In The Supreme Court of Nigeria

On Friday, the 28th day of April 2000

S.C. 45/1997

Before Their Lordships

Salihu Modibbo Alfa Belgore..... Justice, Supreme Court

Michael Ekundayo Ogundare..... Justice, Supreme Court

Uthman Mohammed..... Justice, Supreme Court

Anthony Ikechukwu Iguh..... Justice, Supreme Court

Okay Achike..... Justice, Supreme Court

Samson Odemwingie Uwaifo..... Justice, Supreme Court

Akintola Olufemi Ejiwunmi..... Justice, Supreme Court

Between

General Sanni Abacha

Attorney-General of the Federation..... Appellants

State Security Service

Inspector-General of Police

And

Chief Gani Fawehinmi..... Respondent

Judgement of the Court

Delivered by

Michael Ekundayo Ogundare. J.S.C

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

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

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

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

Alternatively

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

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

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

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

By a subsidiary legislation made by the Inspector-General of Police in exercise of the powers conferred on him by State Security (Detention of Persons) Decree No. 2 of 1984 (as amended) and further by section 4 of the aforementioned Decree No. 2 of 1984 (as amended), the respondent/applicants are immune to any legal liabilities in respect of any action done pursuant to the Decree.

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

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

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

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

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

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

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

The learned judge concluded-

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

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

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

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

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

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

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

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

Pats-Acholonu,JCA in his concurring judgment observed:

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

No other judge of the court below who sat on the appeal made any observation to the same effect. But this observation of Pats-Acholonu JCA is now made a ground of appeal in the cross-appeal.

Both parties are aggrieved by the decision of the court below and have appealed to this court. In the main appeal, the appellants complained against those parts of the judgment of the Court below that relate to findings on the status of the African Charter on Human and Peoples' Right and the order remitting the case to the trial court for the action before the latter court to be resolved on the period of four days not covered by the Detention Order. The respondent cross-appealed against those parts of the court below relating to-

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

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

Procedure for tendering detention order; and

Immunity of the Head of State.

Pursuant to the rules of this court the parties filed and exchanged their respective written briefs of arguments. And at the oral hearing of appeal, their learned counsel proffered oral arguments in further elucidation of the issues raised in their respective briefs. I have fully considered the submissions made by learned counsel both in their briefs and in oral arguments.

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

Status of the African Charter.

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

international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly. See section 12(1) of the 1979 Constitution which provides:

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

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

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

"In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the Crown. Treaties formed no part of domestic law unless enacted by the legislature. Domestic Courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizen' right and duties in common or statute law. They might have an indirect effect upon the construction of statues or might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty"

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

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

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

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

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

'Human Rights under a Military Regime may be aberrations. In a democratic Government under the rule of law, all judicial powers of the State are vested in the judiciary. Under the Military Regimes, the powers are invariably

eroded. The erosion may be creating Military (or Special) Tribunals ….. It may also be the ouster of the jurisdiction of courts of law;

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

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

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

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

"In the result, this appeal partially succeeds. I remit the case back to the trial court to consider the issue of the consequences of the detention for the four days of the appellant which is apparently not covered by the order."

Muhammad J.C.A. in his own judgment observed:

"The grundnorrm in Nigeria under the present Military administration is the Constitution (Suspension and Modification) Decree No. 107 of 1993 and the subsequent Decrees regulating the exercise of executive, legislative and judicial powers in the country. Section 5 of Decree No. 107 enacts as follows:

'No question as to the validity of this Decree or any other Decree made during the period 31st December 1983 to 26th August 1993 or made after the commencement of this Decree or of an Edict shall be entertained by any court of law in Nigeria."

The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 provides:

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

These two enactments, which have been judicially examined since the inception of the Military regimes in Nigeria in a plethora of cases leave no room for any interpretative mechanisms to found jurisdiction when jurisdiction has been effectively ousted. The courts have always construed such clauses strictly, However, where, as in this case, the language is plain, the courts have to give effect to it. The legislations are undoubtedly drastic, but the courts are bound to give effect to them and decline adjudicating."

And Pats-Acholonu J.C.A. for his part. said:

"Let me pause here and examine the case in hand with the background of Section 4 of the State Security (Detention of Persons) Act Cap. 414.

4(I) No suit or other legal proceedings shall be taken against any person for anything done or intended to be done in pursuance of this Act.

(2)Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done nor proposed to be done in pursuance of this Act shall not be inquired into of any court of law and accordingly Sections 219 and 259 of that Constitution shall not apply in relation to any such question.

(Before going further, I wish to remark in passing and in further buttressing of my opinion and holding that the suspension of operation of the provision of African Charter and the Incorporating Act has never been intended nor to my mind carried out).

On the fact of it the purport of the provision is that the jurisdiction of the court is completely ousted."

The respondent has argued strenuously against the position taken by their Lordships, \, too, must say that I find it rather strange that after the views expressed by them on the status and applicability of the African Charter they could turn round. . as they did, to reach the position that the courts' jurisdiction was ousted in detention cases. It looks a somersault!

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

4. (I) No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this Act.

(2)Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything

done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law, and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question.

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

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

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

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

> "16 (I) Subject to this Decree or any other Decree made during the period 31st December 19H3 to 26th August 1993 or made after the commencement of this Decree. all existing law, that is to say, all laws (other than the Constitution of the Federal Republic of Nigeria 1979) which whether being a rule of law or a provision of an Ad of the National Assembly or of a Law made by a State House of Assembly or any other enactment or instrument whatsoever. Shall, until that law is altered by an authority having power to do so. continue to have e1lei.:t with such modifications (whether by way of addition, alteration or omission) as may be necessary to bring that into conformity with the Constitution of the Federal Republic of Nigeria 1979, as amended, suspended, modified or otherwise affected by this Decree or any other Decree made during the period 3Ist December 1983 to 26th August 1993 or made after the commencement of this Decree, and with the provisions of any Decree made after the commencement of this Decree or Edict relating to the performance of any functions which are conferred by law on any person or authority.
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> (2) It is hereby declared that the continued suspension by this Decree or any other Decree made after the commencement of this Decree by any Decree or any provision of the Constitution of the Federal Republic of Nigeria 1979 shall be without prejudice to the continued operation in accordance with subsection (I) of this section of any law which immediately before the commencement of this Decree was in force by virtue of that provision"
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> "17. All laws (other than any law to which section 16 of this Decree applies) which, whether being a rule of law or a provision of an Act. a Decree. an Edict or a By-law or of any other enactment or instrument whatsoever. was in force immediately before the commencement of this Decree or made before that date but comes into force on or after the commencement of this Decree shall until that law is altered by an authority having power to do so. Continue to have effect as if made in exercise of the powers conferred by or derived under this Decree."

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

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

One reason given by the court below for abruptly denying the respondent redress under the Charter is that he came by way of a wrong procedure. With profound respect to their Lordships, I think they are wrong for so holding. In *Fajinmi v. The Speaker, Western House of Assembly* (1962) I SCNLR 300, (1962) vol. 4 NSCC 144,(1962) ANLR Pt. I page 205 this court held that where there is no provision as to the procedure to be followed in enforcing the jurisdiction conferred, the plaintiff was entitled to bring the case in the usual form of

an action and to have it heard. And in *Ogugu'. The State* (1994) 9 NWLR (PU66) I. again this court. per Bello CJN. at pages 26-27 held:

"However. I am unable to agree with Mr. Agbakoba that because mother the African Charter nor its Ratification and Enforcement Act has made a special provision like Section 42 of the Constitution for the enforcement of its human and peoples' rights within a domestic jurisdiction, there is a lacuna in our laws for the enforcement of these rights. Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the juridical powers of the courts as provided by the Constitution and all other laws relating thereto...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There was no counter-affidavit impugning the faults deposed to above. The notice of preliminary objection filed by the appellants to the respondent's application for the enforcement of his rights did not say that the respondent

was detained pursuant to any detention order. Nor was there any affidavit evidence to that effect. I cannot therefore, see how it could be said that the respondent's action is a challenge to any decree.

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

Ouster of court's jurisdiction is not a mallet of course. For the court's jurisdiction to be ousted it must be dearly shown that a particular action falls within the ouster clause. That is not the case here. With respect to their Lordships of the Court below, I an III not impressed by the views expressed by them on the failure of the appellants to tender in evidence the deletion order they relied on. The conclusion I reach is that on the record before us, Decree No. 12 of 1994 does not apply.

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

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

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

> "1. The State Security (Detention of Persons) Decree 1984 as amended by State Security (Detention of Persons) (Amendment) Decree 1984. 19 6. 1988 and 1990 is further amended:
>
> (a) By inserting immediately after the words 'Chief of General Starr the words 'or the Inspector-General of Police wherever they occur in the Decree."
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> It would appear that this amendment overlooked Decree No. 24 of ILJ90 which substitute the Vice-President for the Chief of General Stall. The position in law was that as at the time of the promulgation of Decree No, II of 1994 only the Vice-President. a non-existing office at the time, could issue a detention order; the Chief of General Staff had not been given back that power. It is the muddle in Decree No. I I of 1994 that the respondent is now capitalizing on to submit that -

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

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

"There is 110 dispute that the Detention Order in the instant case as produced in court and was examined by the learned trial Judge and the appellant's counsel. The issue of admissibility of the Detention Order was not raised at the trial. It is a new issue first raised on appeal \without leave, Throughout his lengthy submissions in the court below ,the learned counsel for the appellant did not protest the manner the Detention Order was introduced in the proceedings, He not only referred to it in his submissions but used it to show teal the appellant was arrested and detained days before the Detention Order was signed. A party to any civil proceedings who knowing of an irregularity. allows the irregular procedure to be adopted and indeed used document irregularly produced in the

proceedings cannot complain on appeal on the procedure adopted: see *Akhiwu v. The Principal Lotteries Officer, Mid- Western State* (1972) I All NLR (Pt.I) 22l). The Detention Order. should have been exhibited or somehow tendered. It was not tendered. The learned counsel for the respondents produced it. It was accepted by the learned counsel for the appellant who not only read it but also relied upon it to show the illegality of the arrest or detention of the appellant for a few days. I am of the view, that under these circumstances, the appellant cannot now at the appeal stage impugn the admissibility of the Detention Order. In any event, the substantive action has not commenced, What is in contest is whether the court has jurisdiction to entertain the suit. It was on that preliminary issue the Detention Order was examined by all concerned. the appellant's counsel relying on it to argue that the Inspector-General of Police could not in law issue it. I do not think it is of any moment to now argue that the Detention Order was not formally admitted in evidence. Though the Detention Order should have been exhibited to the notice of preliminary objection. the way and the manner it was introduced in the court below did not occasion any miscarriage of justice."

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

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

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

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

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

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

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

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

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

By their nature, treaties are abided with in good faith, especially through a prolonged treaty practice and most invariably through the habit of transforming some aspect of treaties from *JUS STRICTUM* into *JUS AEQUUM,* But many treaties are naturally destroyed by circumstances that change the nature of contracting parties or change of circumstance of the subject-matter of the treaty no more existing. But of recent are new developments, especially in newly emerging countries with a problem of constitutional and political stability. Nigeria is a

typical example. it has been subjected to many coups *d 'etat* than constitutional and democratic governance. Thus when the African Charter on Human and Peoples' Rights was by Parliament adopted into Nigerian Statutes with commencement date on 17th day of March 1983. the country was under a democratically elected government. The Fundamental Rights in the 1979 Constitution certainly gave effect to the Charter before that: Federal Parliament formally adopted it. Thus H Article I or Chapter I of the Charter reading:

"The member States of the Organization of African Unity parties to the present Charter shall recognize the rights. duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them," anticipated not only domestic law reflecting the rights, duties and freedoms enshrined in the Charter but if possible Constitutional provisions.

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

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

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

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

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

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

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

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

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

> "1. Whether the Court of Appeal applied the principle of international law correctly when it held that in signing the treaty on Africa Charter. Nigerian attempted to fulfill an international obligation which it

voluntarily entered into and agreed to be bound and that Government cannot be allowed under international law to contract out of its international obligations by local legislation.

2. Whether the Court of Appeal was right in holding that African Charter CAP 10 Laws of the Federation is not inferior to the Decrees of the Federal Military Government on the ground according to the Court below that the legislation has international flavour and accordingly the ouster clause contained in the Decrees cannot operate to oust the jurisdiction of the court in matters touching on African Charter".

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

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

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

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

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

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

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

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

"The provisions of the Charter are in a class of their own and do not fall within the classification uf the hierarchy of laws in Nigeria in order of superiority as enunciated in *Labiyi* v. *Anretiola* (1992) 8 NWLR (Pl.258) 139. It seems to me that the learned trial judge acted erroneously when he held that the African Charter contained in

Cap 10 of the Laws of the Federation of Nigeria 1990 is inferior to Decrees of the Federal Military Government. It is common place, that no Government will be allowed to contract out by local legislation, its international obligations. It is my view, that notwithstanding the fact that Cap, 10 was promulgated by the National Assembly in 1983, it is a legislation with international t1avour and the ouster clauses contained in Decree No. 107 of the 199'.'1 or No. 12 of 1994 cannot affect its operation in Nigeria while the decrees of the Federal Military Government may override other municipal laws. they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matter pertaining to human rights under the African Charter. They are protected by the International law and the Federal Military government is not legally permitted to legislate out of its obligations".

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

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

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

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

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

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

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

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

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

> "4. (I) No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this Act. Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law, and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question.

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

Constitution of the Federal Republic of Nigeria, I <.)79 would have specifically so stated by clear words, See PYX *Granite Co. Ltd.* \'. *Ministry of Housing and Local Government* (1960) A.C 260 at286 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, favored by the courts in the absence of clear words to that effect. See *Chorlton* v. *Tonge Overseers* (1871) LR 7 CP. 178. As Coke, C.J. put it in *Dr, Fosters Case* (1614) II Rep. 56batp. 63a:

"For as much 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 A constrained construction 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 pan of the law makers not to repeal or suspend the statute thus omitted, See *R* v, *Poor Law Commissioner, Re St, Pancras Parish* (I 1837) 6 Ad, and ELI.

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' Right (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 19X3 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' Right (Ratification and Enforcement) Act 1983 remained detective and in full force at all times material to the respondent's alleged detention. I entertain no doubt also that the count 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 Ael which stipulates that from the date of its commencement. the provisions of the African Charter on Human and People's Rights shall. subject as provided there under. *have full force of law, in Nigeria and shall be given full recognition and effect and judicial powers 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 la\', courts to entertain the respondent's claims under African Charter 011 Human and Peoples' Right (Ratification and Enforcement) Act. 1983.

I need finally 10 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 10 entertain the respondent's claims. These are section *5* of the Constitution (Suspension and Modification) Decree No. 107 of 1993 and section I (2) (b) (i) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree H No. 12 of 1994,

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 tile period 31st December, 1983 to 26th August. 1 *YY3* or made after the commencement of this Decree or of an Edict shall be entertainer by any court of law in Nigeria"

There is next section 1(2)(b)(i) 0 I' 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 institute before, on or after the commencement of this Decree. the proceedings shall abate, be discharged and made void"

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, 19X3 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 kerned brother. Ogunuare, J .S.C. and I need not repeat them all over again in this judgment. These comprise declaratory claims in respect of ` appellants from any further arrest of the respondent and N I 0,000.000.00 damages for the alleged unlawful arrest and/ or detention of the respondent. It suffices to state that

the main issues before the trial court center 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 9A 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. LA 3123 H LO 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 compiled.
>
> 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, mailer or thing done pursuant to any Decree or Edict. The onus was on the appellants depose to facts to establish. or at least. to allege that whatever action they look against the respondent was pursuant to a Decree or Edict they were relying Oil. This they failed to do. It cannot in the circumstances 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 appellants' alleged conduct complained of with Decree 12 of 1994 it would be wrong to invoke the Decree *invacuo* that is to say without any claim whatsoever either of the parties to the effect that the action in question is in respect of an act or thing done pursuant to the A Decree.

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 statutes, al1 he needs do is Cul1y to plead material facts necessary to bring his case within that statute, See *Read v. Brown 22 Q. B. D. 128: Re Vandervill's Trusts. (No.2) (1974) 3*ALL E.R 205 at 213 (C.A.); *Anyanwu v. Mbara (1992) 5* NWLR (Pt.242) 386 at 398.

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, l 07 of 1993 or Decree No.12 of]994. 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. It is or 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 al1owed. 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 appel1ants costs in this court which I assess and fix at N 10,000.00

ACHIKE, J.S.C (Dissenting on the Cross-Appeal): The respondent, 'a human rights activist, 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-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 authorised the arrest and detention of any person believed by the authorities to have been "unearned in acts prejudicial to 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 appel1ants, as respondents to the application. The application, by motion *ex-purte* for leave to enforce his fundamental rights, was brought pursuant to section 42(I) of the Constitution of the Federal Republic of Nigeria 1979, Order I Rule 2(I). (2) and (6) and Orders 4 and 6 of the Fundamental Rights (Enforcement Procedure) Rules 1979 and inherent jurisdiction of the Supreme Court as preserved by the 1979 Constitution. The relief's sought by the applicant were:

> "1. A Declaration that the arrest of the applicant, Chief Gani Fawehinmi at his residence at 9A Ademola Close GRA, Ikeja. Lagos on Tuesday. January 30.]996. by the State Security Service (SSS) 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, S. 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.

2. A Declaration that the attention and 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 respondent at his residence 9A Ademola Close. GRA. lkeja, 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 and Peoples' 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 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 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.

5. N 10.000.000.00 (Ten Million Naira) damages for the unlawful and unconstitutional arrest and/or detention of the applicant - Chief Gani Fawehinmi."

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 the State Security (Detention of Persons) Decree No.2 of 1984 (as amended), the Federal Military (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 and the Constitution (Suspension and Modification) Decree No. 107 of 1993, particularly any action relating to the enforcement of any of the provisions of Chapter IV of the J 979 Constitution (as amended) and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. The learned trial judge, Nwaogwugwu, 1. declined jurisdiction in that the procedure adopted by the respondent was improper and struck out the suit. Dissatisfied with the ruling, the respondent appealed to the Court of Appeal, Lagos Division which. in allowing the appeal partially. held as follows:

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 A the jurisdiction of the court when called to do so in relation to matters pertaining to Human Rights under the African Charter.

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 Charter. The contracting parties to the African Charter are obliged to establish some machinery for the effective protection of the terms of the Charter.

Undoubtedly, the main appeal before us can be summarized as 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 argument. The appellants identified three issues for determination, viz:

"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. I () 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 1O, 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 re-spondent for the period of four days not covered by the Detention Order.

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

"(i) What is the nature of a treaty or agreement between two or more sovereign states. such as the African Charter on Human Rights Acparticularly 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 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'?

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

1. Whether it is permissible for a state party to a multilateral treaty (0 promulgate municipal legislations that are inconsistent with its obligations under the treaty.

Alternatively

2. Whether the African Charter on Human and adopted by Nigeria is inferior or superior promulgated by the Government of Nigeria.

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 lbidapo* v. *Lufthansa Airways* (1997) 4 NWLR (PI. 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 on 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 Nigerian law should be treated as any other law. He finally urges us to allow the appeal.

Mr. Ebun-Olu Adegburuwa learned counsel for respondent, submits that the main issue in the appeal is to determine the status of the African Charter *vis-a-vas* 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 Brownie. *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. I O. Referring to Article 10 of the African Charter, counsel emphasizes 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.

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 A in the cross-appeal, counsel urges us to allow same.

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.

First we turn to the main appeal. There is very little to choose between appellants' 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 I and 2 together as they seem to encompass respondent' s issue No. I.

Issue No. I

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 fulfill an international obligation which it voluntarily entered into and agreed to be bound and that Government cannot be allowed under international law to contract out of its international obligations by local legislation.

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 binding ness from municipal law. As a result. according to learned counsel. a treaty binds only the states-parties thereto. In consequence, counsel further submits that a treaty does not bind individuals or other states who are not panics 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 cognizance 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 KB 613 at 639. Reference was also made to *Walker* v. *Baird* (1892) AC 491 at p. 497 and *Sobhuza ll v. Miller* (1926) AC 518. pp. 522 - 524; so also *Halsbury's Laws of England,* YoI.18,4thEd.(1977)paragraph 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 states-panics 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 ruks of customary I international law over those of municipal law since the contrary will superb the I sovereignty 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 arc 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. 1O of the Laws of the Federal Republic of Nigeria !990 (hereinafter referred to as Cap. 1O, LFN 1990) was between the members of the Organisation of African Unity of which Nigeria is one but that did not empower the respondent to sue the Federal Military Government for breach of any of the provisions of the treaty. relying on the authority *Ikpeazu v*. A. *CE.* (] 965) NMLR 374. Learned counsel, in conclusion, urges us *10* 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 issue seeks to determine the judicial status of a treaty in municipal law that has been incorporated into a domestic or municipal law.

Rationalising from the principles of international law adumbrated by the Court of Appeal in its judgment, it held, *inter alia,* first that Cap. 10 LFN] 990 is not inferior to the Decrees of the Federal Military Government, and secondly that the provisions of the said Cap.] 0 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 *Labiyi v*. *Anretiola* (1992) 8 NWLR (Pt. 25) 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] 2 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 Article I of Cap 10 LFN to establish that the Federal Government applied the principle: of adoption in giving effect to 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 to Acts passed by Congress. and calls in aid several decisions of the Supreme Court of U.S. including *Cook v. US* 2::\ U.S. 102, *Chat' Own Ping v. US. (Chinese Exclusive Case)* 130 US.58l. Counsel about submits that the decision of the lower court in this regard ran contrary to the principles stated above, particularly the Supreme Condescension in *Labiyi 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 CulI1munity 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 Organisation of African Unity cannot be compared with the European Union, counsel further submits. and calls in aid the work of ECS Wade and Bradlyon. *Constitution 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 matters 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. I. 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 privacy of contract as it applies in domestic law does not govern international law because rights ensure 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) AC 130 at p. 144.

It is learned counsel's further submission for the respondent, which was upheld by the lower court, that the appellants 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 her dies on the authority of Oshevire v. british *Calendonian Airways Ltd.* (1990) 7 NWLR (PI. 163) 489 at 519. Counsel further cites the Botswana case of *A-G Botswana v. Unity Dow* (1998-) HRLRA page I and the Ghana case of *New Patriotic Party (NPP) v. The Inspector-General of Police. Ghana* and Others 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 Nigerian Courts ought readily to assume jurisdiction to pronounce on the African Charter rather than decline jurisdiction. Counseling's support to this submission by reference to Section I 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 Peoples' Rights. ..*

Counsel further submits that the African Charter having been incorporated into the 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 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 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 or 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 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 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 I of that Constitution, the doctrine of supremacy of the 1979 Constitution is limited to the territorial entity known as Nigeria by reason of its Section I (I), Consequently, counsel argues that the provisions of the Constitution cannot have effect in Ghana, Kenya and other countries within the Organisation of African Unity (OAU) and therefore the concept of constitutional supremacy is in relation *to uny orher 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 voluntary 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 suspend 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 E repression."

International law and 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 *Lubiyi* v. *Anreriola (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 *Labiyi 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 t1avour" 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 LFN 1990, and which became binding on Nigeria from 2] / 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 enforcement of the rights guaranteed to him by the Charter. Counsel calls in aid *Fajinmi* v. *The Speaker Western House ofAssel1lbly* (1962) I SCNLR 300, (1962) I All NLR (PI. I) 205. Concluding, he submits that the same procedure provided for enforcement of fundamental rights under Chapter IV of the 1979 Constitution and 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) I 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 binding ness 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.] 980. 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 governmental acts affecting them would observe the terms of the unincorporated treaties. See the recent Privacy Council Opinion in *Higgs and Anory v.Minister of National Security and 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. we arc 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 privacy of contract under municipal law. exemplified by the authority of *Ikpeazu v. A.CB. (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.

Authorities abound today wherein municipal or domestic court is at liberty to apply and enforce a treaty. See *Schorsch Meier Gimbh v. Hennin* (1975) I All E.R. 152 where. relying on the European Economic Community Treaty, Article, 106 and the English European Communities Act, 1972, Section 2(J), 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 canons. o! construction applied and that Article 106 did not prevail on the rule of common law. The Court of Appeal overturned 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 Ca:::; Sa* v. *Fulks Vaitas*

Ltd. (1974) All ER 51 and the decision of the Nigerian Court of Appeal in *Oshevire* v. *British Caledonian Airways Ltd.* (1990) 7 NWLR (Pt. 16) 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 195 - at p. 168 of the Laws of Federation of Nigeria, 1958 ed. vol. 6. So also in *VA* C. *(Nig) Ltd.* v. *Global Transporte SA* (1996) 5 NWLR (Pt. 448) 291 the Court of Appeal gave effect to the Hague Rules. Again. the applicability of the Warsaw Convention 1929 by our Court of Appeal in a fairly recent decision in *lbidupo* v, *Lujthansa 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, is unsupportable.

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 Chapter") has been given effect to under the Nigerian Law by reproducing the African Charter unedited in the schedule to the municipal law (i.e. schedule to Cap 10 (LFN 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-à-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 fl1unicipallegislation, 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 I. Section 1(1) as follows:

> "1(I) This Constitution IS supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria".

For purposes of clarity, its Section 1 (1) goes further to state:

> "1 (3)lf 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,"

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

"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 there under provided, B 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."

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

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

The combined effect of sub-sections (I) and (3) of section I and Section 12(I) 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. 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 vigor and strength than mere decree for it has been elevated to a higher pedestal."* (emphasis supplied)

With the utmost respect to his Lordship, the emphasized 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 variance with section 12(1) of the]979 F Constitution which stipulates that Uno 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 municipal law and as a schedule to the only two sections of the Act, i.e. Cap] 0 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 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 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 SeidJe-Hovenveldern, "Transformation or Adoption of International Law into Municipal Law" (1963) 12 Inter and Camp. LQ 90 at p. 115, pp. III - 112.

Speaking in the same vein, Musdapher, lCA, 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 *Labiyi* in *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 J 990 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 *Labiyi 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.
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
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-honored 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 *Babarunde and Anor v. OIaltunji and Anor* (2000) 2 NWLR (Pt. 646) 557 and *Ezeokafor v. Ezeilo* (1999) 9 NWLR (Pt.619) 369. (1999) 6 SC (Pt.II) I. With the utmost respect to Musdapher. lCA, 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 *Labiyi* 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 commonsense 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 *Labiyi* case. Had the lower court done so. notwithstanding that the African Charter is a legislation with international favour. 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 authority of *Labiyi* case by the lower court is totally absurd, untenable and unwanted.

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-à-vis* other municipal legislations.

There is a further coloration 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 I (I) 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 I (I) 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 provision 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 order 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 I (I) 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 disjointedly, as counsel seemingly seeks to do, the concept of constitutional supremacy- as is generally understood c 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 members 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 incorporating 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 slate in international law at the instance of the other states parties to the treaty. In variably ,this is a political decision involving such sanctions that the other states signatory to the treaty may deem fit to impose, See AH. Robertson *Human Rights in National a/ld 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 *Macurthys Ltc!. 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 or Enforcement of the African Charter", I am clearly of opinion that that sub-title neither arose under the grounds or 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 or appeal nor subsumed under any issue for determination would be discountenanced, This shall be the fate or respondent's submission made on the above sub-title.

Notwithstanding the authoritativeness of the decision in *Labiyi* case, about which 1 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 the 1984, as amended by Decreed No. II of 1994. Furthermore, it is necessary to remember that Section -H I) or this Decree also contains an ouster clause of the court's jurisdiction, Its Section 4(2) suspends the operation of Chapter 4 or the 1979 Constitution, 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 or 1984, as amended by Decree No. II of 1994, is void. It will surely be foolhardy for any Court to overlook the far-reaching and devastating effect of the above provisions or 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 appeals issues Nos. 1 and 2 and respondent's issue No. I 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 I *Y84.* as amended and partly because the procedure for initiating the suit. i.e. under the procedure 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. Muhammad and Pats-Acholonu, JJCA, concurring, Musdapher, JCA while up holding the validity 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 covered 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 have made was one striking out the suit, otherwise if the suit was remitted to the trial court the appellants would still raise a preliminary objection under the Fundamental Human Rights Enforcement Rules *Y7Y* 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 detention 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 commencement of the suit by the procedure under Section 42 of the I *Y79* 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 legislations similar to it are enforced: *Ogugu* \'. *State* (1994) 9 NWLR (Pt. 366) I is cited and relied upon Lo 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 on the issue of the enforcement of the African Charter. he would have directed it to the authoritative decision of *Ogugu* I'. *The State (supra).* Counsel also cites *Agbakoba* v. *the Director, State Security Services* (19*94)* 6 NWLR (Pt. 351) 475 at p, 500 paras A - B p. 499 para to buttress *Ogugu* case.

It is sensible to take appellal1ls' issue No.3 in the main appeal together with the cross-appellant's issue No.3: this will avoid unnecessary repetition. Learned cross-appellant's counsel places a great premium on the authority of Ogugul'. *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 that *Ogugu* v. *Suite (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. 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 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(I) of the 1979 Constitution, as well as section 230 of the Constitution as modified 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 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.

From the foregoing, it is manifest that the Court of Appeal was right to have frowned at 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.

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:

> "I. 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. II 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 immune from civil or criminal actions in all cases.

It may he 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 immune from civil or criminal action in the circumstances of this case".

Preliminary Objection

The appellants. as cross-respondents, in their brief, first raised 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 there from, from the cross-appellant's brief. (See page 4 of the cross-appellalll's hriel)"

Thereafter the cross-respondent identified two issues for determination, to wit

> "1. Whether the Inspector-General of Police having regard to Decree No.2 of 1984 as amended by Decree No. II of 1994 is a competent person and/or authority to sign and issue a detention Order under the said decree.
>
> 2. Whether the provisions of African Charter on Human and Peoples' E Rights can he enforced through the Fundamental Rights (Enforcement Procedure) Rules made pursuant to Section 42 of the 1979 Constitution as amended:'

Finally. cross-appellant filed a reply brief which was a response to the Notice of Preliminary Ohjection filed hy the cross-respondents.

Resolution of Preliminary Objection

I shall tackle the points raised under the preliminary objection *seriatim.*

(i) *Objection/ to ground* 5 *of the grounds of appeal*

The reason for cross-respondents' prayer that ground 5 be struck out is that the complaint is against the concurring judgment of Pats Acholonu, JCA rather than the leading judgment of Musdapher,

JCA Cross-respondents' counsel calls in aid the decision of this Court in *ldise* v. *Williams Int. Ltd.* (1995) I NWLR (Pt. 370) 142 01'(1995) I SCNl 120.

Learned counsel to the cross-appellant however stresses that the principle in *ldise* \". *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* \'. *Ba/J/gbose* (1986) 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 *obiterdictul1l* 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. "Iconcur" 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 binding ness 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 *rations* 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/dise* 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.IO2) 122 at 161: */be* \'. *State* (1992) 5 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 t1ows 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 grave men of that ground of appeal is the endorsement by the lower 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. I

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 II 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. I. 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) (A ;1endment) 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 orders. 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, deleted the Chief of General Staff and substituted it with Vice-President by virtue of State Security (Detention of Persons) (Amendment) Decree No. 24 of] 990.

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)(I)(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. II 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 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
>
> (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 II of 1994 to Decree No.2 of 1984 is as amended by Decree No. 24 of 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. II 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 Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 688 at 733, *Jennifer Madike v. I.G. of Police* (1992) 3 NWLR (Pt. 227) 70 at 107. *Onuzulike v. CDS. Anambra State* (1992) 4 NWLR (Pt. 232) 791 at pp. 820 - 821. It is his further submission, relying on *Vickers, Sons of Maxim Ltd. v. Evans* (I 9 10) AC 444 at 445 and *Thompson v. Goold and 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. II of 1994 inferences which were not contained therein. Finally, he submits that Decree No. II of 1994 was not just inelegant, as Musdapher, lCA 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.

The response of the cross-respondents was concise but lucid. While rejecting the cross-appellant's submission of the Chief of General Staff being nonexistent under the amendment of Decree No.2 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 intendment of the legislature. Thus the intention of the legislature in promulgating Decree No. II 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 further submits that the amendment as contemplated in Section I(a) of Decree No. II 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 of Persons) Decree No.2 of 1984 as amended because a careful perusal of Section I (a) of Decree No. II of 1994 shows that it says "or the inspector-General of Police" and in law the insertion is disjunctive. Therefore, counsel finally submits that the insertion of the office of Inspector-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.

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 there from. 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 I (a) of Decree No. I] 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 Stall as the only signatory for the operation of State Security (Detention of Persons) (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 over sighted by the law-maker. It is this oversight that has led to an apparent state impasse in an effort to construe section I (a) of Decree No. II 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. I 07 of 1993 was promulgated, nobody in Nigeria had the power under the law to sign a 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 I (a) of Decree No. II of 1994 with the apparent case of omission arising from oversight on the pan 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 pan 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. II of 1994 was promulgated the provisions of its section lea) would have tallied with the intendment of the legislature. and in turn avoid the absurdity under Decree No. **II** of 1994 of insening the phrase "01' the Inspector-General of Police" after a non-existent office. Therefore. section I (a) of Decree II 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.

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. 111/0 State Environmental Sanitation Authority (supra)* at P. 724:

"I believe that an indubitable offshoot of the principle of construction that the courts must seek out the legislative intention and give effect to it is 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. II of 1994 along with the State Security (Detention of Persons) Decree 1984, as amended by the amendment Decrees of] 984, 1986 1988 and 1990. would leave no one in doubt that the true intent of Decree No. II 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 "01"' in the context of section I (a) of Decree No. II of 1994 is unmistakably disjunctive in its meaning.

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. I 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.

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 1984 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.C.P.* (1992) 3 NWLR (Pt. 227) 70 at 107 and *OnuZlllike v.* C. *D.s.. Anambra St(l{e (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 (I) 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 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 informed 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) AC 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 and Ors. v. Chief of Staff (unreponed)* Appeal No. *CA/L/25/85* of April I, 1985, per A. Ademola, lCA 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) AC 66 at pp. 76 - 77. *Padfield v. Minister of Agriculture. Fisheries and Food* (1968) AC 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 being contested under the second arm of issue No. I is whether in the exercise of powers conferred on a detaining authority to issue detention orders, the done of the said power is under any obligation to disclose the reasons for his conclusion that a particular citizen, 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 I (I), (with its various amendment Decrees of 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 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 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 I (I) of Decree No. II 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, 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 into the lucid and unambiguous provisions of Section I (I) of Decree No. I J 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 v. Anderson (supra).* The Defence (General) Regulations, 1939, Regulation 18b, para. (I) 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 the 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."

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 Stale. 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 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 18b, para I were made for emergency period in England.

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 and Ors. v. Chief of* Staff (unreported) Appeal case No. CA/L/25/85 delivered on April, 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 I (I) of Decree No. I I 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 power 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 entrustment on the plain and unambiguous provisions of the statute. In any event, the inbuilt 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 provisions 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.

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 cross-respondents' 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 cross-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 Lotteries Officer MidWestern Region* (I Y72) I AIINLR(Pt.I)229wouldnotapply.Nothavingproperly 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 the detainee was being kept or a certified true copy thereof was tendered in evidence.

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

Except that Section 4 of the State Security (Detention of Persons) (Amendment) Decree No. II o{ IY94 had erected an ouster clause stifling the right of a citizen to question a Decree, it seems to me that the handling 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 uetention 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 the court to take judicial notice of such a document in the absence of any law authorising such approach. There is no gainsaying the fact that the 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 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 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 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, ICA 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] 984). The orders of detention are "subsidiary instruments" made in the exercise of powers conferred on the Chief of Staff by Decree No.2 of] 984. The orders made here, that is Exhibits 4 and 5, are enactments with Section 27(I) of the Interpretation Act 1964. They are not documents public or otherwise. I am enjoined by the positive enactment in Section *n(* I)(a), (b) of the Evidence Act to take judicial notice of them and by the provision of Section I of the suspended part of the constitution to enforce if'.

The next case was *Abdulmani Yaro Saidu v. E.O.P.* (unreported), Suit No. *CAJ* K/I/87 of 10th November, 1987. Here, the question of in admissibility 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 and Achike (fICA). 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 conferred by an act', (See Section 27(I) 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 characrer (italics* mine) as distinct from specific instructions to which the term 'directions' is applied: (See Halsbury's Statutory Instruments Vo!. I of 1972 page 6). In my view. the hall-mark of an 'order' which makes it cognisable as a 'subsidiary instrument' or 'subsidiary legislation' 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.L 17 of 1984 Customs Tariff (Import Prohibition) (No.2) Order of I st April, 1984 is made under powers conferred under Section 7 of the Customs 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(I) (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. 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.

For all I have said, issue No.2 is regrettably tholved against the cross appellant.

Issues Nos. 3 *and* 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.

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 of costs I confess that I have some difficulty. 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 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 costs.

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 26 March,] 996 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 had 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. 9A 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 N 10 million. The learned trial judge (Nwogwugwu, J.) granted leave to the cross-appellant on February I, 1996 to move for those relief’s.

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 (I) 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.] 2 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 and Peoples' Rights (Ratification and Enforcement) Act.

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) At the held that Decree No. 107 of 1993 represented the groundwork 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.

The cross-appellant in his appeal against that judgment to the Court of Appeal presented such a compendious and comprehensive brief of argument that could hardly fail to make a favurable 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 issue about the status of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act as contained in Cap. 10 of the Laws of Federation, 1990. In his opinion, Musdapher JCA who gave leading judgment observed admirably in that case reported as *Fawehinmi* v. *Abacha* (1996) 9 NWLR (Pt. 475) 710 at 747; (1988) I 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] 990 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 favour 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. 75];(1998) I HRLRAatp.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;(1988) I *HRLRAatp.606illteralia:*

"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 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 nor repealed either directly, impliedly or inferentially,"

The learned justices said in the above-quoted paragraphs from their judgments and much more 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 lCA meant to express the due effect to be given to the African Charter 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 high pedestal" I shall endeavor 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* I', *The State* (1994) 9 NWLR (pt. 366) I at 26, it was an anti-climax in the otherwise enterprising judgment of Musdapher lCA who, after acknowledging that Bello ClN 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:

"I, 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 fulfill an international obligation which it voluntarily entered into and agreed to be bound and that Government cannot be allowed under international law to contract out of its international obligations by local legislation, 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.

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 guaranteed under the African Charter on Human and Peoples' Rights Cap 10 Laws of the Federation of Nigeria 1990 because of the procedure adopted therefore. 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.

Put the other way but in form of questionnaires (sic) and for better clarity and comprehension, issues No. I & 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.

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. I OLFN 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 I 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 going by the provisions of the state Security (Detention of Persons) 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 reason for issuing same.

2. Whether the court in taking judicial notice of the detention order was proper.

3. Whether the procedure adopted by the cross-applicant 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-appellant. 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 appellant's counsel. In his reply brief, the cross-appellant dealt very briefly but effectively with it. I agreed with him that issue 2 is covered by ground 2 of the ground 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 other but i shall endeavor 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 Organisation 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 chapter 10 of the Laws of the Federation of Nigeria 1990, Vol. I. 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 provisions of the African Charter on Human and Peoples' Rights which are set out in the schedule to this Act shall, subject as there under provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria."

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;

Requiring 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 Africa:"

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, color, 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. 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)

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."

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 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 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 Salawi v. Secretary of State for India (1906) I K.B. 613 at 639 where Flercher Moulton L. 1. 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, 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 Sobhuzaii v. Miller (1926) A. C. 518, 522524 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 benefits 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 5]; Schorsch Meier GMBH v. Hell/lin (1975) I All ER 152; Garden Cottage Foods Ltc!. 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 Lawz 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 (I) 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 Fuller of the United States Supreme Court in Underhill v. Hermandez (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 been recited earlier in this judgment as they appear in Articles 2, 4, 5, 6, 7(I) (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 justifiable 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 to domestic law. It would appear that in so far as a Community obligation gives rise to rights in favor 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 caused 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 defense 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 arts. 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 LIS to give the judgment and to enforce it, it is a task worthy of our mettle."

Similarly in Schorsch Meier GMBH v. HeIlin (1975) I All ER 152, at page 157, Lord Denning M. R. said:

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 they and the national courts can enforce those rights and obligations."

More recently, the House of Lords upheld the same principle of law in Cordell Cottage Foods Ltd. v. Milk Marketing Board (1984) A. C. 130. At page 144. Lord Dip lock 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 pan, 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) I at pages 26-27: (1998) I HRLRA 167at 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 of each court." See also Oshevire v. British Caledonian Airways Ltc/. (1990) 7 NWLR Cpt. 163) 489; UA.C. (Nig.) Ltd. I'. Global Transporte Oceanica SA (1996) 5 NWLR CPt. 448) 291; and Ibida!7o v. Lufthanza 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 entertain able 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 altitude 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 defense 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 minuend (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 lCA in Attorney-General of Botswana v. Unity Dow' (1988) I HRLRA 27-128. (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-à-vis other domestic laws. It was this. I think, that led Musdapher lCA 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 in terror 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 flavor and the ouster clauses contained in Decree No. 107 of 1993 or No.] 2 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 endeavor to show. In their own judgments in support, Muhammad and Pats-Acholonu JJCA held the same view. But Pats-Acholonu lCA went a little further to say at page 758 and page 606 of the respective Law Reports (supra), in deterrence 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 vigor and strength than mere Decree for it has been elevated to a higher pedestal "

This passage from Pats-Acholonu lCA'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. I 0 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 sacrosanct unlike most municipal laws and may as long as it is in the statue book be clothed with vestment of inviolability (by reason) except where a decree specifically repeals it."

It appears all the learned justice labored 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. Foscolo Mango & Co. Let. (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 acceptation."

I respectfully agree with Lord Macmillan's observation. I would like to remark that Pats-Acholonu lCA's perception of the status of the African Charter will be better appreciated on the grounds (I) 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 criticize, 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) 489 at pages 523-524 where the case ofS. A. Menwrex v. Societe de drait Jordanien Alia et Societe e droit Sauudien Saudia Arabian Airlines (reported in 1986 uniform law Review Biannual vol. II, page 538) was cited. The Court of Appeal of Brussels in Belgium was said to have held that:

"Belgian 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 preparatories and its origins, as it would be pointless to work out a convention establishing international rules if it 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. Trails World Airlines Inc. 16 A vip. 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 traveled in from Tel Aviv, Israel to New York, U.S.A. The defense 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 any valor 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 Caledollial Airways Ltd. at page 520 is known as Aero Fretv. Air Cargo Egypt decided by the Court of Appeal Paris (reported in the Uniform Law Review Biannual, 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 Co-operation (1981) A. C. 303, Lord Scarman observed at page 354:

'"... there is a presumption, albeit rebut table 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."

There is therefore a presumption that a statute (or an Act of Parliament) will not be interpreted so as to violate rule of international law. In other words, the courts will not construe a statute so as to bring it into connect with international law. Thus it was observed in Boxhaul v. Favre (1888) 8 P. D. !OI 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. C inspector of taxes (1968) I All ER 779; Corocrcift Ltd. v. Pall-Am Airways Inc. (1969) I 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 of the 4th edition of HalsblllY '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 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(I) 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 b 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 Comn1Unities Act 1972, or at least sections 2(I), 2(4) and 3(I), 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 (I) 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(I) 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) I All ER 456 at 460-461.

In our own case what is enacted under s. I 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 onaw 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(I) 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. l6(]) and 17 preserved it. It is pertinent to refer particularly to s.] 7 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-à-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 or 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 Nigerian legal and political system; (b) the Charter has some international flavor 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 comradely 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 connect with the decision of this court in Labiyi 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 notlUld 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 right."

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 course of that it would consider and determine to what extent the ddails 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(I) (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 co un reached a decision that the ouster clauses relied on by the appellants did not operate against the crossappellant in the face of the provisions of the African Charter. Article 7(I) provides for the right of every individual to have his cause heard. In particular 7(I) (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 crossappellant 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 Ogugll v. The Store (supra) at pages 26 as follows:

"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 beemphasised that the section does not exclude the application of other means for their enforcement under common law or statute or rules of Courts....

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 Bello 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 Sallde v. Abdullahi (1989) 4 NWLR (PI. 116) 387 at 418-419; see also Minister of Internal Affairs v. Slwgaba 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 any 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 OgUgll'S case as follows:

"By the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10, Vol. I Laws of the Federation of Nigeria, 1990, Nigeria adopted the African Charter on Human and Peoples' 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 Constitution."

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

lL 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 Carden Cottage Foods Ltd. v. Milk Marketing Board (1984) AC 130; (1983) 2 All ER 770; Davy v. Spelthorne Borough Council (] 984) AC 262; (1983) 3 All ER 278. I am satisfied that the crossappellant filed this action by an appropriate procedure and that the lower court was in error to have held 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 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 of the court to entertain any civil proceedings that arisc from anything done pursuant to the provisions of any Decree. An argument was canvassed that since at the time the Inspector-General was maJe an alternate signatory to the Chief of General Staff, the post of the Chief of General Staff had been replaceJ by that of Vice-President, the Inspector-General coulJ 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 contai ned was Chief of General Staff or Inspector-General as authorised 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 appellants. When addressing the coun later, learned counsel for the crossappellant 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 count. In this ruling the learned trial judge said:

" I observed in the course of this proceedings (sic) that the 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 Inspector-General of Police, though 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 75t I) of the Evidence Act. the co un is enjoined to take judicial notice of any legislation. I therefore hold that this coun 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(I) of Evidence Act."

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 the 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 Jo 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. When a court takes judicial notice of a legislation under s. 75(I) 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 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 designated office. That question can be decided even without the detention order being tendered at that stage of the proceedings. I do not think there was 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 lCA at page 754 of the Law Report (supra) as follows:

"When I look at this case, I observe that one of the respondents is the Head of State - General Sani AbachahimselL 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."

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 particularised by reference to section 267 of the Constitution 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 SilO motu without allowing panies to address on it. It was this ground of appcal the appellants objected to as being incompetent. This observation, no doubt, is an obiter dicutlll of the learned justice of the Court of Appeal. 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 even 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 the observation a rather expensive obiter, quite capable 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(I) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section

(a) no civil or criminal proceedings shall be instituted or

continued against a person to whom this section applies during his period of office;

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

no process of any court requiring or compelling the appearance 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.

The provisions of subsection (I) of this section shall not apply to ci vii 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.

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 fordoes 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 he "Head of State and Commander-in-Chid of Armed Forces (General Sani Abachar 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 arrival 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 I and 2 are restated in issues 4(i)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 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 respect of all the reliefs sought. I award costs of N I 0.000.00 in favour of the cross-appellant.

EJIWUNMI, J.S.C: 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. 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 practice at the Bar, also been well known as front line defender of human rights 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,

19%, signed by the Inspector-General of Police, pursuant to powers conferred on him by the State Security (Detel1lion of Persons) Decree No.2 of 1984, as amended. This authorised the arrest and detention of any person believed by the authorities 10 have been "concerned in acts prejudicial to State Security,"

As the respondent felt that he was been unlawfully arrested and 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-parts for leave to enforce his fundamental rights. was brought pursuant to section 42(I) of the Constitution of the Federal Republic of Nigeria 1979. Order I. Rule 2(]) (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:

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

A declaration that the detention and the continued detention of the applicant without charge since Tuesday, January 30th,] 996 when the applicant was arrested by the officers, servants. agents, privies of the respondent at his resident 9A 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] 2 of African Charter on Human and Peoples' Rights (Ratification and Enforcemel1t) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

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

An order of Mandamus compelling the respondents to forthwith arraign the applicant before a properly constituted court orTribunal 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 (Ratitication and Enforcement) Act Cap. 10 Laws of the Federation]990.

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.

N 10,000,000.00 (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 court's jurisdiction to entertain the respondent's case on the grounds. imeralia, that by the combined effect of the State Security (Detention A of persons) Dt:cree No.2 of 1984 as amt:nded 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 counst:! for the parties, Nwaogwugwu 1. 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 learned trial judge recognized that the African Charter on Human and People's Rights 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. I Cap. 10. Laws of the Federation 1990, His Lordship or the Federal High Court further observed that the fundamental Human Rights provisions of Chapter 4 of till: 1979 Constitution of the Federal Republic of Nigeria IS in truth and in fact a replica of the provisions of Articles 4, 5, 7 and 12 of the African Charter on Human and People's Rights. However, after due consideration of Decree 107 of 1993, 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 Peoples' 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 Apepal. His appeal succeeded substantially, when in allowing the appeal, the court below, held in what could be described as a unanimous judgment. held inter aha, 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.

That the learned trial judge acted erroneously when he held that the African Charter contained in Cap 10 of the Laws of the Federation

1990 is inferior to the Decrees of the Federal Military Government. That the Decree of the Federal Military Government cannot oust the jurisdiction of the court when properly called upon to do so in relation 10 matters pertaining to Human Rights under the African Charter.

That the learned trial judge was right in declining jurisdiction in that the procedure followed in the commencement of the suit was Improper.

ThaI the case be remitted back to the trial court to consider [he consequences of the detention for four days of the respondent(s) which period was nOl covered by the detention order.

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 deli vered 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:

"(I) 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.

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 flavor and accordingly the ouster clause contained in the Decrees cannot ope prate to oust the jurisdiction of the court in matters touching on African Charter.

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 therefore, to wit. procedure by way of Fundamental Rights (Enforcement) procedure Rules I 97Y. 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 Grder."

Issues (I) 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 flaV\)ur and the ouster clauses contained in Decree No. 107 of

1993 or No. 12 of 1994 cannot affect its operation in Nigeria.

In this context, 1 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 I of the Charter provides:

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

"The member countries - parties to the protocol - recognized that the fundamental human rights stem from the attributes of human beings whichjustify 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 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 underthe provisions of the Charter. The contracting states are bound to establish some machinery for the effective 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 or the hierarchy of laws in Nigeria in order of superiority as enunciated in Lauiyi v. AI/retia/a (J 992) 8 NWLR

Then at page 211 of the records. Pats Acholonu, JCA, quoting from the judgment Bello CJN in Ogugu v. The Stute (1994) 9 NWLR (Pt. 366) I at 27, said, inter alia:

"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 accord ance 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 orthe preamble and section seem to vest that Act with a greater vigor and strength than mere decree ror it has been elevated to a higher pedestal and as Bello CJN said in Ogugu v. State (supra), its violability becomes actionable "

The passages quoted aboveJrom 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 Peoples' Rights. now Cap I O 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 organisation of African Unity or 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(I) of the

1979 Constitution (s. 12(I) of the 1979 Constitution) which provides:

OO12(I). 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 Jaw 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 & aI/or. 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 entered 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 uncorporated 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. Adegboruwa, 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 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 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 filed five grounds of appeal challenging certain aspect 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:

"(I) Whether going by the provision of the State Security (Detention of Persons) Decree No.2 of 1984 and its vairous amendments, particularly as amended by Decree No. II of 1994, the lnspector 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.

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.

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.

Whether the I st respondent, as Head of State of Nigeria immuned from civil or criminal actions in all cases."

I do not need to comment particularly on issues I 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 arc 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.

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 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 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) 629. I have before now, set out the application made by 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 3H of the 1979 Constitution. and also Articles 4,5,6 and 12 of the African Charter on Human and peoples' Rights (Cap 10) of the laws of the Federation).

For the respondent the argument urged on the court with regard to whether the cross-appellant could pursue his remedies under the above provisi6ns of the constitution and Cap 10 of the Laws of Federation, 1990 was anchored on the ground that their provisions have been suspended by Decree 107 of 1993.

However, the contrary argument was put forward for the cross-appellant. In addition. it was urged on the court apply the principle, already recognized in this court. that the court must in order to protect its jurisdiction, construe strictly such laws as lend to deny or whittle its jurisdiction.

As Decree 107 of 1993 by its S. 17 has left in tad 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 N 10.000.00 for the main appeal and the cross-appeal.

Chiesonu Okpoko..... For the Appellants

Legal Officer, Federal Ministry of Justice

Ebun-Olu Adegboruwa..... For the Cross-Appellants

with Mohammed Fawehinmi