 1986, 1988 and 1990 is further amended:*

*(a) By inserting immediately after the words 'Chief of General Staff' 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 1990 which substituted the Vice-President for the Chief of General Staff. The position in law that as at the time of the promulgation of Decree No. 11 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. 11 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 1990, the office 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. 11 of 1994 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 had been taken away by Decree No. 24 of 1990.

In conclusion I resolve issue 1 against the Respondent.

On Issue 2, I think the Respondent misconstrued what the Court below 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 JCA who read the lead judgment said:

*"There is no dispute that the Detention Order in the instant case was 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 that 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 Officers, Mid-Western State (1972) 1 All NLR (Pt. 1) 229. 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."* B

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, therefore, resolve the issue against the Respondent. C

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 of 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 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."* D E F

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 sub section (2) of section 267 G H

*"(2) The provisions of subsection (1) 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 favour 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 N10,000.00 costs in this Court.

### MOHAMMED JSC

I agree with the opinion of my 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 1 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 African Charter. Nigeria attempted to fulfil 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 detained 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' Right (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 continued 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 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 33 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. N10,000,000.00 (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 Nigeria Law - See Cap 10 laws of the Federation of the Nigeria, 1990.

I will now consider the submission made in respect of issue. Learned Counsel for the appellants submitted quite correctly that 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 fact - 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 a treaty in its relations to another state-party under international law the State cannot escape from its treaty obligations by pleading  
B 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  
C 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 again the state in international law at the instance of the other states who ratified the treaty. Once the state decides to exercise such right through a legislation the courts in that country are bound  
D to follow the promulgated law. In Macarthy's Ltd. v. Smith (1979) 3 All ER 325 at 329 Lord Denning M. R. held as follows:

*"If the time should come when our Parliament deliberately passes an Act with the intention of repudiating a Treaty or any provision in it or  
E intentionally of acting inconsistently with it and says so in express terms then it 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 21 will  
F say that in incorporating African Charter on Human Rights the country (Nigeria) provided that the treaty shall rank at par with other ordinary municipal laws. In other words, this country did not expressly state that the treaty after its ratification and embodiment into our municipal laws had attained a status superior to our constitution or other municipal laws.  
G 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 of the hierarchy of laws in Nigerian in  
H order of superiority as enunciated in Labiye v. Anretiole (1992) 8 NWLR (part 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 flavour and the ouster clauses contained in Decree No. 107 of the 1993 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 courts is superior the Constitution. See Lakanmi & Anor. v. Attorney-General (West) & ors (1970) NSCC 143 and Labiya v. Anretiola (1992) 2 NWLR (part 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 on Human and Peoples' Rights which is now part of our municipal laws. In any event The Federal Military government (Supremacy and Enforcement of Powers) Decrees No. 12 1994 has clearly ousted the jurisdiction of courts to determine any claim by any individual against the Military Government's action Section 1 (2) (b) (i) of Decrees No. 12 of 1994 provides:

*"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 proceed-*

*ings 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 four days which were not covered by the Order of can 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.

## D **IGUH JSC**

I have had the privilege of 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. 10 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 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. (1) 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) Charter 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, 1979 would have specifically so stated by clear words. See Pyx Granite Co. Ltd v. Ministry of Housing and Local Government (1960) A. C. 260 at 286 where Viscount Simonds, delivering the judgment of the House of Lords expressed this principle of law as follows:-

*"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words".*

Although, a later statute may suspend or repeal an earlier one either expressly or by implication, suspension or repeal by implication is not, as a general rule, favoured by the courts in the absence of clear words to that effect. See Chorlton v. Tonge Overseers (1871) L. R. 7 C. P. 178. As Coke, C. J. put it in Dr. Fosters Case (1614) 11 Rep. 56 b at P. 63 a :-

*"Forasmuch as Acts of Parliaments are established with such gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained con-*

*struction out of the general and ambiguous words of a subsequent Act, to be abrogated".*

And if, as with all modern statutes, the later Act contains a list of earlier enactments which it expressly repeals or suspends, the omission of a particular statute from such list will be highly indicative of a strong presumption of intention on the part of the law makers not to repeal or suspend the statute thus omitted. See R. V. Poor Law Commissioners, Re St. Pancras Parish (1837) 6 Ad. and E 1.1.

In the present case, section 4 of the State Security (Detention of Persons) Act unequivocally and in clear terms mentions Chapter IV of the Constitution of the Federal Republic of Nigeria, 1979 as the earlier enactment which it expressly suspends. It neither mentioned nor did it include the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983 as one of the enactments concerning fundamental human rights it was suspending. My attention was not drawn to any Decree or, indeed, to any other Act or Law Promulgated after 1983 which in clear terms repealed or suspended the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983 in relation to detention of persons. In the circumstance, I think the said African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 remained effective and in full force at all times material to the respondent's alleged detention. I entertain no doubt also that both courts below, with profound respect, were in definite error when they held that there was no jurisdiction in the law courts to entertain the respondent's claims for the entire period of his alleged detention. I think such jurisdiction exists. This is by virtue of the fact, firstly, that the African Charter on Human and peoples' Rights (Ratification and Enforcement) Act, 1983 was at no time suspended or repealed. There is, secondly, section 1 of that Act which stipulates that from the date of its commencement, the provisions of the African Charter on Human and Peoples' Rights shall, subject as provided thereunder, have full force of law, in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive and judicial powers in Nigeria. Thirdly, and finally, is the fact that the

respondent's action was expressly founded in his originating summons, not only under the 1979 Constitution, but also under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10 Laws of the Federation of Nigeria, 1990 which, as I observed, remains fully in force and enforceable in Nigeria. It is my view, therefore, that there is ample jurisdiction in the law courts to entertain the respondent's claims under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983. B

I need finally to say a word or two with regard to two Decrees from which it would appear that the trial Federal High Court held it had no jurisdiction to entertain the respondent's claims. These are section 5 of the Constitution (Suspension and Modification) Decree No. 107 of 1993 and section 1 (2) (b) (i) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 C D

Section 5 of Decree No. 107 of 1993 states 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"* E

There is next section 1 (2) (b) (i) of Decree No. 12 of 1994. This provides thus -

*"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 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"* F

In the first place, it ought to be pointed out that no question as to the validity of any Decree or Edict, whether made before, during the period 31st December, 1983 to 26th August, 1993 or at any other time thereafter is in issue on the face of the respondent's action. His claims against the appellants are fully set out in the leading judgment of my learned brother, Ogundare, J.S.C. I need not repeat them all over again in this judgment. These comprise of declaratory claims in respect of the alleged arrest and detention of the respondent, a mandatory order for his G H

release, an order of injunction restraining the appellants from any further arrest of the respondent and N10,000.000.00 damages for the alleged unlawful arrest and/or detention of the respondent. It suffices to state that the main issues before the trial court centre on the alleged unlawful arrest and detention of the respondent by the appellants and not with the validity of any Decree or Edict.

In the second place, the respondent in paragraphs 3 - 7 of the affidavit in support of his originating summons carefully deposed as follows -

"3. That on Tuesday, January 30, 1996 at about 6.00 a.m., six (6) men who identified themselves as operatives of the State Security Service (SSS) and policemen invaded our residence at 9 A Ademola Close G.R.A., 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. That thereafter the Applicant was taken away in a light blue Peugeot 504 Station Wagon car with Reg. No LA 3123 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 crime in any court."

No counter-affidavit was filed by the appellants in answer to the above depositions of the respondent. The obvious result is that having regard to the unchallenged depositions of the respondent, there was no evidence before the court to the effect that the respondent's claims had anything to do with or were in respect of any act, matter or thing done pursuant to any Decree or Edict. The onus was on the appellants to depose to facts to establish, or at least, to allege that whatever action they took against the respondent was pursuant to a Decree or Edict they were relying on. This they failed to do. It cannot in the circumstance be said that there was any evidence before the court to connect Decree No. 12 of 1994 or, indeed, any other Decree or Edict with whatever acts the appellants were said to have done in the present action. In my view, in

the total absence of any deposition, Whether from the respondent or the appellants, to connect the appellant's alleged conduct complained of with Decree No. 12 of 1994, it would be wrong to invoke the Decree in vacuo, that is to say, without any claim whatsoever from either of the parties to the effect that the action in question is in respect of an act or thing done pursuant to the Decree. B

In this connection, I ought to observe that while it is a principal rule of pleading that a party must plead material facts only and not law, yet every party is permitted by his pleading to raise a point of law. It is thus not only unnecessary but contrary to the rule of pleadings to plead law, statutes, or sections thereof before reliance can be placed on them. If a party's case depends on a statute, all he needs do is fully to plead material facts necessary to bring his case within that statute. See Read v. Brown 22 Q. B. D. 128, Re Vandervell's Trusts. (No. 2) (1974) 3 All E.R. 205 at 213 (C. A.), Anyanwu v. Inbara (1992) 5 N.W.L.R. (Part 242) 386 at 398. C D

In the present case, no material facts were deposed to by the appellants in answer to the affidavit in support of the respondent's originating summons to bring their case within the purview of either Decree No. 107 of 1993 or Decree No. 12 of 1994. I think both courts below were clearly in error to have invoked both Decrees in holding that there was no jurisdiction in the trial Federal High Court to entertain the respondent's claims. E F

It is for the above and the more detailed reasons contained in the judgments of my learned brothers, Ogundare and Uwaifo, JJ.S.C. that I, too must resolve the main appeal against the appellants. Their appeal is accordingly dismissed for want of substance. The cross-appeal, for the same reasons, succeeds and it is hereby allowed. The judgment and orders of the court below are hereby set aside and, in substitution thereof, the respondent's case is remitted to the trial Federal High Court for hearing and determination on its merits before another Judge of that court. I award to the respondent against the appellants costs in this court which I assess and fix at N10,000.00. G H I

**UWAIFO JSC**

There are two appeals for consideration: one is an appeal and the other a cross-appeal against the judgment of the Court of Appeal, Lagos Division given on 12 December, 1996 in this matter. The judgment is in respect of the decision of the Federal High Court delivered on 26th March, 1996 upon a preliminary objection to this action which was begun by the cross-appellant as applicant in February, 1996.

A short background of the cross- appellant is relevant. I take it from the affidavits and other documents filed in court. No one has disputed the facts revealed therein. The cross-appellant at the time this action was filed had hand over 31 years of experience as a legal practitioner. In those years he turned out to be an active legal advocate, an author and publisher particularly in the field of law. He was also widely known as a human rights activist and pro-democracy campaigner, and towards this involvement he became the National Co-ordinator of a Party known as the National Conscience Party. He is not known to have committed any offence under the law and has never been charged with the commission of any crime in any court. He prides himself as a law-abiding citizen who does not indulge in carrying guns or other dangerous weapons.

On Thursday, 30 January, 1996 at about 6 a.m., the cross-appellant was arrested at his residence No. 9 A Ademola Close, G.R.A., Ikeja, Lagos without any warrant. He was taken to the State Security Service Detention Centre at Shangisha, Lagos. From there he was taken to Bauchi Prison where he was detained incommunicado. He was not brought to trial over any offence. On February 1, 1996, the cross-appellant whose only known forum of seeking to redress a grievance is the law courts, filed an application to begin an action at the Federal High Court, Lagos, to challenge his arrest and detention by the respondents. The action was brought under the Fundamental Rights (Enforcement Procedure) Rules, 1979.

In the action which was first by way of an ex parte motion, the cross-appellant asked for a number of reliefs. But those finally sought in the motion on notice include two declarations that his arrest and detention constitute a violation of his fundamental rights guaranteed under the

1979 Constitution and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation of Nigeria, 1990. The others were a mandatory order to compel the respondents to release the cross-appellant, an injunction and damages of N10 million. The learned trial judge (Nwogwugwu, J.) granted leave to the cross-appellant on February 1, 1996 to move for those reliefs. B

By a notice of preliminary objection filed by the present appellants as respondents in the High Court, the competence of the court to entertain the action was called into question on the grounds that (1) by a subsidiary legislation made by the Inspector-General of Police in exercise of the powers conferred on him by the State Security (Detention of Persons) Decree No. 2 of 1984 (as amended) and further by section 4 of the said Decree, the respondents are immune from any legal liabilities in respect of any action done pursuant to that Decree; (2) the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 and the Constitution (Suspension and Modification) Decree No. 107 of 1993 ousted the jurisdiction of the court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree; (3) the Court lacks the 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 Rights and Peoples' Rights (Ratification and Enforcement) Act. C D E

The learned trial judge held that the Inspector-General of Police was empowered to issue the order with which the cross-appellant was detained and that such detention order having been made by the appropriate authority under the Decree, could not be legally questioned. On the effectuality of the provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, he held that Decree No. 107 of 1993 represented the grundnorm of Nigeria at the material time and that any of the provisions of that Act which are inconsistent with that Decree are void to the extent of the inconsistency. In the result he struck out the action on the ground that the court was incompetent to entertain it. F G H

The cross-appellant in his appeal against that judgment to the

Court of Appeal presented such a compendius and comprehensive brief of argument that could hardly fail to make a favourable impression on a listening tribunal. Reading through that brief, I marvel at the strength of the arguments and the industry engaged in putting them across. I shall be obliged to rely on some of those arguments in the course of this judgment. The lower court, upon a thorough understanding of the judgments of the three learned Justices, appreciated the issues about the status of the African Charter on Human and Peoples's Rights (Ratification and Enforcement) Act as contained in Cap. 10 of the Laws of the Federation, 1990. In his opinion, Musdapher JCA who gave the leading judgment observed admirably in that case reported as Fawehinmi v. Abacha (1996) 9 NWLR (pt. 475) 710 at 747; (1998) 1 HRLRA 531 at 590-591 as follows:

*"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 the Decrees of the Federal Military Government. It is common place (knowledge), 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 flavour and the ouster clauses contained in Decree No. 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria ..... It is for the above that I hold that the provisions of Cap. 10 of the Laws of the Federation 1990 are provisions in a class of their own. 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 matters pertaining to human rights under the African Charter."*

The other learned Justice of the Court of Appeal, R. D. Muhammad JCA said (1996) 9 NWLR (pt. 475) at p. 751; (1998) 1 HRLRA at p. 596:

*"On the issue of the status of the African Charter on peoples' right, I agree that ordinarily, a state, which is a party to a treaty will not be permitted to legislate locally out of its obligations. But in this matter, Decree No. 2 of 1984 as amended did not exclude the operation of the*



*clauses of the African Charter ..... I am of the opinion that the ouster clauses contained in the enactments do not affect the African Charter."*

The third member of the Court of Appeal panel, Pats-Acholonu JCA observed (1996) 9 NWLR (pt. 475) at p. 758: (1998) 1 HRLRA at p. 606 inter alia:

*"It is apparent .... that the human and peoples' rights of the African Charter are enforceable by several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court .... By not merely adopting the African Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal ... The intention of Cap. 10 is that it be accorded full force of law by which Nigeria is seen as a country that the not only signs, respects and adopts the full contents and import of the convention or charter but has gone the extra mile of incorporating same into a municipal law. It is to be noted that the Act has neither been abrogated not repealed either directly, impliedly or inferentially."*

The learned Justices said in the above-quoted paragraphs from their judgments and much that the appellants could not circumvent the effect of the African Charter as adopted by an Act in Cap. 10 of the Laws of the Federation of Nigeria, 1990 as long as the Act remains in the statute book. I do appreciate that Pats-Acholonu JCA meant to express the due effect to be given to the African Chapter when he said that having been adopted as part of our domestic law by an Act, "the preamble and section of the Act seem to vest that Act with greater vigour and strength than mere decree for it has been elevated to a higher pedestal". I shall endeavour later to put this in a manner to depict clearly what the status of the African Charter must be seen to be and how it should be treated and applied in this country. But there is no doubt that one after the other, the learned Justices seemed subsequently to have capitulated to the argument of appellants' counsel that the cross-appellant adopted a wrong procedure for seeking relief by relying on the Fundamental Rights (Enforcement Procedure) Rules, 1979. Overlooking some contradictions

indulged in by the lower court, as I am inclined to do, but concerned about the apparent misinterpretation of the observation of Bello CJN in Ogugu v. The State (1994) 9 NWLR (pt. 366) 1 at 26, it was an anti-climax in the otherwise enterprising judgment of Musdapher JCA who, after acknowledging that Bello CJN said that the African Charter Articles could also be enforced by applicable "Rules of practice in the Courts", observed at page 748 and page 592 respectively of the Law Reports:

*"I am of the view that the Appellant (i.e. now cross-appellant) 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."*

Yet the case was ordered to be remitted back to the trial court to consider the consequences of an aspect of the cross-appellant's detention. The other learned Justices endorsed this judgment and order. There is obvious contradiction there between that finding and this order.

Both sides have appealed to this court: the respondents as appellants and the applicant as cross-appellant. The appellants raised the following issues:

*"1. Whether the Court of Appeal applied the principle of international law correctly when it held that in signing the treaty on African Charter, Nigeria attempted to fulfil 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.*

*3. Whether the Court of Appeal having concurred with (sic) the decision of the trial Federal High Court declining jurisdiction to entertain the respondents application for the Enforcement of rights guaran-*

*teed under the African Charter on Human and Peoples Rights Cap 10 laws of the Federation of Nigeria 1990 because of the procedure adopted therefor, to wit, procedure by way of Fundamental Rights (Enforcement) Procedures Rules 1979, adjudged by both Courts as incorrect was right -*

(i) *in not striking out the application right away; and*

(ii) *in remitting the application to the Federal High Court to consider the consequences of the detention of the respondent for the period of four days not covered by the Detention Order.*

4. *Put the other way but in form of questionnaires (sic) and for better clarity and comprehension, issues No. 1 & 2 above may be epitomised as follows -*

(i) *What is the nature of a treaty or agreement between two or more sovereign states, such as the African Charter on Human Rights particularly as regards its force and applicability.*

(ii) *Where a treaty or agreement between two or more sovereign states is incorporated into the municipal law of a contracting state by its Constitution or municipal legislation does it have force or effect greater or higher than that of the Constitution or the municipal law because of 'its international flavour'? Further, in the particular case of Nigeria as a country ruled by an absolute Military Government whose Decrees are supreme over the unsuspended provisions of the Constitution 1979 and over all the other pre-existing laws, does the African Charter as incorporated into Nigeria's municipal law by legislation of National Assembly Cap. 10 LFN 1990 have a force or effect greater or higher than that of a Decree so that a Decree cannot oust the jurisdiction of the Court in respect of its provisions".*

Issue 4 (i) & (ii) purports to be a variant of issues 1 and 2 but in my view, issue 4 (i) is incompetent as it is merely a general issue not directed to the circumstances of this appeal. So is the first part of issue 4 (ii).

The respondent to the appeal in the respondent's brief put the issues arising as follows:

"1. *Whether it is permissible for a State party to a multilateral treaty to promulgate municipal legislations that are inconsistent with its obligations under the treaty. Alternatively*

2. *Whether the African Charter on Human and Peoples' Rights as adopted by Nigeria is inferior or superior to municipal laws promulgated by the Government of Nigeria.*

3. *Whether the Court of Appeal was right in remitting the case back to the trial court to consider the consequences of the detention of the respondent for the period of four days not covered by the detention order."*

I think issue 1 can be made more specific if stated as: "Whether it is permissible for Nigeria which is a party to and has adopted the African Charter on Human and Peoples' Rights to promulgate municipal legislations that are inconsistent with its obligations under that Charter while it remains in its statute book."

In the cross-appellant's brief, the following issues for the determination of the cross-appeal are set down:

"1. *Whether going by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 and its various amendments, particularly as amended by Decree No. 11 of 1994, the Inspector-General of Police is competent to issue sign a detention order and whether if the answer to this question is in the affirmative, he can be compelled to disclose the reasons for issuing same.*

2. *Whether the court below was right to have held that the procedure adopted by the trial court in taking judicial notice of the detention order was proper.*

3. *Whether the procedure adopted by the cross-appellant in this case in enforcing the articles of the African Charter on Human and Peoples' Rights was proper.*

4. *Whether the 1st Respondent, as Head of State of Nigeria is immuned (sic) from civil or criminal actions in all cases."*

The appellants raised two objections: one was against the competence of ground 5 of the grounds of appeal filed by the cross-appeal. I shall deal later with this in this judgment. The other was to have issue 2 struck out on the grounds, according to counsel, that it was not covered by any ground of appeal. Argument was canvassed at length on this by the appellants' counsel in his reply brief, the cross-appellant dealt very

briefly but effectively with it. I agree with him that issue 2 is covered by ground 2 of the grounds of cross-appeal. I need not say more on this. I therefore overrule that objection.

I shall consider the main appeal first. I shall do so bearing in mind all the relevant issues raised in it by both sides. I do not intend to deal with them one after the other but I shall endeavour to answer them as necessary. But I think the proper approach to this appeal is to get at the pith and substance of it as quickly from the outset as possible. This can be achieved by considering and resolving the inevitable question, to what extent and in what circumstances is the Government of Nigeria bound by the African Charter which it has adopted as one of its domestic laws? It is the answer to this main poser that leads to the easy resolution of all other issues.

The African Charter on Human and Peoples' Rights was adopted by the Organization of African Unity (OAU) on 19 January, 1981. Nigeria is a member of the OAU. The said Charter was passed wholesale into Law by Nigeria, known as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983 (the Act) on 17 March, 1983. It can be found in Charter 10 of the Laws of the Federation of Nigeria 1990, Vol. 1. It is part of the Laws of the Federation of Nigeria which are not repealed but were kept in force under the Revised Edition (Laws of the Federation of Nigeria) Decree 1990 by the Federal Military Government. Section 1 of the Act states as follows:

*"1. As from the commencement of this Act, the provision of the African charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder 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."*

I consider it necessary to recite some of the provisions of the said Charter here. First, I take some aspects of the preamble enunciated by the member States of the OAU which read:

*"Considering the charter of the Organization of African Unity, which stipulates that 'freedom, equality, justice and dignity are essential*

*objectives for the achievement of the legitimate aspirations of the African peoples';*

*Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;*

*Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;*

*Firmly Convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in African;''*

It was following these affirmations that the member States agreed the Charter on Human and Peoples' Rights, the most pertinent of which for the purposes of these appeals provide:

#### ARTICLE 2

*"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."*

#### ARTICLE 4

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

#### ARTICLE 5

*"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."*

#### ARTICLE 6

*"Every individual shall have the right to liberty. No one may be*

*deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested and detained.*" (Emphasis by me)

ARTICLE 7

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

*(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions laws, regulations and customs in force.*" (Emphasis by me) C

ARTICLE 26

*"States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."* D

Learned counsel for the appellants has argued that the African Charter is a contract between the participating sovereign states. As a contract in the form of a treaty, it binds only the states who are parties to it. He says E further that being a treaty and not a statute, it has not the force and effect of a statute and therefore does not bind those, whether individuals or states, who are not parties to it. He contends that the stipulations in a treaty are entirely beyond the cognizance of municipal courts because F they do not administer treaty obligations between independent states, arguing further that the nature of a treaty is established by authorities to be referable to an "act of state." In this regard he cites Salaman v. Secretary of State for India (1906) 1 K. B. 613 at 639 where Fletcher Moulton L. J. G said:

*"An act of State is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal Courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal Courts must accept it, as it is, H without question. But it may, and often must, be part of their duty to take cognizance of it. For instance, if an act is relied upon as being an act of State, and as thus affording an answer to claims by a subject, the*

*Courts must decide whether it was in truth an act of State, and what was its nature and extent."*

Citing the House of Lords decision in Sobhuza II v. Miller (1926) A. C. 518, 522-524 as having approved Fletcher Moulton L. J.'s statement of the law, the learned counsel came to the conclusion that the cross-appellant cannot rely on the African Charter to found jurisdiction in the High Court to entertain his action.

Learned counsel for the cross-appellant contends however, that a treaty is not simply a contract in the ordinary sense. But rather, unlike a mere contract, being a treaty creating benefit to individuals in a state can be enforced in the municipal courts of that state, relying on the cases of Application des Gaz SA v. Falks Veritas Ltd (1974) 3 All ER 51; Schlorsch Meier GmbH v. Hennin (1975) 1 All ER 152; Garden Cottage Foods Ltd v. Milk Marketing Board (1984) A. C. 130.

First, let me say that the definition of a treaty by learned counsel for the appellants as a mere contract as understood under contract law is too limited in content and is bound to mislead as to the import and purport of a treaty. I think it is useful to remember that the relevant law on the matter is now generally governed by the Vienna Convention on the Law of Treaties of 1969. The convention was based upon draft articles proposed by the International Commission and was adopted at the Vienna Conference on the Law of Treaties. According to the convention "treaty" means an international agreement or by whatever name called, e.g. Act, charter, concordant, convention, covenant, declaration, protocol or statute, concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation: see Halsbury's Laws of England, 4th edn., vol. 18, para. 1769 and 1769n8, page 918.

Second, I cannot help remarking that learned counsel for the appellants has misconceived the meaning and essence of what is known as an act of State. Act of State doctrine is a doctrine denying to municipal courts (1) the jurisdiction to pass judgment upon the validity or legality of the acts of a foreign state and (2) the right to challenge executive statements of their own government on the conduct of foreign affairs.



As observed by Chief Justice Fulier of the United States Supreme Court in Underhill v. Hernandez (1897) 168 U.S. 250, "Every sovereign state is bound to respect the independence of another sovereign state and the courts of one state will not sit in judgment on the acts of another done within its own territory."

The African Charter as far as Nigeria is concerned, is not purely a matter of public international law (or international customary law per se) regulating the relationship between member states which are signatories to it. It is an understanding between some African states concerned to protect and improve the human rights and dignity of their citizens and other citizens within the territorial jurisdiction of their countries, to the commitment of which, that understanding has been translated into a legal obligation by adopting the Charter as a domestic law. In our own case, it is the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act earlier referred to which is the domestic law.

The next question to ask is whether an individual can rely on the Act, first, as to the jurisdiction of the national courts to entertain his cause and second, to sustain that cause on the basis that his human rights protection under that Charter has been violated. The Charter contains a number of rights recognized and guaranteed to every individual. Some have recited earlier in this judgment as they appear in Articles 2, 4, 5, 6, 7(1) (a) and 26. These and other Articles of the Charter show that individuals are assured rights which they can seek to protect from being violated and if violated to seek appropriate remedies. It is in the national courts such protection and remedies can be sought, and, if the cause is established, enforced contrary to the contention of learned counsel for the appellants. In other words, those individual rights are justiciable in Nigerian Courts.

There are many authorities of comparable relevance which support this proposition. The European Communities Act, 1972 has made the European Economic Communities Treaty part of the Laws of England the same way as our Act in Cap. 10 Laws of the Federation of Nigeria has made the African Charter part of the Laws of Nigeria. In regard to the European Communities Act, 1972 and the Community Treaty,

Halsbury's Laws of England, 4th edn., vol 51, para. 3.05, pages 378-379 says:

"The fact that rights and obligations etc arising directly under Community law are transformed into enforceable Community rights and obligation under the European Communities Act 1972 has consequences in domestic law. It would appear that in so far as a Community obligation gives rise to rights in favour of individuals, breach of that Community obligation becomes in English law a breach of a statutory duty imposed for the benefit of private individuals to whom loss or damage is accused by a breach of that duty. Thus a breach of a provision of Community law giving rise to individual rights may constitute a cause of action in English private law as a breach of a statutory duty."

In Application des Gaz SA v. Falks Veritas Ltd (1974) 3 All ER 51, a company had instituted an action against another company for infringement of the copyright in a drawing it claimed was assigned to it. The defendant relied on the defence that the action was contrary to the European Economic Communities Act which by its article 85 forbids any concerted practice which unduly restricts competition within the common market and article 86 which forbids any abuse of a dominant position within the common market or a substantial part of it. The issue that fell for determination was whether the rights created by a treaty are available to an individual and whether such rights are enforceable in municipal (or national) courts. The Court of Appeal answered the questions in the affirmative. Lord Denning M. R., in reliance on a judgment of the European court, said inter alia at page 58:

"Put into English, that judgment of the European Court shows that acts. 85 & 86 create rights in private citizens which they can enforce in the national courts and which the national courts are bound to uphold. Furthermore, on 27th March 1974 the European Court held that it is for the national courts to assess the facts so as to see whether they amount to an infringement.

So we reach this conclusion. Articles 85 and 86 are part of our law. They create new torts or wrongs ..... Any infringement of these articles can be dealt with by the English courts. It is for our courts to

*find the facts, to apply the law, and to use the remedies which we have available .... It is for us to give the judgment and to enforce it. It is a task worthy of our mettle."*

Similarly in Schlorsch Meier GmbH v. Hennin (1975) 1 All ER 152, at page 157, Lord Denning M. R. said:

*"I turn now to the Treaty of Rome. It is by statute part of the law of England. It creates rights and obligations not only between member states themselves, but also between citizens and the member states, and between the ordinary citizens themselves and the national courts can enforce those rights and obligations."*

More recently, the House of Lords upheld the same principle of law in Garden Cottage Foods Ltd v. Milk Marketing Board (1984) A. C. 130. At page 144, Lord Diplock said that it was " ... the duty of national courts to protect the rights conferred on individual citizens by directly applicable provisions of the treaty." On his part, Lord Wilberforce said at page 151:

*"It can I think be accepted that a private person can sue in this country to prevent an infraction of article 86. This follows from the fact, which is indisputable, that this article is directly applicable in member states ..... It is for the national courts of member states to safeguard the rights of individuals. Since article 86 says that abuses of a dominant position are prohibited, and since prohibited conduct in England is sanctioned by an injunction, it would seem to follow that an action lies, at the instance of a private person, for an injunction to restrain the prohibited conduct."*

I think the position has also been made clear in Nigeria in the case of Ogugu v. The State (1994) 9 NWLR (pt. 366) 1 at pages 26-27; (1998) 1 HRLRA 167 at 187-189 where Bello CJN, in reference to the enforcement of the African Charter as to its human rights provisions within a domestic jurisdiction observed inter alia as follows:

*Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto .... It is apparent .... 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 each court."*

See also Oshevire v. British Caledonian Airways Ltd (1990) 7 NWLR (pt. 163) 507; U.A.C. (Nig.) Ltd v. Global Transporte SA (1996) 5 NWLR (pt. 448) 291; and Ibidapo v. Lufthansa Airlines (1997) 4 NWLR (pt. 498) 124 in which the Warsaw Convention, 1929 (a treaty) was given effect to by Nigerian Courts. It follows that the contention of the appellants that the African Charter being a treaty could not be a subject of litigation entertainable by Nigerian courts is utterly misconceived.

It seems to me that where we have a treaty like the African Charter on Human and Peoples' Rights and similar treaties applicable to Nigeria, we must be prepared to stand on the side of civilized societies the world over in the way we consider and apply them, particularly when we have adopted them as part of our laws. To my mind, this remains a valid attitude whether in military or civilian government. This will necessarily extract from the judiciary, so much so in a military regime, its will and resourcefulness to play its role in the defence of liberty and justice. The judiciary must not be seen as assisting those who step on liberty and justice to effectively press them down. Of course, if its role is completely taken away or abrogated in any particular situation, it will be obvious that no blame can be laid at its door for the infraction of human rights and liberties in question in any given situation. I subscribe to every view which supports the attitude that "we cannot afford to be immuned (sic) from the progressive movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understanding as well as in the respectable and respected voices of our other learned brethren in the performance of their adjudicating roles in other jurisdictions" to use the words of Aguda JCA in Attorney-General of Botswana v. Unity Dow (1998) 1 HRLRA 1 at 127-128. [HRLRA is Human Rights Law Reports of Africa].

With this in view, I must now say that the prevailing attitude is to give special consideration to treaties adopted by any state as part of its domestic laws vis-a-vis other domestic laws. It was this, I think, that led

Musdapher JCA in the present case at page 747 and pages 590-591 of the respective law Reports already cited to observe 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 .... 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 the Decrees of the Federal Military Government .... 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 flavour and the ouster clauses contained in Decree No. 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria."

With due respect, I am of the opinion that the learned Justice of the Court of Appeal was absolutely right to say that the African Charter is in a class of its own as I shall endeavour to show. In their own judgments in support, Muhammad and Pats-Acholonu JJCA held the same view. But Pats-Acholonu JCA went a little further to say at page 758 and page 606 of the respective law Reports (supra), in reference to the Act incorporating the African Charter as part of our laws, that:

*"By not merely adopting the African Charter but enacting it into our organic (sic) law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than mere Decree for it has been elevated to a higher pedestal ...."*

This passage from Pats-Acholonu JCA's judgment could give the impression that he regards the Act as superior to and overrides a Decree (or the Constitution) but I think the misrepresentation arises only because of the language used. If that was his real view I would without hesitation disagree with him and overrule it as I earlier indicated.

But the learned Justice later at that same page 758; 606 cited s. 17 of the Constitution (Suspension and Modification) Decree No. 107 of 1993 apparently preserving the African Charter which section I shall more particularly consider in the course of this judgment, and in between he made the following observation:

*"The intention of Cap. 10 is that it be accorded full force of law by which Nigeria is seen as a country that not only signs, respects and*

*adopts the full contents and import of the convention or charter but has gone the extra mile of incorporating same into our municipal law: It is to be noted that the Act has neither been abrogated nor repealed either directly, impliedly or inferentially .... The full import of this provision (of s. 17 of Decree No. 107 of 1993) is that an Act such as Cap. 10 of 1990 is still a law to which the court (sic: judiciary), the executive and the legislature which is really the Provisional Ruling Council by virtue of section 10(2) of the Decree No. 107 of 1993 must give due recognition and enforce. It then means that the obvious interpretation is that the law is in full force, and because of its genesis it has an aura of sacrosanctcy unlike most municipal laws and may as long as it is in the statute book be clothed with vestment of inviolability (by reason) except where a decree specifically repeals it".*

It appears all the learned Justice laboured to say was that Decree No. 107 of 1993 preserved the Act in Cap. 10 of the 1990 Laws of the Federation of Nigeria (i.e. the African Charter) and because of its international character with its attendant image implication for Nigeria, the Act attained a special status and should be accorded due recognition for what it is. He then reasoned from that premise that the African Charter, like the Hague Rules incorporated as part of English Rules, should be construed with some degree of uniformity in the various jurisdictions where it is operative. He cited Stag Line Ltd v. Fascolo Mango & Co. Ltd (1932) A. C. 328 at 350 where Lord Macmillan said of the Hague Rules:

*"As these rules must come under consideration of foreign Courts it is desirable in the interest of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance".*

I respectfully agree with Lord Macmillan's observation. I would like to remark that Pats-Acholonu JCA's perception of the status of the African Charter will be better appreciated on the grounds (1) that Decree No. 107 of 1993 specifically preserved the Act which incorporated the African Charter as part of Nigerian municipal laws (2) that the Charter has international image implication for Nigeria (3) that since no law has

abrogated or repealed the Act, the Charter is entitled to due recognition by all the arms of government, and in particular, enforcement by the courts. That being the situation which I have no reason to criticise, the next course is to examine in what manner the efficacy of that Charter should be ensured.

The position in Belgium was referred to by the Court of Appeal in Oshevire v. British Caledonian Airways Ltd (1990) 7 NWLR (p. 163) 507 at pages 523-524 where the case of S.A. Memorex v. Societe de draït Jordanien Alia et Societe de droit Saudien Saudia Arabian Airlines (reported in 1986 uniform law Review Biannual vol. 11, page 538) was cited. The Court of Appeal of Brussels in Belgium was said to have held that:

*"Belgium case law affirms that a convention whose purpose is the unification of law must be interpreted on the basis of the specific characteristics of the Convention, in particular, its object, purpose and context, as well as of the travaux preparatoires and its origins, as it would be pointless to work out a Convention establishing international rules if were to be interpreted by the courts of each state in accordance with that state's own legal concepts".*

The clear implication of this is that the spirit of a convention or treaty demands that the interpretation and application of its provisions should meet international and civilized legal concepts. That means those concepts which are widely acceptable and at the same time of clear certainty in application.

I have been profoundly assisted by the brief submitted by the cross-appellant in this court and even more by the one he submitted in the lower court from which I learned of the next case, Tova Kahu et v. Trans World Airlines Inc 16 Avip. 18, 041. In that case which is very instructive, a passenger filed claims against Trans World Airlines for damages for herself and her children which were occasioned by the hijacking of the aircraft they travelled in from Tel Aviv, Israel to New York, U.S.A. The defence was a reliance on Article 29 of the Warsaw Convention which bars suits against airline companies if not commenced within two years of the time of arrival or scheduled arrival of the aircraft. It was

however the contention of the plaintiffs that Article 29 being a limitation clause was subject to the limitation imposed by U.S.A. municipal law. The New York appellate court held that it was the intention of the signatories to the Warsaw Convention that actions governed by the Convention were to be immune from the uncertainty which would attach were they to be subject to the various provisions of the laws of the member states and that Article 29 was intended to be absolute. This decision must have a bearing on the consideration to be given to ouster clauses imposed by any member state to the African Charter which may have a tendency to water down the rights guaranteed under the said Charter.

A further case referred to in Oshevire v. British Caledonian Airways Ltd., at page 520 is known as Aero Fret v. Air Cargo Egypt decided by the Court of Appeal Paris (reported in the Uniform Law Review *Bian* dual, 1987, vol. 2 page 669) where it was held that:

*"The provisions of an international treaty, in this case, the Warsaw Convention, as amended by the Hague Protocol, which has been ratified prevail over the rules of domestic law when they are incompatible with the latter."*

In Attorney -General v. British Broadcasting Corporation (1981) A. C. 303, Lord Scarman observed at page 354:

*"..... there is a presumption, albeit rebuttable that our municipal law will be consistent with our international obligations .... if the issue should ultimately be, as I think in this case it is, a question of legal policy, we must have regard to the country's international obligation to observe the Convention (for the Protection of Human Rights and Fundamental Freedoms) as interpreted by the Court of Human Rights."* [Parenthesis added by me]

There is therefore a presumption that a statute (or an Act of Parliament) will not be interpreted so as to violate a rule of international law. In other words, the courts will not construe a statute so as to bring it into conflict with international law. Thus it was observed in Bloxham v. Favre (1883) 8 P. D. 101 at 107 (adopting the opinion expressed in Maxwell on interpretation of Statutes) that -

*"every statute is to be so interpreted and applied, as far as its*



*language admits, as not to be inconsistent with the comity of nations or with the established principles of international law."*

The application of this principle does not imply that a statute will be declared ultra vires as being in contravention of a treaty or of an international law, or that the treaty is superior to the national laws ( a completely erroneous concept), but that the courts would desist from a construction that would lead to a breach of an accepted rule of international law: See Cheney v. Conn Airways (1968) 1 All ER 779; Corocraft Ltd v. Pan-Am Airways (1969) 1 Q. B. 616. In Macarthys Ltd v. Smith (1979) 3 All ER 325, Lord Denning M. R. observed that directly applicable European Economic Community treaty prevailed over the internal law of a member state whether passed before or after joining the Community. He added however at page 329 that:

*"If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. "* (Emphasis mine)

Although this observation has been duly acknowledged, the editors the 4th edition of Halsbury's Laws of England, Vol. 51 para. 3.14, page 388 have reacted thus:

*"it is submitted that a distinction may be drawn between United Kingdom legislation which conflicts with a substantive provision of Community law and United Kingdom legislation which expressly amends or repeals the European Communities Act 1972. In the former case, section 2(1) does not equate substantive Community law with United Kingdom legislation; rather it provides in effect for the recognition and enforcement in the United Kingdom of Community rights, powers, liabilities, obligations, and restrictions arising from directly applicable or directly effective provisions of Community law. It is inherent in the concept of a directly and generally applicable regulation that it should not be affected by the unilateral acts of one member state, and it is inherent in the concept of direct effect that provisions of Community law giving rise to rights enforceable by individuals before courts may be invoked despite*

*the existence of substantive incompatible national legislation. It is therefore submitted that later United Kingdom legislation would prevail only if it amended or repealed the European Communities Act 1972, or at least sections 2 (1), 2 (4) and 3 (1), and that otherwise United Kingdom courts must continue to recognize enforceable community rights and obligations."*

I think, with due respect, the above-quoted passage correctly summarizes the prevailing legal position and concept. I must add that the European Community experience as regards the way the Treaty applies to member states (particularly Britain with whose Laws on it we are fairly familiar) may appear far more settled than what we face with the African Charter but the principles involved are not, in my opinion, very different when properly considered and understood.

The European Court laid down two principles to guide European Community Countries even long before United Kingdom joined the European Community. They are (1) that an obligation imposed by EEC Treaty shall have direct application to member states; (2) that Community law shall prevail in case of conflict or inconsistency between that law and the internal law of one of the member states, whether passed before or after joining the Community. The British Parliament by s. 3 (1) of the European Communities Act 1972 enacted that the United Kingdom should abide by those principles laid down by the European Court: See Shields v. E. Coomes (Holdings) Ltd (1979) 1 All ER 456 at 460-461.

In our own case what is enacted under s. 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act - now in Cap. 10 Laws of the Federation of Nigeria 1990 - is that the provisions of the Charter shall "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."

This no doubt is a command similar to that of s. 3 (1) of the European Communities Act 1972. To reinforce the continued applicability of Cap. 10 the Constitution (Suspension and Modification) Decree No. 107 of 1993, ss. 16 (1) and 17 preserved it. It is pertinent to refer particularly to s. 17 which provided that:

"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 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 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 power conferred by or derived under this Decree." [Emphasis by me]

It is the nuances with which to place Nigeria vis-a-vis Britain comparatively in the way their circumstances should be related in these matters having regard to the prevailing legal and political systems at the time that could be an issue. But the call to judicial duty in both remains, and we must make the very best of our situation.

Therefore I proceed on the basis and upon the understanding that at the time the cross-appellant was arrested, the appellants recognized and acknowledged that the African Charter, adopted by Cap. 10 of the Laws of the Federation of Nigeria, and affirmed by Decree No. 107 of 1993, was in full force. From the principles and the Laws already discussed above the following basic concepts ought to be established, namely (a) the African Charter is a special genus of law in the Nigeria legal and political system; (b) the Charter has some international flavour and in that sense it cannot be amended or watered down or sidetracked by any Nigerian law; (c) the effect of the Charter in Nigeria may be completely obliterated by an express repeal of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. I do not think to pay due regard to the African Charter, even though it is now part of our municipal law, will be in conflict with the decision of this court in Labiya v. Anretiola (1992) 8 NWLR (pt. 258) 139. Obviously the African Charter now falls within the category of Laws made by the National Assembly. But like the experience under the European Communities Act, 1972 in regard to the policy towards the European Economic Communities Treaty, by comparison; the African Charter cannot also be submitted, as I hope I have shown, to the sheer vagaries of any other municipal

or domestic law. We cannot be so different from other countries in this matter.

It follows that when the cross-appellant was arrested and later detained in the manner he was, at about 6 a.m. on 30 January, 1996, he was entitled to have recourse to the guarantee offered him by article 6 of the African Charter which, to repeat, provides that:

*Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."*

The fact that the arrest and detention happened in this particular case during a military regime will not, in my respectful opinion, come into consideration. I think only a state of war might have made a difference when the issue is that of the security of the state. The issue must be whether the right of the cross-appellant to be told promptly of the reasons for his arrest was violated. If it was because he was not told why he was being arrested, he was as a human being made violable when by article 4 of the Charter this must not be so since:

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

The same goes for his detention and the manner of it.

It is not for this court to go into any detail as to whether the cross-appellant can or cannot prove a case for redress. That is for the trial court to hear and determine. In the courts of that it would consider and determine to what extent the details of the acts allegedly committed by him to warrant his arrest ought to be disclosed to him; and also as to his right under article 7 (1) (d) to be tried within a reasonable time by an impartial court or tribunal instead of an indefinite detention.

As to whether the courts have the jurisdiction to entertain his cause of action, this court can decide that on this appeal. I think the lower court reached a decision that the ouster clauses relied on by the appellants did not operate against the cross-appellant in the fact of the provisions of the African Charter. Article 7 (1) provides for the right of

every individual to have his cause heard. In particular 7 (1) (a) provides for "the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force." But the lower court was in grave error when it held that the Fundamental Rights Procedure under which the cross-appellant brought his cause before the Federal High Court was not a proper procedure. I think the lower court misread the observation of Bello CJN in Ogugu v. The State (supra) at page 26 as follow:

*"I am inclined to agree with Mr. Agbakoba that the provision of section 42 of the Constitution for the enforcement of fundamental rights enshrined in Chapter IV of the Constitution is only permissible and does not constitute a monopoly for the enforcement of those rights ... it must be emphasized that the section does not exclude the application of other means for their enforcement under common law or statute or rules of Court .....*

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

I cannot comprehend how the lower court took the above observation to mean that the Fundamental Rights Procedure under s. 42 of the Constitution was not available to the cross-appellant. What Bellow CJN said was not new. He merely reiterated what this court had earlier said that fundamental rights proceedings may be commenced under the Fundamental Rights (Procedure) Rules, 1979 or any other form of action as may be appropriate: See Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387 at 418-419; see also Minister of Internal Affairs v. Shugaba Darman (1982) 3 NCLR 915 at 997. The Fundamental Rights (Procedure) Rules are rules of practice and procedure available to any High Court in Nigeria.

In this particular situation in which reliance is placed on the African Charter where no procedure for commencing action is provided, there can be no doubt that my appropriate procedure may be adopted and this includes the Fundamental Rights (procedure) Rules. There was a

direct observation on the applicability of those rules to proceedings under the African Charter by Ogwuegbu JSC at p. 47 of Ogugu's case as follows:

B *"By the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap. 10, Vol. 1 Laws of the Federation of Nigeria, 1990, Nigeria adopted the African Charter on Human and People's Rights as part of their municipal law. The provisions of that Charter are enforceable in the same manner as those of Chapter 4 of the 1979 Constitution by application made under section 42 of the Constitu-*  
C *tion."*

Where the procedure for the enforcement of obligation or rights by an individual against national authorities before nation courts, arising from treaty, charter etc. is not provided for, it will be useful to restore to D the statement in Halsbury's Laws of England vol. 51, para. 3. 71, page 448, 4th edn. which says:

E *"Where an individual or trader wishes to enforce Community law against national authorities before national court, the basic principle remains that, in the absence of any relevant Community rules, normal national remedies should be used provided that they do not make it practically impossible to exercise enforceable Community rights, and that those national rules are non-discriminatory and subject to the overriding obligation on national courts to protect directly effective rights under*  
F *Community law."*

It follows that either the procedure for fundamental rights, or judicial review, or common law or statutory procedure for obtaining declaration, an injunction or damages may be used where appropriate: See Garden  
G Cottage Foods Ltd v. Milk Marketing Board (1984) AC 130; (1983) 2 All ER 770; Davy v. Spelthorne Borough Council (1984) AC 262; (1983) 3 All ER 278. I am satisfied that the cross-appellant filed this action by an appropriate procedure and that the lower court was in error to have held  
H to the contrary.

There is the issue whether the procedure adopted by the trial court in taking judicial notice of the detention order was proper. Although there was agreement on both sides that a detention order on the

cross-appellant was signed by the Inspector-General of Police and that his counsel had a look at the one that was produced in the course of hearing at the trial court, no detention order was formally tendered and admitted in evidence. There was an aspect of the preliminary objection to the jurisdiction of the Court to entertain the action. This was on the B ground that the detention order having been made by the Inspector-General of Police in exercise of the powers conferred on him by the State Security (Detention of Persons) Decree No. 2 of 1984 (as amended), Decree No. 107 of 1993 and Decree No. 12 of 1994 ousted the jurisdiction C of the court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree. An argument was canvassed that since at the time the Inspector-General was made an alternate signatory to the Chief of General Staff, the post of the Chief of General Staff had been replaced by that of Vice-President, the Inspector-General D could not be an alternate to a non-existent office.

I think that was the only reason it was necessary to physically see the detention order at that stage of the proceedings to ascertain that what it really contained was Chief of General Staff or Inspector-General E as authorized signatory. Learned counsel for the cross-appellant then perused the detention order after it had been produced and shown to the court by learned counsel for the appellants. The court did not at that stage admit it in evidence but handed it back to learned Counsel for the F appellants. When addressing the court later, learned counsel for the cross-appellant contended that the failure to tender the detention order for admission as an exhibit in court was fatal although it had been shown to the court. In this ruling the learned trial judge said:

*"... I observed in the course of this proceedings (sic) that the G said Detention Order No. 004556 was produced in open court and shown to applicant's counsel who had every opportunity to peruse it. It was also shown to the court, I perused it and was satisfied that it was issued by the H Inspector-General of Police, thought the usual thing would have been for the respondent (sic) counsel to annex (sic) it to the motion or to tender it as exhibit before the court. Furthermore, by virtue of section 75 (1) of the Evidence Act, the court is enjoined to take judicial notice of*

any legislation. *I therefore hold that this court has taken judicial notice of the Detention Order No. 004556 dated 3/2/96 as subsidiary legislation (shown to the Court though not tendered) see section 75 (1) of Evidence Act".*

B When a document is produced before a court for the purpose  
that it be used in the proceedings, the proper procedure is to tender it  
formally. If it is admissible it is accordingly admitted as an exhibit in its  
original form. But if it is a document that cannot be parted with by  
C person in whose custody it is, or the original is not available, a copy or  
certified copy as secondary evidence in appropriate cases will meet the  
occasion. If it was necessary that would have been done in this case. I  
do not think it was a question of recourse to taking judicial notice as the  
learned judge said, of a legislation or subsidiary legislation the way he did.  
D When a court takes judicial notice of a legislation under s. 75 (1) of the  
Evidence Act, the legislation is placed before it and it takes judicial notice  
of its contents and of the fact that the legislation was duly made unless  
that is an issue. In the present case, however, the question was whether  
E the Inspector-General was competent to sign the detention order (which  
I do not regard as a subsidiary legislation), if technically he could not be  
an alternate signatory to a functionary of a non-existent officially desig-  
nated. That question can be decided even without the detention order  
being tendered at that stage of the proceedings. I do not think there was  
F any miscarriage of justice or that the failure to tender the detention order  
was fatal.

The final issue relates to the unnecessary observation made by  
Pats-Acholonu JCA at page 754 of the Law Report (supra) as follows:

G "*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 267 of the constitu-  
tion of the Federal Republic of Nigeria. That section provides immunity  
H 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 re-*



*flected in the suit in the first place. It offends the provision of the Constitution."*

This was what the cross-appellant complained of in his ground 5 of his grounds of appeal. After quoting the passage above as an error in law, the error was particularized by reference to section 267 of the Constitu-  
tion which gives immunity only in case of action brought in respect of  
acts done in personal capacity. It was also said the issue was raised su  
motu without allowing parties to address on it. It was this ground of  
appeal of appellants objected to as being incompetent. This observation,  
no doubt, is an obiter dictum of the learned Justice of the Court of Ap-  
peal. It was not part of the argument before the court. The learned  
Justice adverted to the point on his own in the course of his judgment. It  
played no part whatsoever in the decision reached either by the lower  
court or ever by the maker himself. It is not a fit subject for appeal as  
appeal is fought on the basis of the decision of the court and is not taken  
against mere obiter.

But I consider observation a rather expensive obiter, quite ca-  
pable of misleading the unwary and therefore deserves to be corrected at  
the first opportunity. Section 267 of the 1979 Constitution (now section  
308 of the 1999 Constitution) provides:

*"267. (1) Notwithstanding anything to the contrary in this Con-  
stitution, but subject to subsection (2) of this section -*

*(a) no civil or criminal proceedings shall be instituted or contin-  
ued against a person to whom this section applies during his period of  
office;*

*(b) a person to whom this section applies shall not be arrested or  
imprisoned during that period either in pursuance of the process of any  
court of otherwise; and*

*(c) no process of any court requiring or compelling the appear-  
ance of such a person shall be applied for or issued;*

*Provided that in ascertaining whether any period of limitation  
has expired for the purposes of any proceedings against a person to whom  
this section applies no account shall be taken of his period of office.*

*(2) The provisions of subsection (1) 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.*

(3) *This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to 'period of office' is a reference to the period during which the person holding such office is required to perform the functions of the office."*

Sub-section (2) is self-explanatory. The immunity provided for does not apply to the person in question in his official Capacity or to a civil or criminal proceeding in which such a person is only a nominal party. The immunity is to protect such a person from the harassment of his person while in office for his action done in his private capacity before or during his tenure in office. In fact in the present case, the suit is against the "Head of State and Commander-in-Chief of Armed Forces (General Sani Abacha)" and it is in respect of his alleged action in his official capacity. The immunity provided for in the Constitution does not arise and does not apply.

Before ending this judgment, I need to add that the cross-appeal was very contentious. The judgment of my learned brother Achike JSC which I had the privilege of reading in advance expresses the consensus view on the appeal. But the dismissal arrived at by him of the cross-appeal, the reasons for which I respectfully acknowledge he has painstakingly stated in the clearest possible manner, was initially a majority position while on the other hand I held a minority view to allow the cross-appeal. After I made a draft of this judgment available, it appeared the merit of the cross-appeal became crystal clear and so the majority view emerged in favour of allowing the cross-appeal.

From what I have discussed in this judgment, I now proceed to answer the issues for determination in respect of the two appeals. The issues raised by the appellants are indeed those raised in issues 3 and 4 since issues 1 and 2 are restated in issues 4 (i) and 4 (ii). The said issues 4 (i) and 4 (ii) have been fully discussed in this judgment. Issue 3 would have been answered in the negative but in view of issue 3 raised by the

cross-appellant which I have answered in the affirmative nothing has been achieved by the appellants in regard to that issue. From the totality of the discussion of both the appeal and the cross-appeal, the central question is whether the trial court has jurisdiction to entertain the suit. This was what was sought to be determined by the preliminary objection B raised against the suit. My judgment is that the trial court has jurisdiction to entertain the suit and to reach appropriate decisions upon the reliefs sought. I therefore dismiss the appeal and allow the cross-appeal. I accordingly order that the suit be remitted to the Federal High Court to be C heard and determined by another judge in respect of all the reliefs sought. I award costs of N10,000.00 in favour of the cross-appellant.

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#### EDIWUNMI JSC

I have had the privilege of reading before now the draft judgment of my learned brother, Ogundare JSC. It is noted in that judgment, my learned brother's conclusion is that the main appeal must fail. I fully agree with him and his reasons not only for dismissing the main appeal, E but also for upholding the cross-appeal of the respondent. It is my desire to add a few comments of my own. For this purpose, I need to give briefly the facts leading to this appeal. The respondent, a distinguished legal practitioner of many years standing at the Bar, in addition to his legal F practice at the Bar, also been well known as front line defender of human right's abuses in this country. However, on Tuesday, January 30th, 1996, he was himself arrested by virtue of a Detention Order dated the 3rd day of February, 1996, signed by the Inspector-General of Police, pursuant G to powers conferred on him by the State Security (Detention of Persons) Decree No. 2 of 1984, as amended. This authorized the arrest and detention of any person believed by the authorities to have been "Concerned in acts prejudicial to State Security."

As the respondent felt that he has been unlawfully arrested and H detained by the appellants, he filed an application at the Federal High Court, Lagos, challenging his arrest and detention by the appellants. The application, by motion ex-parte for leave to enforce his fundamental rights,

was brought pursuant to section 42(1) of the Constitution of the Federal Republic of Nigeria 1979, Order 1, Rule 2(1) (2) and (6) and Orders 4 and 6 of the Fundamental Rights (Enforcement Procedure) Rules 1979, and the inherent jurisdiction of the Court as preserved by the 1979 Constitution. The following were the reliefs sought by the respondent, as applicant:-

"(a) A declaration that the arrest of the applicant, Chief Gani Fawehinmi at his residence at 9 A Ademola Close G.R.A Ikeja, Lagos on Tuesday, January 30th 1996, by the State Security Service (S.S.S) or officer, 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 Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

(b) A declaration that the detention and the continued detention of the Applicant without charge since Tuesday, January 30th, 1996 when the applicant was arrested by the officers, servants, agents, privies of the Respondent at his residence 9 A Ademola Close G.R.A. 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 African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

(c) A mandatory Order compelling the Respondents, whether by themselves or by their officers, agents, servants, privies or otherwise however 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 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 of Laws of the Federation 1990.*

*(d) An Injunction restraining the Respondents, whether by themselves or by their officers, agents, servants, privies or otherwise however from further arresting, detaining or in any other manner infringing on the fundamental rights of the Applicant.*

*(e) N10,000.000 (Ten Million Naira) damages for the unlawful and unconstitutional arrest and/ or detention of the applicant - Chief Gani Fawehinmi."*

The appellants on the receipt of the motion filed a Notice of Preliminary objection challenging the courts jurisdiction to entertain the Respondent's case on the grounds, inter alia, that by the combined effect of the State Security (Detention of persons) Decree No. 2 of 1994 as amended and the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 and the Constitution (Suspension and Modification) Decree No. 107 of 1993, the Court could not exercise jurisdiction in terms of the reliefs sought by the respondent.

After hearing arguments presented by learned counsel for the parties, Nwaogwugwu J. of the Federal High Court, Lagos struck out the suit holding that the court has no jurisdiction to entertain the suit. In the course of his ruling, the learning trial judge recognized that the African Charter on Human and People's Right is an International Treaty, and that Nigeria being a party to the treaty, had incorporated it into its municipal law by virtue of its enactment in Vol. 1 Cap. 10 Laws of the Federation 1990. His Lordship of the Federal High Court further observed that the fundamental Human Rights provisions of Chapter 4 of the 1979 Constitution of the Federal Republic of Nigeria is in truth and in fact a replica of the provisions of Articles 4, 5, 6, 7 and 12 of the African Charter on Human and People's Rights. However, after due consideration of Decree 107 of 1979, he held that any law which is inconsistent with it is void. Hence, he further held "that any of the provisions of the African Charter on Human and People's Right which is inconsistent with it is void to the extent of its inconsistency." The learned trial judge finally held thus:-

*"In the result, I hold that the 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."*

As the respondent was not satisfied with the decision and orders of the trial court, he appealed to the Court of Appeal. His appeal succeeded substantially, when in allowing the appeal, the court below, held in what could be described as a unanimous judgment, held inter alia, that:-

"(i) *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. 12 of 1994, the jurisdiction of the Court is ousted to entertain the appellant's case.*

*(ii) That the learned trial judge acted erroneously when he held that the African Charter contained in Cap 10 of the federation 1990 is inferior to the Decree of the Federal Military Government.*

*(iii) That the Decree of the Federal Military Government cannot oust the jurisdiction of the Court when properly called upon to do so in relation to matters pertaining to Human Rights under the African Charter.*

*(iv) That the learned trial judge was right in declining jurisdiction in that the procedure followed in the commencement of the suit was improper.*

*(v) That the case be remitted back to the trial court to consider the consequences of the detention for four days of the respondent (s) which period was not covered by the detention order.*

*(vi) That the arrest and detention of the appellant on the facts adduced clearly breached the provisions of the African Charter. The contracting parties, the court below continued are bound to establish some machinery for the effective protection of the Charter."*

As the appellants were not satisfied with the judgment of the Court of Appeal (Lagos) allowing the appeal and remitting the case back to the trial court as contained in the considered judgment delivered by the

court below, they have now appealed to this Court. The issues raised in this Court, (vide appellants brief, dated 19th June 1998) read in part thus:-

"(1) Whether the Court of Appeal applied the principle of international law correctly when it held that in signing the treaty on African Charter, Nigeria attempted to fulfil 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 its international obligations by local legislation. B

(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. C D

(3) Whether the Court of Appeal having concurred with the decision of the trial Federal High Court declining jurisdiction to entertain the respondent's application for the enforcement of rights guaranteed under the African Charter on Human and Peoples Rights Cap 10 Laws of the Federation of Nigeria 1990 because of the procedure adopted therefor, to wit, procedure by way of Fundamental Rights (Enforcement) Procedure Rules 1979, adjudged by both courts as incorrect was right - (i) away; and (ii) in remitting the application to the Federal High Court to consider the consequences of the detention of the respondent for the period of four days not covered by the detention Order." E F

Issues (1) and (2) would be considered together as they are both concerned with whether the Court of Appeal was right to have found that notwithstanding the fact 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. G H

In this context, I think it is desirable to quote Musdapher JCA who in the course of his leading judgment said at page 186 of the Printed Record thus - Now Article 1 of the Charter provides:-

*"The member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this chapter and shall undertake to accept legislative or other measures to give effect to them."*

B *"The member countries - parties to the protocol - recognized that the fundamental human rights stem from the attributes of human beings which justify their international protection and accordingly, by the promulgation of Cap. 10 the Nigerian State attempted to fulfil its international obligation. It is an international obligation to which the nation*  
C *voluntarily entered and agreed to be bound. The arrest and the detention of the Appellant on the facts adduced clearly breached the provision of the Charter and can be enforced under the provisions of the Charter. The contracting States are bound to establish some machinery for the effective*  
D *protection of the terms of the Charter and when the local procedure is exhausted or when delay will be occasioned, the matter will be taken to the international Commission. All these indicate that the provisions of the Charter are in a class of their own and do not fall within the classification*  
E *of the hierarchy of laws in Nigeria in order of superiority as enunciated in Labiya v Anretiola (1992) 8 NWLR (Pt. 258) 139."*

Then at page 211 of the Records, Pats Acholonu JCA, quoting from the judgment Bello CJN in Ogugu v. The State (1994) 9 NWLR (pt. 366) 1 at 27, said, inter alia:-

F *"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 .... By not merely adopting*  
G *the African Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than decree for it has been elevated to a higher pedestal and as Bello CJN said in Ogugu v State (supra), its*  
H *violability becomes actionable....."*

The passages quoted above from the judgment of the learned Justices of the Court of Appeal, have provoked a lot of great and lengthy argument from the learned counsel for both parties to this appeal. For



the appellants, the thrust of the argument being that the Court below was wholly wrong on the view they took of the position of the African Charter on Human and Peoples' Rights vis-a-viz, the municipal laws of Nigeria is erroneous and must be rejected, learned counsel for the Respondent has argued to the contrary. The various authorities that were cited in support of their arguments though very valuable, I think the simple question that must be determined is whether indeed the African Charter on Human and People's Rights, now Cap 10 of the Laws of the Federation of Nigeria indeed enjoys a higher status than the municipal laws of Nigeria.

It is common ground that this law is indeed an International Treaty as it was the product of the Organization of African Unity of which Nigeria is a member. It is also common ground that Nigeria in accordance with the Protocols enshrined in the Charter, caused through the National Assembly of the then Government of Nigeria to enact as part of our municipal law, all the provisions of the African Charter on Human and Peoples' Rights.

This was done in accordance with the provisions of section 12 (1) of the 1979 Constitution (s. 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)."*

It is therefore manifest that no matter how beneficial to the country or the citizenry, an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly. This position is generally in accord with the practice in other countries. In the recent case of Higgs & anor v Minister of National Security & Ors. . The Times of December, 23, 1999 the Privy Council 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 citizens rights and duties in common or statute law. They might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the Government, in its acts affecting them, would observe the terms of the treaty."*

I think the above ought to be accepted as representing the position of our law with regard to International Treaties into by the Federal Government of Nigeria. If such a treaty is not incorporated into the municipal law, our domestic courts would have no jurisdiction to construe or apply it. Its provisions cannot therefore have any effect upon citizens' right and duties. However, it is also pertinent to observe that the provisions of an incorporated treaty might have indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty.

Bearing in mind the above observations, the African charter on Human and Peoples' Rights, having been passed into our municipal law, our domestic courts certainly have the jurisdiction to construe or apply the treaty. It follows then that anyone who felt that his rights as guaranteed or protected by the Charter, have been violated could well resort to its provisions to obtain redress in our domestic courts. It remains for me to say that view held of the provisions of the charter, by the court below, may not be out of place for the reasons given above, and also because of its source - Being the product of an International Treaty. But, its status, cannot as argued by MR. ADEGBORUMA, learned counsel for the respondent be superior to the constitution. That argument of counsel is erroneous. This is because as Cap 10, has become part of our law, it is certainly open to our National Assembly to revoke it by the simple exercise of repealing it from our law.

On the third issue raised, I will only say briefly that the Court below was wrong to have held that the respondent approached the court for his redress by a wrong procedure. It is now settled that a person whose rights have been violated must be free to seek redress for such wrongs in the courts. It is a mere technicality to hold it against him that

he failed to approach the court properly as in this case. In any event no specific procedure had been laid down for the enforcement of violated rights under Cap. 10 The case of Ogugu v The State (supra) is in my humble view in support of the view held above. The respondent was therefore free to approach the court by commencing an action by a writ B or by any other procedure such as the Fundamental Rights (Enforcement Procedure Rules, 1979).

In the result, I will therefore dismiss the main appeal for the above reasons and the fuller reasons given in the leading judgment of my learned brother Ogundare JSC. For the same reasons given in respect of C appellant's issue 3 of the Cross-Appeal is hereby also resolved in favour of the respondent as Cross-Appellant.

The respondent filed a cross-appeal as he was not satisfied with certain aspects of the decision of the court below. Pursuant thereto, he D filed five grounds of appeal challenging certain aspects of the judgment of the court below. In accordance with the Rules of this court, cross-appellant brief was duly filed and served, wherein four issues were identified for the determination of the cross-appeal. They are:- E

*"(1) Whether going by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 and its various amendments, particularly as amended by Decree No. 11 of 1994, the Inspector-General of Police is competent to issue and sign a detention order and whether F if the answer to this question is in the affirmative, he can be compelled to disclose the reasons for issuing same.*

*(2) Whether the court below was right to have held that the procedure adopted by the trial court in taking judicial notice of the detention order was proper.* G

*(3) Whether the procedure adopted by the Cross-appellants in this case in enforcing the articles of the African Charter, on Human and Peoples' Rights was proper.*

*(4) Whether the 1st Respondent, as Head of State of Nigeria H immuned from civil or criminal actions in all cases.*

I do not need to comment particularly on issues 1 and 2 as I agree with the reasoning of my learned brother Ogundare, JSC which led

to the conclusion that the issues so raised by the cross-appellant are meritorious and therefore deserve to succeed. I also uphold the said issues, I will also allow the appeal on issue for the reasons simply given by Uwaifo JSC, in his concurring judgment.

B As I have already upheld the 3rd issue during my consideration of the main appeal, that issue must also, therefore, be resolved in favour of the cross-appellant. In the result, the cross-appeal is allowed. And it is ordered that the matter be heard by the Federal High Court before  
C another judge of that court. This is in connection with whether the action of the appellants/cross-appellants constituted a violation of the cross-appellant's rights under articles 4,5,6 and 12 of the African Charter on Human and Peoples (Ratification and Enforcement) Act Cap 10, Laws  
D of Federation of Nigeria, 1990, and under certain sections referred to under the 1979 constitution. It is of course settled law that the jurisdiction of a court to hear a matter is invariably determined by the claim of the plaintiff. See A. G. Anambra State v. A. G. Federation (1993) 6 NWLR (Pt. 302) 692. I have before now, set out the application made by  
E the Cross-appellant in the trial court. A careful reading of the reliefs sought by the cross-appellant, clearly shows that the cross-appeal anchored his reliefs on both the provisions of fundamental rights guaranteed under sections 31,32 and 38 of the 1979 Constitution, and also Articles 4,5,6 and 12 of the African Charter on Human and Peoples Rights  
F ((Cap. 10) of the laws of the Federation).

For the respondent the argument argued on the court with regard to whether the cross-appellant could pursue his remedies under the  
G above provisions of the constitution and Cap 10 of the Laws of Federation, 1990 was anchored on the ground that their provisions have been suspected by Decree 107 of 1993, However, the contrary argument was put forwarded for the cross-appellant. In addition, it was argued on the  
H court to apply the principle, already recognized in this court, that the court must in order to protect its jurisdiction, construe strictly such laws as tend to deny or whittle its jurisdiction.

As Decree 107 of 1993 by its S. 17 has left in tact the provisions of Cap 10, The Human and Peoples Rights, it is my view that in

such circumstances, the cross-appellant could quite properly pursue his action in the Federal High Court and before another judge of that court.

I will therefore allow the Cross-Appeal for the above reasons and the fuller reasons given in the judgment of my learned brother Ogundare JSC.

The cross-appellant is awarded costs in the sum of N10,000.00 for the main appeal and the cross-appeal.

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**EDITOR'S NOTE**

**OVERRULING OF A PRINCIPLE OF LAW ESTABLISHED  
BY THE COURT OF APPEAL**

By this decision of the Supreme Court, it has overruled a principle of law established by the Court of Appeal in the cases of *Fawehinmi v. Abacha* (1998) 2 KLR (pt 58) 351 CA and *Comptroller Nigerian Prison's v. Adekanye* (2000) 5 KLR 1747. We published those CA decisions because of their novelty in line with our practice of now publishing all SC decisions and novel CA cases towards making legal authority available in all areas of the law. Whereas the CA was of the view that African Charter on Human Rights Cap. 10 Laws of the Federation of Nigeria 1990 s.1 is superior to Nigerian Decrees, the Supreme Court has now reversed that view. It must be noted that the reversal of the said principle does not in any way affect the relevance of these CA cases as they still contain other fine principles of law that should still be relied upon in case law. So that our subscribers should not feel that it is not useful adding novel CA cases within the KLR as we now do. Even the Supreme Court overrules itself where the need arises. The law is not static and keeps changing with the times. The Supreme Court may well in future overrule itself on this principle and fall back on the Court of Appeal's view that stands reversed for now. In fact it will be necessary for it to do so if a dictator as brutal as the late Abacha takes over the government of Nigeria. But God forbid!