



NIGERIA - FUNDAMENTAL RIGHTS DENIED

REPORT OF THE TRIAL OF KEN SARO-WIWA AND OTHERS

Michael Birnbaum QC

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Preface

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This report about the trial of Ken Saro-Wiwa and other members of the Ogoni community in Nigeria was prepared by Michael Birnbaum QC, a senior English criminal lawyer, who attended part of the proceedings in March 1995. He did so as the accredited representative of the Law Society of England and Wales and the Bar Human Rights Committee of England and Wales, of which he is a member, and with the support of ARTICLE 19, the International Centre Against Censorship.

Michael Birnbaum was asked to attend the trial proceedings as an international observer in view of widely expressed concern in the UK and elsewhere that the trial might not conform to internationally-recognized standards of fair trial and could result in the imposition of the death penalty on some or all of the accused in circumstances where they will be denied any right of appeal to a higher court. This, in itself, would represent a gross breach of international standards. Mr Birnbaum's specific order of mission is set out in the text of his report.

ARTICLE 19 is now publishing this report, in association with the Law Society and the Bar Human Rights Committee, because it is clear that the trial is fundamentally flawed and there is grave reason to fear that its continuation will represent a gross injustice and an abuse of human rights. The tribunal established to hear the case is neither independent nor impartial: it has handed down rulings which are blatantly unfair and militate against any prospect of the accused receiving a fair trial, as required by international law. The Federal Military Government's decision that this case should be heard by a special tribunal, rather than the ordinary courts, undermines the normal rights of defence enshrined in Nigeria's own Constitution and in international human rights instruments to which Nigeria is a party. It also suggests that the government's actions may be politically-motivated and intended to silence one of its most outspoken critics.

Michael Birnbaum's report provides a valuable, independent analysis of the proceedings, including the composition and conduct of the tribunal, the nature of the charges and evidence against the accused, and the legal basis of the case. His assessment takes particular account of the requirements of Nigeria's Constitution and law and of the international human rights instruments that Nigeria has committed itself to uphold.

ARTICLE 19, the Law Society and the Bar Human Rights Committee are calling on the Federal Military Government to take immediate action to terminate the trials before this special tribunal. If the government wishes to try any of the defendants, the trial should take place before an ordinary court and in such a way as to guarantee all their rights under both Nigerian and international law.

We urge the international community to support this call and to make clear to the Nigerian government its obligation to fully respect the right to freedom of expression and other fundamental human rights, including the right to fair trial.

Frances D'Souza

Executive Director

ARTICLE 19

May 1995

ACRONYMS AND NAMES

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ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AFRC	Armed Forces Ruling Council
CDHR	Committee for the Defence of Human Rights
CDST	Civil Disturbances Special Tribunal
CJ	Chief Justice
CLO	Civil Liberties Organization
COTRA	Council of Ogoni Traditional Rulers
CRP	Constitutional Rights Project
FOWA	Federation of Ogoni Women's Associations
FIIB	Federal Intelligence and Investigation Bureau
FMG	Federal Military Government
ICCPR	International Covenant on Civil and Political Rights
ING	Interim National Government (27 Aug-17 Nov 93)
J	High Court Judge
JAC	Judge of the Court of Appeal
JSC	Judge of the Supreme Court
MOSOP	Movement for the Survival of the Ogoni People
NDSC	National Defence and Security Council
NYCOP	National Youth Council of Ogoni People
OMPADEC	Oil Minerals Producing Areas Development Commission
PRC	Provisional Ruling Council
SIIB	State Intelligence and Investigation Bureau

FEDERAL GOVERNMENT AND RIVERS STATE ADMINISTRATION

Gen. Ibrahim BABANGIDA	President of Nigeria Aug 1985 - Aug 1993
Ernest SHONEKAN	President of Nigeria Aug - Nov 1993 (ING)
Gen. Sani ABACHA	President of Nigeria Nov 1993 to date
Dr Olu ONAGORUWA	Attorney General under Abacha until Sept. 1994
Michael AGBAMUCHE S A N	Attorney General since September 94
Lt-Col Paul OKUNTIMO	Commander of Rivers State Internal Security Task Force
Lt-Col DAUDA KOMO	Military Administrator Rivers State

KILLED AT GIOKOO ON 21 MAY 1994

Chief Albert BADEY

Chief Edward KOBANI

Chief Samuel ORAGE (S N ORAGE)

Chief Theophilus ORAGE (T B ORAGE)

DEFENDANTS

Group A Charged 28 January 1995

Kenule ("Ken") SARO-WIWA

Ledum MITEE

Dr Barinem Nubari KIOBEL

John KPUINEN

Baribor BERA

Group B Charged 28 February 1995

Pogbara AFA

Saturday DOBEE

Monday DONWIN

Felix NUATE

Nordu EAWO

Group C Charged 28 February

Paul LEVURA

Joseph KPANTE

Michael VIZOR

Daniel GBOKOO

Albert KAGBARA

MEMBERS OF THE TRIBUNAL

Justice AUTA (Chairman)

Justice ARIKPO

Lt-Col ALI

PRINCIPAL COUNSEL

Prosecution:

Chief Philip UMEADI S A N

Joseph DAUDU S A N

Dr Ego-Queen Ahichie EZUMA

Defence:

Chief Gani FAWEHINMI

Femi FALANA

Olisa AGBAKOBA

PART A: INTRODUCTION

1. OVERVIEW

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1.1 Fifteen members of Nigeria's Ogoni ethnic minority have been brought to trial before a special tribunal for the murder of four Ogoni traditional chiefs during a riot in May 1994. The 15 include Ken Saro-Wiwa, an internationally-known writer, human rights activist and environmental campaigner. All 15 face a possible death penalty and are denied access to the ordinary courts or any right of appeal, in breach of their fundamental rights guaranteed both by Nigerian and international law.

1.2 Ogoniland is an area of some 404 square miles in Rivers State in the Niger delta area of south-eastern Nigeria. The estimated 500,000 Ogonis live in one of the most densely populated and polluted parts of Africa. Most of the pollution is the result of intensive exploitation of the area's oil reserves. The Ogoni have received little benefit from the Nigerian oil boom. They are poor and facilities for education, health care and social services are very basic, where they exist. Many Ogoni accuse Shell, the multinational petroleum corporation most deeply involved in the exploitation of Ogoniland's oil reserves, and Nigeria's Federal Military Government of responsibility for their plight.

1.3 In the early 1990s a number of prominent Ogoni founded an organization to promote the Ogoni cause. It was called the Movement for the Survival of the Ogoni people, MOSOP. Although MOSOP commanded a great deal of support among the Ogoni, by mid-1993 there was dissension among its leaders. Some were more disposed to compromise with the Federal Military Government and the authorities of Rivers State than others. The opposing faction was led by Kenule ("Ken") Saro-Wiwa, who became MOSOP's President in June 1993.

1.4 On 21 May 1994 a meeting was held at the Palace of the Gbenemene of Gokana (a traditional ruler) in Giokoo. A number of Saro-Wiwa's opponents attended. The meeting was attacked by a large mob and four chiefs were killed. A Military Task Force was already active in Ogoniland, pacifying (according to the Federal Military Government) or (according to many Ogoni and a number of human rights groups) oppressing the local population. In the wake of the killings, hundreds of Ogoni were arrested.

1.5. For many months the detainees were held without charge, access to lawyers or a court appearance. In November 1994 the Nigerian President, General Sani Abacha, convened a Civil Disturbances Special Tribunal (CDST) consisting of two judges and a military officer to try cases arising out of the Giokoo disturbance. On 28 January a group of five defendants were charged, namely Ken Saro-Wiwa, Ledum Mitee, Barinem Nubari Kiobel, John Kpuinen and Baribor Bera. Of these the first three are said to have counselled and procured (that is encouraged) the killing of the four murder victims, whilst Bera and Kpuinen are alleged to be among the actual killers. On 28 February 1995 two further groups of five were charged; all 10 were alleged to have participated in the killings. The trial of Group A, as I shall call the Saro-Wiwa group, began in Port Harcourt on 6 February.

1.6. The detentions and the proposed trial aroused great concern for reasons which I have attempted to analyze in Section 4 below. Briefly:

- The detainees were held without charge for several months. Saro-Wiwa had been frequently arrested in the past. He, Mitee and Kiobel were said by many to have been detained for political reasons. They were adopted by Amnesty International as Prisoners of Conscience. Saro-Wiwa was believed to be in very poor health.
- Although Nigeria's 1979 Constitution guarantees fundamental rights, a succession of military governments has tended to rule by decree thereby eroding the Constitution, the rule of law and the rights of the individual. Many decrees have ousted the jurisdiction of the courts and the federal government of the day has frequently ignored unfavourable court rulings.
- There have been numerous reports of human rights violations on a large scale, many of the more recent and serious relating to incidents in Ogoniland.
- There were grave doubts as to the legality and fairness of the proposed trial. The tribunal is appointed by the federal military government. One of its three members is a military officer. Its decisions are subject to confirmation by a military council but may not be appealed or challenged in the courts. The tribunal can impose the death penalty which is mandatory for murder. Proceedings before an earlier CDST appointed in 1992 to deal with disturbances in northern Nigeria had been very unfair.

1.7. Against this background I was delegated by the Bar Human Rights Committee of England and Wales and by the Law Society of England and Wales to attend the trial of

Saro-Wiwa and others as an independent observer. The objects of my visit as set out in my Orders of Mission from the Bar Committee and the Law Society were:

(1) to make known to the Tribunal and to the Nigerian authorities responsible for the administration of justice the concern and interest of British lawyers in the trial;

(2) to obtain information about the background to the trial, the conduct of the trial, the nature of the case against the defendants, the nature of their defence and the legislation under which they are tried;

(3) to assess the extent to which the trial has been held in accordance with internationally recognized standards and the rules of Nigerian Law relating to fair trial;

(4) to report on the above matters to the General Council of the Bar and the Law Society of England of Wales.

1.8. The Bar Human Rights Committee is supported by the General Council of the Bar of England and Wales. My mission was also supported by ARTICLE 19, the International Centre Against Censorship, which has undertaken the publication of this report.

1.9. My qualifications for carrying out this mission are that I have been a barrister in full time practice since 1969. During that time I have specialized in criminal cases, both prosecuting and defending. I was appointed an Assistant Recorder in 1988, a Queen's Counsel in 1992 and a Recorder in 1995.

1.10. My visit to Nigeria, from 21-29 March, was relatively short. I attended five days of the trial, during which no evidence was called, but there were a number of important legal arguments and rulings. On 28 March the tribunal made a crucial ruling. The prosecution had applied to try Groups B and C — and indeed any others who may be charged — before the same tribunal which is already trying the Group A defendants. The tribunal granted this application. The effect of the ruling is that there will be at least two simultaneous trials before the same tribunal. The trial of Group A has already started and a few witnesses have been heard. The trial of Groups B and C will be a separate trial but conducted simultaneously with the first trial, and on substantially the same evidence. Numerous witnesses will be called twice over. The possibility of other such trials remains open.

1.11. Plainly I am in no position to decide any of the following:

- the competing claims as to who is responsible for human rights abuses in Ogoniland;
- whether Saro-Wiwa or any other defendant is a prisoner of conscience;
- the guilt or innocence of any of the defendants.

1.12. However, I was able to fulfil the mission's two main tasks, namely to form a view of the legality and fairness of the trial and to analyze the evidence. I had lengthy discussions with counsel on both sides and with the Attorney-General and Minister of Justice, Chief Michael Agbamuche S A N. I had access to transcripts and reports of the trial and received from prosecution counsel a bundle of the statements of the witnesses they proposed to call. My watchword has been independence: this report is my own analysis of the legal and evidential issues. It is not a manifesto on behalf of any organization, party or pressure group.

1.13. I have borne very much in mind a point stressed to me by the Attorney-General and counsel for the prosecution: Nigeria is a relatively young country with serious problems of communal and ethnic strife which have no real parallel in Western Europe. It would be wrong to judge the Nigerian attempt to solve these problems by purely Western standards. There is force in this argument. In forming conclusions about the trial I have not sought to impose standards which are alien to Nigerian experience or aspirations. Rather I have judged the proceedings by reference to *Nigerian* standards. These are the provisions of the 1979 Constitution; international human rights treaties to which Nigeria is a party; and international standards on fair trial and the death penalty promulgated by the United Nations, of which Nigeria is a member. They include the following:

- The Universal Declaration of Human Rights;
- The International Covenant on Civil and Political Rights;
- The African Charter on Human and Peoples' Rights;
- UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty;
- UN Basic Principles on the Independence of the Judiciary.

1.14. The official position of the Federal Military Government is that it upholds these international human rights standards (see, for example, the recent speech of the Attorney-General at the UN, cited in 14.1). The African Charter has the force of law in Nigeria. As recently as July 1994, Nigeria acceded to the International Covenant on Civil and Political Rights. Furthermore, although some parts of the 1979 Constitution have been suspended or modified by decree, the constitutional rights of fair trial and appeal have not been affected.

1.15. Nothing that I saw or heard whilst in Nigeria allayed the grave doubts as to legality and fairness summarized in 1.6. above. I was particularly concerned to know why the government had appointed a tribunal which bypassed the ordinary courts. I was given a number of reasons by the Attorney-General and by prosecuting counsel (for example, that the trial had to be held quickly in secure conditions (see 15.3-9). None of these seemed to me to explain why it was necessary to appoint a special tribunal excluding any access to

the ordinary courts or right of appeal. I was not even able to establish the answer to a fundamental question: how many remain in custody and as yet uncharged?

1.16. During my stay other reasons for concern emerged. It is fair to point out that the tribunal has made some decisions favourable to the defence. For example, it has ordered the prosecution to disclose the statements of its witnesses to the defence (see 14.4-8). But the tribunal has made two decisions which to my mind strongly suggest that it is biased in favour of the prosecution and the federal government.

1.17. First, the decree which empowers the tribunal states that the prosecution must provide it with a summary of the evidence. Before embarking on the trial of a defendant, the tribunal must be satisfied that a defendant "appears to have committed an offence". In this case the prosecution has served three summaries, one for each group of defendants. The summaries disclose no case at all against 11 of the defendants: indeed 10 of them were not even mentioned. Even though defence counsel twice protested that the summaries disclosed no case against some of the defendants, the tribunal has ruled that the trials should commence (see 8.5-6; Section 10; 11.17; 11.20-23; 11.32).

1.18. Second, I could not understand how any impartial tribunal could grant the application for simultaneous trials. The prosecution can now call each of their witnesses twice. But each defendant will be tried only once and will, therefore, have only one opportunity to cross-examine. If a witness gives different evidence in two trials then the prosecution and the tribunal will be in a position to use evidence against the defendant in one trial which was only given in the other. The decision also involves an abdication of control of the proceedings by the tribunal in favour of the prosecution: it is the prosecution who will decide how many trials there are to be. The more trials, the greater the risk of injustice. These arguments are analyzed in greater detail at 11.36-42.

1.19. On the last day of my visit (29 March), the prosecution served on the defence a bundle of the statements of the witnesses on whom they rely. I have analyzed these statements in great detail (see Part E and Appendix 9). I have a number of concerns as to the sufficiency and quality of the evidence which are set out in section 23 below. I must stress that they are concerns rather than conclusions since they are based on a reading of papers rather than on a hearing of the live evidence. I draw attention to the following:

- It is plain that the Giokoo disturbance lasted a number of hours and involved hundreds of rioters. Witnesses were terrified and some badly injured. There may well have been more than one assault against each of the deceased;
- There is no forensic evidence. It has not been alleged that any of the defendants made admissions. The case against the first three defendants appears to be based on their presence at or near the murder scene together with conflicting evidence that Saro-Wiwa incited violence, while the case against the alleged killers rests on identification by eyewitnesses;

- The two principal witnesses against Saro-Wiwa have now sworn affidavits claiming that they were bribed to give false evidence;
- The identification evidence is very vague. In most cases it is quite unclear who was identified or what he is alleged to have done. In some cases witnesses who in their first statements made no claim to have seen the killings later identified a number of people as having committed them;
- The evidence so far served and called by the prosecution appears to disclose no case at all against some of the defendants. Against some others it appears to disclose no more than a possible participation in the general riot.

1.20. After my departure, the defence argued that Saro-Wiwa was so unwell that he could not attend the trial. On 25 April the tribunal ordered his admission to hospital. It is unclear whether he will be fit to stand trial. In the meantime, the second trial (of 10 defendants) has commenced. Thus fifteen people have already been indicted for offences which carry a mandatory death sentence. There may well be a number of others who will face capital charges. It is unclear how many trials there will be before the one tribunal or how long they will take. I have carefully considered whether it is appropriate to publish a report before the conclusion of the trials (see section 6). In my view the risk of serious injustice is already so apparent that early publication is not only justified but essential.

2. SUMMARY OF PRINCIPAL CONCLUSIONS

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2.1. No sensible person could either doubt the seriousness of the Giokoo killings or challenge the right of the Nigerian authorities to investigate and try offences relating to them before an independent and impartial tribunal. However, I believe that the proceedings before the tribunal that has been specially appointed to try the case violate a number of the fundamental rights of the defendants which are guaranteed both by the Nigerian Constitution and by international human rights instruments to which Nigeria is a party.

2.2. Procedurally the trial is orderly. The tribunal listens to both sides of an argument and gives reasoned rulings. Strictly speaking it is not a military tribunal, since only one of its members is a military officer and it does not follow courts martial procedure. (See 7.4-5, 11.5-6.)

2.3. The defendants are being allowed, or it is at least arguable that they are being allowed, to exercise certain of their fundamental rights:

(1) The defendants are represented by counsel. One (Mitee) who is legally qualified is allowed to represent himself. The defendants are able to challenge the prosecution evidence and to call evidence. They cannot be compelled to give evidence.

(2) The Chairman of the Tribunal has indicated that the burden is on the prosecution to prove the case (see 11.4).

(3) The laws of murder under which the defendants are being prosecuted are not retroactive.

(4) The restrictions on public access to the trial are arguably proper having regard to the sensitivity of the case, the possibility of public unrest, and the right of access afforded to members of the press and international observers (see 11.8).

(5) Arguably the trial of the first five defendants has been commenced within a reasonable time assuming that the pre-trial delay is to be judged by the criteria of what is normal in the Nigerian courts (see 14.9).

2.4. The proceedings before the tribunal are in breach of fundamental rights in that:

(1) The tribunal is not independent of the government. There is no sensible pragmatic reason for the appointment of a Civil Disturbances Special Tribunal in this case other than the desire of the Federal Military Government that any trial relating to the Giokoo killings should take place before a tribunal which it hopes will favour the prosecution and a desire to avoid the scrutiny of its case by the ordinary courts.

(2) The tribunal has made some rulings favourable to the defence. For example, it has ordered the prosecution to disclose the statements of the witnesses it proposes to call. But, overall, it has behaved in a way which strongly suggests that it is biased in favour of the Federal Military Government and the prosecution. Two of its decisions were blatantly unfair. First, it embarked upon the trials of 15 defendants when in the case of 11 of them there was no material disclosed by the prosecution in its summaries of the case to suggest that they were guilty of any offence. Second, it ruled that in principle the prosecution are entitled to conduct before the same tribunal two or more simultaneous trials of different groups of defendants on essentially the same evidence. (See Section 15.)

(3) None of the defendants was allowed to see his counsel before the commencement of the first trial. Even now, their meetings with counsel are routinely attended by a senior military officer, Lt-Col Paul Okuntimo. The denial of pre-trial access to counsel and the limited basis on which it is now permitted are breaches of the right to adequate time and facilities for preparation of the defence. (See Sections 13 and 16.)

(4) In every case months elapsed between the arrest of a defendant and his first appearance before the tribunal. In some cases the delay was as long as nine months. Similarly, although a number of the defendants were arrested in late May 1994, it was not

until late January 1995 that any defendant was informed of the charges against him. (See Section 17.)

(5) There is compelling evidence of harassment of defence lawyers by the security forces. (See 16.4.)

(6) The procedure under which the defendants are being tried is calculated to deny them any right to challenge any decision of the tribunal before the ordinary courts of Nigeria or any right of appeal. This is all the more disturbing in that the tribunal has the power to impose the death penalty. (See Section 18.)

2.5. The fundamental rights to trial by an independent and impartial court or tribunal, to fair trial, to adequate time and facilities for preparation of the defence and to appeal to higher courts have not been suspended by decree. Hence the denial of these rights is a breach even of those parts of the Constitution which the present government claims to uphold.

2.6. In assessing the overall fairness and legality of a trial one does not simply count up the rights denied and those upheld in order to make a purely numerical comparison. It is my view that the breaches of fundamental rights I have identified are so serious as to arouse grave concern that any trial before this tribunal will be fundamentally flawed and unfair.

2.7. I am also particularly concerned about two further aspects of the case. The first is the apparent influence of Lt-Col Paul Okuntimo, an officer against whom grave allegations of human rights abuses have been made. In my view his insistence on arranging and attending defence conferences is bound to inhibit the preparation of the defence. His uninvited presence at my own meeting with prosecution counsel must give rise to fears that their independence has been compromised. There is also reason to suspect that he has private access to the members of the tribunal. (See Section 13.)

2.8. Secondly, it is a matter for the gravest concern that there may be many people still in custody and as yet uncharged (see Appendix 7).

2.9. I cannot at this stage reach any definite conclusions on the evidence against the defendants. I have, however, a number of serious concerns as to its sufficiency and quality which are summarised in 1.17 and Section 23.

PART B: BACKGROUND

3. BACKGROUND TO THE KILLINGS

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3.1. The Ogoni are an ethnic community comprising six clans, the Eleme, Tai, Gokana, Babbe, Kenkhana and Nyokhana. Each clan is headed by a first class traditional chief, the Gbenemene. Second and third class chiefs and village heads owe allegiance to the Gbenemene in council.

3.2. In 1990 a number of leaders of MOSOP issued the "Ogoni Bill of Rights". It set out the plight and grievances of the Ogoni people and made a number of demands. One of the signatories to the Bill, Dr G B Leton, has summarised its three cardinal principles:

- (1) Political control of Ogoni affairs by Ogoni people
- (2) Control and use of a fair proportion of Ogoni economic resources for Ogoni development and
- (3) The right to protect the Ogoni environment and ecology from further degradation.

3.3. By about the end of 1992 MOSOP had become a genuinely popular movement commanding widespread support among the Ogoni. Its leaders included Dr G B Leton, President, Chief Edward Kobani, Vice-President, and Ken Saro-Wiwa, Publicity Secretary.

3.4. On 4 January 1993 there were marches throughout Ogoniland in which between 50,000 and 300,000 people converged on the main towns to proclaim their support for MOSOP. A resolution was passed giving Shell 30 days to quit Ogoniland. There was a series of meetings between MOSOP leaders and officials of both the Rivers State Administration and of the Federal Military Government.

3.5. However, from about the Spring of 1993 onwards a rift began to develop within MOSOP between a faction led by, amongst others, Dr Leton and Edward Kobani, and a faction led by Ken Saro-Wiwa. Among the Saro-Wiwa supporters were Goodluck Diigbo and the defendant Mitee, a barrister, who was the chairman of the Rivers State branch of the Civil Liberties Organisation (CLO). It is difficult for the outsider faced with a welter of allegation and counter allegation, political conflict and personal rivalries to ascertain the true facts and I shall not attempt to do so. But among the bones of contention were:

- (1) How to strike a balance in negotiating with the Federal Military Government and Shell between confrontation and conciliation;
- (2) Whether the Ogoni people should boycott the Presidential elections of 12 June 1993;
- (3) The tactics to be adopted in dealing with inter ethnic disputes. There were violent clashes with two neighbouring tribes: with the Andoni in August 1993 and with the Ndoki in April 1994 (see 4.13);

(4) The political structure of MOSOP. In early 1993 a number of organisations were formed including the Council of Ogoni Traditional Rulers (COTRA); the National Youth Council of Ogoni People (NYCOP); and the Federation of Ogoni Women's Associations (FOWA);

3.6. The Leton faction accused Saro-Wiwa of using these new organizations to gain control of MOSOP. In June 1993 Leton and Kobani resigned as President and Vice-President of MOSOP. Saro-Wiwa assumed the Presidency with Mitee as Vice-President.

3.7. In addition, each faction alleged that the other was corrupt and in the pay of the Federal Military Government. Such allegations were made with particular vehemence by the Saro-Wiwa supporters who called their opponents "Vultures". In turn, the so-called "Vultures" maintained that a group calling itself NYCOP Vigilante was seeking to attack and even to kill them.

3.8. On 21 May 1994 a meeting of Gokana notables took place at the palace of the Gbenemene of Gokana in Giokoo (also known as Gioko or Gionkoo). Several dozen people attended including a number of so-called "Vultures". Among the declared purposes of the meeting was to arrange a reception for two "sons of Gokana" one of whom was Barinem Kiobel. He was a recently appointed Minister in the Rivers State Administration, being Commissioner for Commerce and Industry. On 21 May Saro-Wiwa was campaigning near Giokoo driving from one village to another. Mitee accompanied him on part of the journey but in another car. At the Kpopie junction, about one kilometre from Giokoo, the two cars were stopped by security forces. It is alleged that Saro-Wiwa spoke in an Ogoni dialect to some of his supporters telling them that they should "deal with" the "Vultures" in Giokoo who were in the pay of the government and were responsible for the obstruction of his progress through Ogoniland. It is said that a large crowd then descended on the hall and started a riot which appears to have lasted several hours. Many of those at the meeting were attacked and four were killed. They were: Chief Albert Badey; Chief Edward Kobani; Chief Samuel Orage (S N Orage); and Chief Theophilus Orage (T B Orage). One or more of the bodies (it is not clear precisely how many) were put into a Volkswagen Beetle car and burnt.

3.9. In the days and weeks after the killings a large number of people were arrested by the security forces. Among those arrested in late May were Saro-Wiwa, Mitee and Kiobel. It remains unclear how many were arrested or how many remain in custody.

4. REASONS FOR INTERNATIONAL CONCERN

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4.1. Ken Saro-Wiwa is a well known writer and environmentalist and a former President of the Association of Nigerian Authors. In late 1994 he was one of three recipients of the Right Livelihood Award, which honours those working for the survival of mankind. This prize, sometimes known as the alternative Nobel Prize, was awarded for "his exemplary and selfless courage in striving non-violently for the civil, economic and environmental rights of his people". In early 1995 he was awarded a prize by the Goldman Environmental Foundation of California for "outstanding grassroots environmental work" and also the Hellman/Hammett Award of the Free Expression Project of Human Rights Watch.

4.2. During 1993 it was widely reported that Saro-Wiwa had been arrested on two separate occasions in April and that his passport had been confiscated on 11 June, preventing him from travelling to Vienna to attend the UN World Conference on Human Rights. On 21 June he was detained by police for several days without charge. Then on 13 July 1993 he and two other MOSOP members were charged with sedition and were remanded in custody. Shortly after his arrest he was transferred to hospital to be treated for a heart condition and bailed on 22 July. On 28 December 1993 Mitee and Monday Saro-Wiwa (brother of Ken) were arrested and taken to unknown destinations. On 4 January 1994 Ken Saro-Wiwa himself was put under house arrest. By 7 January all three men had been set free.

4.3. Following the Giokoo killings on 21 May 1994, the Ogoni detainees were held for many months in either military or police detention and without charge or access to lawyers. Many organisations concerned with human rights and free speech and a number of prominent individuals protested to the Nigerian authorities.

4.4. These concerns were voiced against the background of what many have long perceived to be the serious erosion of the rule of law and violations of human rights in Nigeria. I shall merely give a thumbnail sketch of the recent erosion of rights, based upon the sources listed in Appendix 1.

4.1 Erosion of the Constitution and Rule by Decree

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4.5. The Federal Republic of Nigeria has a written Constitution enacted in 1979. It vests legislative power for the federation as a whole in a national assembly consisting of a Senate and a House of Representatives. Amendments to the Constitution require a two thirds majority in both Houses. It is provided that each state shall have its own legislature (there are now 30 states). The Constitution establishes a hierarchy of courts, both federal and state. The effect of sections 230 and 236 is that, with the exception of a few offences triable by the Federal High Court, such as those pertaining to the Revenue, the State High Courts have an exclusive jurisdiction to try serious criminal cases. High Court trials in Nigeria take place before a single judge with a right of appeal from any High Court

(whether Federal or State) first to the Federal Court of Appeal and thence to the Federal Supreme Court. In capital cases the appeal lies as of right and without any requirement for leave. There are a number of safeguards for individual liberty and fundamental rights. Save as provided by the Constitution neither Federal nor State legislatures may enact any law purporting to oust the jurisdiction of the Courts (s4(8)). Fundamental rights guaranteed by the Constitution include those to life (s30) personal liberty (s32) and to fair trial (s33). The National Assembly has a limited power to enact legislation derogating from the rights to life and liberty in times of emergency (s41). The State High Courts have a special jurisdiction to grant redress in any case where fundamental rights have been or are likely to be contravened (s42).

4.6. However, since 1984, a succession of military governments has legislated by decree. Many such decrees have encroached upon personal liberty and restricted fundamental rights by: (1) the suspension or abrogation of large parts of the Constitution; (2) the diversion of trials from courts to Special Tribunals, many of a military character and generally with no right of appeal; (3) retroactive provisions some of them annulling earlier court decisions against the government of the day; (4) provisions authorizing detention without charge or trial; (5) ouster provisions excluding reliance on the Constitution and/or the jurisdiction of the courts to invalidate government action.

4.7. Such ouster provisions prohibit the courts from enquiring into the validity of acts done pursuant to a decree. In broad terms there have been two schools of judicial reaction to such clauses and to the validity of decrees in general. Some Nigerian judges have taken the view that a successful coup begets its own legality. In 1984, the Court of Appeal considered the effect of the two principal ouster decrees promulgated by the Buhari administration. In a striking and much quoted phrase, Ademola J C A said that their combined effect was that:

... on the question of civil liberties, the law courts of Nigeria now blow with muted trumpets.

Again, in 1990, Belgore JSC held that once a military regime achieved power the Court even though "not happy" with an ouster clause must give effect to it.

4.8. But other judges, mostly members of the Lagos State High Court, have asserted their independence and their jurisdiction to decide whether the act in question was done strictly in accordance with the decree relied on by the authorities. If it was not the courts can declare it to be invalid in spite of an ouster clause. This theory has on occasion been invoked to secure the release of detainees whose detention did not strictly comply with the enabling Decree.

4.9. Erosion of the Constitution has tended toward avalanche under the present government of General Sani Abacha. The previous government of General Babangida had come to power by a coup in August 1985. Under Babangida, supreme power was vested in the Armed Forces Ruling Council (AFRC). During the late 1980s and early 1990s, preparations were made for transfer to civilian rule. A new (1989) Constitution

was promulgated. Its provisions as to personal liberty and fundamental freedoms were similar to those of the 1979 Constitution. Progress was slow. Although elections to the National Assembly took place in June 1992, the AFRC insisted on retaining power until a civilian government was installed. On 12 June 1993, presidential elections were held. The general view of both Nigerian and international observers was that the elections had been fair and that M K O Abiola had won. The new President was to be inaugurated, and the 1989 Constitution was to come into force, on 27 August 1993.

4.10. However, the Babangida government refused to recognize the election, alleging that it was corrupt. The election was annulled by decree. In August, Babangida announced his intention to resign and nominated Ernest Shonekan as head of an Interim National Government (ING) with Gen. Abacha as Secretary of Defence. This transition was achieved by a number of decrees. Decree No. 59 of 1993 put an end to the Babangida administration whilst Decree No. 61 created the ING. However, on 10 November, Akinsaya J in the Lagos State High Court, ruling in a case brought by Abiola, declared the ING illegal: Babangida having divested himself of power by signing Decree No. 59 had no power to sign Decree No. 61.

On 17 November, Shonekan resigned and Abacha immediately announced that he was taking over as Head of State and Commander-in-Chief of the Armed Forces. The authority for this appointment was said to be Decree No. 61, which had been declared invalid only the week before.

4.11. Beginning on 21 November 1993, the Abacha government promulgated a large number of decrees. They included the following:

- Nos 107 and 17 of 1993 (the numbering of decrees is erratic) annulling the 1989 Constitution and suspending some provisions of the 1979 Constitution;
- No. 110 of 1993 dissolving the State Houses of Assembly and the State Executive Councils constituted by State Governors. The effect was to put all states under military administration.
- Nos 112 and 114 of 1993 dissolving the National Electoral Commission and the only two political parties which had been allowed to field candidates in the June 1993 election. This empowered the government to dissolve any other party and to ban processions of more than three people.
- No. 11 of 1994 amending the State Security (Detention of Persons) Decree No. 2 of 1984 by extending the power to detain those considered a threat to the security of the state from six weeks to three months. This was one of a number of decrees promulgated in September 1994. Others proscribed three newspaper groups and abrogated certain court judgements. The Attorney-General, Dr Olu Onagoruwa, called a press conference declaring that the September decrees had not been issued by his office and calling for their withdrawal. He was dismissed.

- No. 14 of 1994, promulgated on 1 October 1994, abrogating the right to apply for habeas corpus.

4.12. Meanwhile, on 11 June 1994, Abiola had declared himself President. On 23 June 1994 he was arrested and, in August, charged with treason.

4.2 Human Rights Abuses

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4.13. Abuses of human rights under various military regimes have been widely reported in recent years. Amongst the matters regularly reported by human rights groups, including Amnesty International and the Civil Liberties Organization, are allegations of arbitrary arrests, detentions without trial, torture by the security forces and extrajudicial executions. The US State Department in its Country Reports on Human Rights Practices for 1994 stated that "Nigeria's human rights record remains dismal." Of particular concern are the allegations of abuses in Rivers State, including that:

(1) in 1990, between 80 and 200 demonstrators in Umuechem village were shot dead by police. A Judicial Committee of Enquiry reported to the government in January 1991. Leaks to the press of its findings suggested that it had recommended prosecution of a named police officer but no action was taken against him or anyone else.

(2) the security forces encouraged and assisted attacks on Ogoni communities by members of the Andoni tribe in August 1993 and of the Ndoki tribe in April 1994. In both cases a number of Ogonis were killed and villages destroyed.

(3) a Rivers State Internal Security Task Force set up to "restore order" in Ogoniland had killed hundreds of Ogonis, driven out thousands more and destroyed many villages. These activities were said to have begun before, but to have intensified after, the Giokoo killings, on the pretext of a government drive to "restore order" in Ogoniland. The Task Force has about 200 members drawn from the Mobile Police Force and the three Armed Forces. It is under the command of Lt-Col. Paul Okuntimo. A number of human rights organizations have reported allegations by civilians that Okuntimo personally supervised and committed atrocities. One organization, Human Rights Watch/Africa, claims to have obtained confirmation of such reports from members of the Task Force.

4.14. In addition, under Abacha a large number of political opponents of the military government have been detained, sometimes for a comparatively short time, sometimes for many months. They include politicians, military officers, trades unionists, human rights workers and lawyers. The most widely publicized case has been that of Abiola. Although granted bail by the Court of Appeal in November 1994, Abiola, who is in poor health, remains in custody, and his trial for treason proceeds very slowly with frequent adjournments.

4.15. The Nigerian government maintains that it is committed to the cause of human rights. The alleged abuses are largely denied or attributed to opposition groups, such as "radical" Ogoni factions. In January 1995 at the 51st Session of the UN Commission on Human Rights meeting in Geneva a resolution expressing "deep concern" at human rights violations in Nigeria was defeated by 21 votes to 17 with 15 abstentions.

4.3 Trial by a Special Tribunal

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4.16. In November 1994 Abacha appointed a CDST to try offences arising out of the "civil disturbance which occurred on 21st May 1994 at Giokoo". The tribunal is constituted under a 1987 decree. It consists of two High Court judges and a military officer. Its decisions are effective only upon confirmation by the AFRC (see 18.7) and cannot be challenged in the courts. There is no right of appeal. The tribunal can impose the death penalty.

4.17. Earlier CDST trials gave no reassurance to those concerned that their proceedings were inherently unfair. In 1992 there was inter-communal and religious strife in Kaduna, Northern Nigeria, between the Hausa Fulani majority and the Kataf ethnic minority. Hundreds of people were killed. The Babangida government appointed two special tribunals, one chaired by Adegbite J and the other by Okadigbo J to try offences arising out of the disturbances. About 70 people were tried, of whom about 30 were sentenced to death.

4.18. The most prominent defendant was Gen. Zamani Lekwot, an ethnic Kataf and former Nigerian ambassador-at-large to four African states. He and five others were initially charged with unlawful assembly. Their trial before the Okadigbo Tribunal commenced on 29 July 1992. The prosecution withdrew the charges on 4 September. The defendants were immediately rearrested. Lekwot and six others were then charged on a 22-count indictment, which included a charge of culpable homicide. During the second trial before the Okadigbo Tribunal, the defence brought proceedings before the Kaduna High Court challenging its legality and fairness. Both the High Court and the Court of Appeal held that they had no jurisdiction. While a final appeal to the Supreme Court was pending, the Federal Military Government promulgated Decree No. 55 of 1992. This declared that decrees took precedence over the Constitution and that no action would lie for any alleged breach of Part 4 of the Constitution (guaranteeing fundamental rights) in respect of anything done or proposed pursuant to any Decree. Decree 55 was made retrospective to 30 July 1991.

4.19. It was widely reported that in both trials Okadigbo J had expressed hostility to the defence and that on at least one occasion he had threatened to jail defence counsel for contempt. On 4 January 1993 defence counsel withdrew from the trial in protest against Decree No. 55. On 4 February six of the defendants were convicted and sentenced to

death; the seventh was acquitted. Meanwhile, the Okadigbo Tribunal had convicted three others including Lekwot's brother of unlawful assembly, and had sentenced them to 18 years' imprisonment. These verdicts were decided during the absence from the Tribunal of one of its members, Godwin Graham Douglas S A N, who resigned in protest.

4.20. In August 1993, after a storm of national and international protest, the government commuted all the death sentences passed by the two tribunals and substituted jail terms of five years.

4.21. No sensible person could either doubt the seriousness of the Giokoo killings or challenge the right of the Nigerian authorities to investigate and try offences relating to them before an independent and impartial tribunal. But, against the background of an eroded Constitution, alleged human rights violations and arbitrary detentions, there were many who feared that the killings were being used as a pretext to secure unjust convictions of political opponents by a hand-picked tribunal whose decisions could not be subjected to independent review or appeal.

5. CHARGES AND TRIALS

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5.1. In essence the prosecution case is that the deceased were killed by, amongst others, defendants 4-15 (i.e. Kpuinen and Bera from Group A and all the Group B and C defendants). It is alleged that the first three defendants, Saro-Wiwa, Mitee and Kiobel encouraged ("counselled and procured") the attacks on the deceased. These allegations are reflected in three indictments. Those for Groups B and C are identically pleaded. Omitting the formalities of statute and taking in each case the killing of Badey as an example, the two forms of indictment read:

5.2. for Group A:

[The defendants] on the 21st day of May at Giokoo in Gokana Rivers State murdered Chief Albert Badey in that the 1st, 2nd and 3rd accused persons counselled and procured the 4th and 5th accused persons in company of others some of whom are at present at large, to inflict grievous harm on the participants of the Council of Chiefs meeting at Giokoo whereby the said Chief Albert Badey was killed.

5.3. for both Groups B and C:

[The defendants] on the 21st day of May 1994, at Giokoo, in Gokana Rivers State *counselled and procured by Kenule Beeson Saro-Wiwa "President of Ogoni Nation" to storm and kill "Vultures" at a meeting of Chiefs at Giokoo*, you, in concert with others now at large armed with assorted dangerous weapons while shouting "E-sho-be" attacked and killed Chief Albert Badey (italics added).

5.4. The differences between these two forms of indictment are puzzling:

(1) In one indictment, three people are said to have counselled and procured grievous harm only whilst, in the other, only one of those three is said to have counselled and procured murder.

(2) The indictments for Groups B and C include the words italicized referring to Saro-Wiwa. Yet, he is not one of the 10 defendants charged in either of those indictments. Furthermore, in relation to any one of those 10, it is unnecessary to prove that he was encouraged by anybody.

(3) The means of the killing are pleaded in one form of indictment and not the other.

5.5. Point (1) may suggest that the prosecution are unsure of what their case is against the first three defendants.

5.6. In mid March, during the trial of Group A, the prosecution made a startling application. They suggested that the trial of Group B should begin immediately before the same tribunal that was already trying Group A. It was also submitted that once a second trial had started it would be possible to start a third (that of Group C) - again before the same tribunal and (although this may not have been explicitly argued) presumably by extension further trials until all suspects had been dealt with in virtually simultaneous trials. For reasons which I shall analyze in Section 10, this was an application so unreasonable that one would have expected any impartial tribunal to have rejected it. In fact, on 28 March the tribunal ruled in favour of the prosecution.

5.7. This ruling of the tribunal has had an important bearing on my views as to its independence and impartiality and the propriety of publishing this report before the end of the first trial.

6. IS IT APPROPRIATE TO PUBLISH A REPORT DURING THE TRIAL?

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6.1. It may well be that in most cases the report of an international trial observer should be published after the conclusion of the trial. There is a risk that earlier publication might be seen as interference in a domestic trial process. However, there are cases where, even at an early stage of the trial, the apparent risk of unfairness and injustice is so great that a report should be published before its conclusion.

6.2. It is my view that the present is such a case. The risk of unfairness and injustice is apparent for the reasons identified in the Summary of Principal Conclusions above.

6.3. Bearing in mind that there are already 15 people, and may be many more, who face possible conviction and condemnation to death, I believe that there is a positive duty to publish a report now.

6.4. If the publication of the report were to await the end of a trial, then the question would be: which trial? There is no telling how many trials of essentially the same case there will now be before the same tribunal. If it is wrong to publish a report during the proceedings of the tribunal, then logically it is necessary to wait until all the trials have concluded. But, by that time, defendants in the earlier trials might have been

unjustly convicted and even executed. The illness of Saro-Wiwa and his recent admission to hospital may well delay the conclusion of the trial of Group A still further.

7. SOME MISCONCEPTIONS

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7.1. I have seen a number of reports relating to the trial containing inaccuracies which it is only fair to correct and which may obscure some of the real issues:

7.2. That the trial is that of Saro-Wiwa alone or (according to some reports) that of Saro-Wiwa, Mitee and Kiobel alone.

Understandably the fame of Saro-Wiwa has been a potent reason for the worldwide attention given to the trial. But it must be stressed that there are believed to be about 27 people still detained in relation to these murders, in addition to the 15 defendants (see Appendix 7). Since they have not been charged or brought before a court they are beyond the scrutiny of press and public. They are denied any constitutional means of securing their freedom.

7.3. That the defendants have been denied legal representation.

This suggestion is quite untrue. There is a substantial team of counsel appearing for the defence including some of the best known barristers in Nigeria. They are led by Chief Gani Fawehinmi, a prominent human rights lawyer. Mitee, who is a barrister by training, was represented by counsel at the start of the trial but has now chosen to represent himself.

7.4. That the tribunal is a military tribunal.

In my view this is incorrect. It is true that the Decree empowering CDSTs requires them to have at least one member who is a military officer (see 8.3). But I agree with the view of Professor Nwabueze that strictly speaking a military tribunal is one all of whose members are military officers which applies courts martial procedure. Whilst there have been a number of tribunals of this kind set up under other Nigerian decrees, a Civil Disturbances Special Tribunal has only one military member and does not apply courts martial procedure. The designation of the tribunal is to my mind a secondary consideration. A much more important question is whether it is independent and impartial.

7.5. On the other hand the Nigerian authorities have not assisted an accurate understanding of the nature of the tribunal. In January of this year Mr Rano of the Nigerian High Commission in London wrote concerning the trial to two British MPs. On 31 January he wrote to Dr John Marek MP enclosing a brief about the trial which stated that the tribunal was made up of two serving High Court judges. The brief was dated 17 January. Curiously, Mr Rano had already written to Glenda Jackson MP giving a different account of the tribunal. His letter to her (also dated 17 January) stated that the tribunal "will be made up of two serving High Court judges and one other individual". Even that letter neglected to mention that the third member had to be a military officer.

PART C: THE PROCEEDINGS

8. CIVIL DISTURBANCES SPECIAL TRIBUNALS

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8.1. Civil disturbance is very broadly defined in Decree No. 2 of 1987 as including:

riot, unrest, civil disorder, civil commotion, rampage, breach of the peace having the effect of destabilising the peace and tranquillity of the nation or affecting public order and safety [s9(1)].

This definition apparently covers any public disturbance going beyond a minor argument.

8.2. The Decree gives the President, Commander in Chief of the Armed Forces, two powers. He may appoint an Investigation Committee to investigate the causes of, and culpability for, civil disturbances and the like [s1]. Secondly, he may appoint a Civil Disturbances Special Tribunal (CDST) to try all cases of civil disturbance [s2].

8.3. Section 2 of the Decree provides that a CDST shall consist of a chairman, who must be a serving or retired judicial officer of any of the superior courts of record of Nigeria, and at "least four other members one of whom shall be a member of the armed forces". Anyone who has investigated, searched for or arrested the accused is ineligible to be a member [s2(2)]. A later Decree (No. 4 of 1992) has altered the rules as to membership: now there must be a judicial chairman and not more than six other members, one of whom must be a serving member of the armed forces.

8.4. The tribunal can try any offence listed in Schedule 1 to the Decree and may award any penalty specified in either the Criminal or Penal Codes which apply respectively in southern and northern Nigeria [s3(1)]. Schedule 1 covers a large number of offences. Criminal Code offences include treason, murder, a range of offences of assault, arson and damage to property and even some offences involving no element of injury or damage such as unlawful procession, insult to religion and unlawful possession. The list of Penal Code offences is even longer. For each code it is provided that the tribunal may try "any other offences relating to or connected with civil disturbances as defined in this Decree ". The President is empowered to modify the list of triable offences. [s3(3)]. Anyone who "acted in concert with any other person" or who "knowingly took part to any extent whatsoever" in an offence may be treated as if he were charged with it [s3(2)].

8.5. Section 4 regulates procedure which must be in accordance with the provisions of Schedule 2. Rules 1 and 2 of this Schedule provide:

1. The trial of offences under this Decree shall commence by way of an application, supported by a summary of evidence or affidavit made to the tribunal by the prosecutor.

2. Where after the perusal of the application and the summary of evidence, affidavit or any further evidence in such form as the Tribunal may consider necessary, the tribunal *is satisfied that any person appears to have committed an offence referred to in this Decree*, it shall cause that person to be brought before the tribunal on such date and at such time as it may direct. (italics added)

8.6. On the face of it this "trigger provision" provides some protection to a defendant against a wholly arbitrary prosecution. The italicized words may not require a prima facie case but they make it clear that there must be at least the makings of a case against a defendant before his trial can commence. Indeed the

rule contemplates that the tribunal may of its own motion require the prosecution to furnish more evidence where it is not satisfied with what has been provided.

8.7. If the accused pleads not guilty the prosecutor may open the case. He then must call his witnesses who may be cross-examined by or on behalf of the accused. If at the close of the prosecution case there is insufficient evidence against the accused he may be acquitted. The accused is entitled to open his case, to give evidence (he does not have to) and to call witnesses. The prosecutor may reply if the accused calls any evidence or puts in any document not going solely to character. The accused or his counsel may then sum up his case [Rules 3-8].

8.8. The accused is entitled to be represented and must be assigned a lawyer if charged with an offence punishable by death or life imprisonment [s4(3)].

8.9. Procedurally this is not too far from the British accusatorial model. But the tribunal has a residual discretion to modify ordinary criminal procedure. Paragraph 17 of Schedule 2 provides:

Where these rules contain no provision in respect of any matter relating to or connected with the trial of offences referred to in this Decree the provisions of the Criminal Procedure Code or depending on the venue, the Criminal Procedure Act shall, *with such modifications as the circumstances may require*, apply to the trial of the offences generally (italics added).

8.10. Clearly this broad discretion is capable of working injustice: the tribunal may decide that the "circumstances require" that the accused should not be afforded a procedural protection or right that he would have if he were appearing in an ordinary court.

8.11. The tribunal must announce its findings but is not required to give reasons for them. If it convicts it "shall impose the appropriate penalty prescribed in the relevant enactment." The tribunal may recommend mercy but must give reasons for doing so [Schedule 2, Rules 10-11].

8.12. There is no means to challenge the tribunal's findings. The section ousting the jurisdiction of the courts is typical of the decrees generally. Section 8(1) provides:

The validity of any decision, sentence, judgement, confirmation, direction, notice or order given or made, as the case may be, or any other thing whatsoever done under this Decree shall not be enquired into in any court of law.

8.13. This belt and braces provision purports to exclude, for example, any right of the accused to argue before any Court that there was no civil disturbance in the first place; that the tribunal is biased against him; that it is making up the rules as it goes along or that he should be given bail.

8.14. There is no right of appeal. Nor is there provision for review by a body independent both of the tribunal and of the State. Section 7 provides that the "confirming authority" is to be the Armed Forces Ruling Council (AFRC) and that:

Any sentence imposed by the Tribunal shall not take effect until the conviction or sentence is confirmed by the confirming authority

The confirming Authority may confirm or vary the sentence of the Tribunal.

8.15. Remarkably there is no provision for the quashing of the conviction. Perhaps a refusal to confirm the conviction would count as an acquittal but this is not made clear.

8.16. Sentence of death may be passed for a number of offences over which a CDST has jurisdiction including, of course, murder. The death sentence is mandatory for murder.

9. PRE-TRIAL HISTORY

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9.1. On 22 May 1994, the day after the killings, Lt-Col Dauda Komo, Military Administrator of Rivers State, held a lengthy press conference devoted to the Giokoo killings, which was videotaped (I have seen it). He blamed the killings on the "reckless and irresponsible terror group of the MOSOP element" and described Saro-Wiwa as a "dictator who has no accommodation and no room for any dissenting view". He stressed that he had ordered the arrest of those within MOSOP who were responsible. Hundreds of arrests were made in the succeeding weeks.

9.2. It appears that the police investigation started immediately, and that many statements were obtained within a relatively short time. Appendix 8 is a list of the statements served on the defence by the prosecution. It will be seen that the majority of the statements bear dates in May, June and July (only five have later dates).

9.3. On 10 August the *Guardian* (Nigeria) reported that Mitee and Saro-Wiwa had applied for bail in the Federal High Court, Port Harcourt. Sanyaolu J had earlier held that he had jurisdiction to grant bail. Counsel for the Rivers State Administrator and Commissioner of Police argued that the Federal High Court had no jurisdiction since the alleged offence was within the exclusive jurisdiction of the Rivers State High Court. Sanyaolu J stayed the proceedings pending the prosecution's appeal on the jurisdictional point.

9.4. On 29 August Reuters reported that Lt.-Col. Dauda Komo had said that the investigations were substantially complete and that the suspects would soon be charged.

9.5. In late October it was reported that the Federal High Court had ordered that Saro-Wiwa be given access to his lawyer, a doctor, his family and newspapers. The Court had yet to rule on the issue of jurisdiction. I have not been able to establish the outcome of this application for bail, which has in any event been overtaken by an application made to the tribunal.

9.6. It was not until 4 November that the tribunal was constituted. The relevant instrument, issued by Gen. Abacha as Commander-in-Chief of the Armed Forces and Head of State, is copied as Appendix 5. It appointed three members: Mr Justice Auta as chairman, Mr Justice Arikpo and Lt.-Col Ali.

9.7. The following details of the career of the two judges and Lt.-Col Ali are based on reports in the Nigerian press. Auta J is a judge of the Federal High Court sitting in Lagos. He was called to the Bar in 1977 and worked for the government under the Babangida administration. He was Attorney-General of Borno State. Arikpo J was appointed a High Court Judge of Cross Rivers State in 1976. He studied at the Middle Temple and was called to the Bar in 1964. He was Attorney-General of Cross Rivers State. Lt-Col Ali was reported to have served as the Military Assistant to Major General Olu Bajowa who had been Director General of the Ministry of Defence when Gen. Abacha was Chief of Defence Staff. I was told that he has a first degree in law and higher degrees in criminology.

9.8. On 21 November 1993 the Chief Justice of the Federation, Mohammed Bello, swore in the three members of the tribunal and cautioned them not to allow anyone to use the proceedings as a platform for political statements.

9.9. The defence was anxious to know when the trial was to start. Chief Gani Fawehinmi wrote on 27 November to Belgore CJ, Chief Judge of the Federal High Court, for information. The judge replied by letter dated 5 December:

This Court has nothing to do about the Tribunal. It is the responsibility of the Presidency.

I advise that you direct your request to the Secretary of the Government of the Federation or the Secretary of the Tribunal.

9.10. The press reported that the members of the tribunal had paid a visit to Lt-Col Dauda Komo. On 26 December, Dateline reported that Mr Justice Auta had said at that meeting that the trial would begin soon in Port Harcourt.

9.11. At a press conference on 10 January 1995, the Attorney-General announced that the trial would begin on Monday 16 January.

9.12. The defence immediately issued proceedings in the Federal High Court seeking an order that the tribunal was unconstitutional, in that one of its members was a military officer, and in breach of the African Charter by not providing a right of appeal. I believe that these proceedings are still pending.

9.13. On 16 January the defence team attended the trial venue, the House of Assembly in Port Harcourt. The prosecution did not attend. Neither Saro-Wiwa nor Mitee were brought to the hearing. Auta J and Lt-Col Ali attended but Arikpo J was absent. *Vanguard* reported Auta J as having said:

It seems there is a mix up today. My tribunal is not going to sit. The Prosecutor is even in Lagos ...
. The absence of the Prosecutor has been communicated to other members of the tribunal including Justice Arikpo.

Chief Fawehinmi protested at what he described as the refusal of the government to allow his team to meet their clients and at the lack of information given to the defence. The trial was adjourned until the first week of February.

9.14. On 28 January the prosecution delivered their application to commence the trial of Group A defendants and the summary of evidence against them.

Comment

9.15. Counsel for the Rivers State Administrator argued in August that the offences were within the exclusive jurisdiction of the Rivers State High Court. This argument seems to me to be correct. Yet, in November, the tribunal was appointed directly by the President.

9.16. No one was charged until 28 January. Yet the evidence now relied on was substantially complete months before.

9.17. Even though a relatively junior Federal High Court Judge had been appointed as chairman of the tribunal, the Chief Judge of the Federal High Court felt constrained to write disassociating the High Court from the tribunal and describing it as "the responsibility of the Presidency".

9.18. It may be that there was a mix up on 16 January. But the explanation given by Auta J suggests that there had been direct contact between the prosecution and the tribunal of which the defence had not been informed.

9.19 Both the statement by Auta J that the trial was to begin soon and the announcement of a specific trial date by the Attorney-General were made before the prosecution's summary was delivered. A decision had been made to hold a trial before the tribunal was in a position to decide whether there was any evidence against anybody. This was plainly a breach of Rule 1 of Decree 2 of 1987.

10. THE PROSECUTION'S APPLICATIONS TO COMMENCE THE TRIALS

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10.1. The point made in the last paragraph above is no mere technicality. It goes to the root of the tribunal's jurisdiction to try men who had been held for months in military or police custody without charge and without access to lawyers. The prosecution was obliged to make an application to commence the trial supported by a "summary of evidence or affidavit made to the tribunal by the prosecutor". Not only had there been no application to commence the trial of the Group A defendants at the time when the date of trial was announced, but the summaries later delivered by the prosecution to the tribunal disclosed no evidence at all against at least 11 of the 15 defendants now charged.

10.2. Since there are three groups of defendants it is understandable that three separate applications to commence were made. As one might expect, the same format was used for each application. The application relating to Group A commences by identifying the defendants and the relevant decree. The charges follow. There then follow 34 pages setting out the evidence of 30 witnesses, generally in précis form but in three cases consisting of typescripts of the witness's statement. Finally there is a list of witnesses.

10.3. In a number of cases the précis of a witness's evidence is purely factual. In others there is substantial comment, none of it favourable to any of the five accused. In the cases of Saro-Wiwa, Kiobel, Kpuinen and Bera, the facts alleged in the summary seem to me to disclose, if not a prima facie case, at least some basis for suspicion. Mitee, however, is mentioned only once: by a witness called Danwi, whose statement had been fully transcribed. He merely says that when Saro-Wiwa's car was stopped at the crossroads near Giokoo and Saro-Wiwa was arguing with security men: "I also saw Mr Ledum mitee (sic) inside his own car near Ken Saro-Wiwa's car."

10.4. Therefore, the tribunal could not have considered that there was any proper basis for the trial of Mitee.

10.5. The applications relating to Groups B and C are dated 28 February and in substance are the same as that for Group A. In other words, although the wording of the charges differs significantly (see 5.2-3) the evidence relied on in the summaries is virtually the same: differences are minimal. Plainly, the prosecution had slightly adapted the application and summary for Group A in order to create those for Groups B and C. In doing so, they had apparently failed to notice that none of the 10 defendants in either of these groups was so much as mentioned in any summary statement or précis. The only reference to their names is in the charges. As in the case of Mitee, there was, therefore, no basis for a trial of any of those 10.

10.6. The plain conclusion is that the tribunal has ignored even the minimal safeguard for defendants prescribed by Rules 1 and 2 and has proceeded with the trials of 15 men even though not a shred of evidence was disclosed against 11 of them in any summary. The tribunal has a specific power to require "further evidence" in order to supplement the material in the summary. But it failed to exercise that power or to enquire of the prosecution as to the basis on which they were seeking a trial of any of the 11. When the apparent lack of evidence was raised by the defence on two occasions, the point was dismissed by the tribunal (see 11.17; 11.20; 11.32).

10.7. It should be appreciated that neither the defence nor the tribunal had the bundle of prosecution witness statements until they were disclosed by the prosecution on 29 March. Comparison of those statements against the summaries shows that in a number of cases the précis of a witness's statement was misleading. Further, the summary in relation to Kiobel was unfair: it exaggerated the effect of the evidence against him and omitted crucial evidence in his favour (see 22.5; 22.12; 22.19).

11. PROCEEDINGS BEFORE THE TRIBUNAL

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11.1. The proceedings against Group A recommenced on 6 February. Defence counsel complained that during the nine months of their detention the five defendants had not been allowed to see any lawyers. The tribunal ordered that counsel should be allowed immediate access to their clients and that Saro-Wiwa should be allowed to see a doctor. The trial was adjourned to 21 February.

11.2. Since then there have been a number of adjournments. The recollections of trial counsel and newspaper reports suggest that the tribunal sat on the following days: 21, 23, 27 and 28 February, 6-10 March, 13-14 March and 16-17 March. As I understand it most of the time was taken up with legal argument. I attended hearings on 23, 24, 27, 28 and 29 March.

11.3. On those five days the tribunal heard further argument and gave rulings concerning matters which had already been argued prior to my arrival. Rather than trying to deal with matters chronologically, I shall begin with a general description of the proceedings as I observed them and will then summarize the evidence already given and the main arguments and rulings by topic.

11.4. On the first day of my attendance, 23 March, I sought and was allowed a meeting with the members of the tribunal. I was shown into their chambers via an ante room guarded by a number of soldiers. After formal introductions we discussed procedural matters. Auta J told me that the ordinary rules of Nigerian criminal procedure would apply to the trial and that where there was a lacuna in those rules the tribunal would refer to English authority. I asked who bore the burden of proof and what was the standard of proof. He replied that the ordinary rules applied, the burden being on the prosecution. I took this to mean that the tribunal would not convict any defendant on any charge unless it was sure of his guilt. Auta J went on to say that the tribunal would apply the Constitution. We did not discuss which parts of the Nigerian Constitution would apply: I took it that the tribunal would consider itself bound only by those parts not suspended by the Abacha regime.

11.5. The tribunal sits in a large room in the House of Assembly in Port Harcourt. Its members sit at one end of the room with three soldiers behind them. Other armed soldiers sit at the farther end of the room. Facing the members of the tribunal is the dock; the prosecution sit to one side and the defence to the other. The proceedings are conducted in an orderly manner. Auta J is clearly in command and asks pointed questions of both sides during argument. All three members of the tribunal appear to be writing down virtually every word of the proceedings. There is a computer assisted service for the recording of evidence and the prompt provision of transcripts. On important questions of principle, the tribunal adjourns its

decision, generally for several days. Its rulings summarise the contentions of both sides, refer to relevant legal authority and give reasons for the decision. Although the trial is heavily and closely guarded by soldiers the atmosphere is surprisingly relaxed. Occasionally, there is good humoured banter between Auta J and counsel, sometimes involving the defendants themselves.

11.6. I have been able to speak to a number of international observers who had attended earlier stages of the trial. Their accounts were consistent with my impression that the proceedings are being conducted in an orderly manner.

11.7. However, I was concerned that some witnesses might be frightened or inhibited by the presence of armed soldiers within the court room, for which I could see no reason.

11.8. The Assembly House is part of a heavily guarded administrative compound. Public access to the trial is strictly limited. At earlier stages of the trial, there had been complaints that supporters and relatives of the defendants were harassed, beaten and denied entry to the court by soldiers. However, by the time of my attendance, a small number of supporters of both sides (defendants and deceased) were being allowed to attend. There were also observers from the Nigerian Bar Association and from Nigerian human rights groups. At earlier stages international observers had attended the trial from time to time, including representatives of various diplomatic missions and human rights groups. A large contingent of accredited journalists has attended every stage of the trial. Reporting of the trial in the Nigerian press has been very detailed. Frequently remarks made by counsel and Auta J are quoted verbatim. When comparing press reports of proceedings against my own recollection and notes, I found them to be generally accurate. Again press reports of earlier proceedings were consistent with the recollections of counsel. Where I have not had access to a transcript, I have, therefore, relied upon the press.

Evidence Given in March

11.9. Only two witnesses have so far given evidence. Dr Leton had made a long statement dealing with the history of MOSOP. Much of it was plainly hearsay or opinion based on a mere belief as to what had occurred. For example:

It is our contention, from every evidence available to us (which we have herein unreservedly made available to you) that the Gionkoo murders were planned and carefully executed by pre-appointed assassins Saro-Wiwa must be exposed for what he is: a habitual liar: a person who uses the travails of his people to achieve his selfish desires and ambition ... a person who is prepared to engineer the elimination of his elders ... a person who in this situation cannot escape complicity in the murder of the four prominent Ogoni Leaders.

It seems to me that such evidence must be as inadmissible in Nigerian law as it is in English.

11.10. Dr Leton's evidence, as reported in the press, related to the grievances of the Ogoni and the split within MOSOP's leadership, which he attributed to Saro-Wiwa's ambition. He alleged that after the 12 June 1993 elections NYCOP members had killed a large number of Ogoni and destroyed their property. On 18 May 1994, he had heard a rumour that seven prominent people had been sentenced to death. They included three of the deceased chiefs and Priscilla Vikue (see below). During his evidence the tribunal ruled inadmissible an anonymous list of 34 people allegedly killed by NYCOP.

11.11. Priscilla Vikue was the only other witness to have given evidence prior to my visit. She reportedly told the tribunal that in 1993 and 1994 there had been intimidation by NYCOP, whose members had destroyed her home. She said that Saro-Wiwa "once threatened that the heads of prominent sons who stood in the way of Ogoniland would roll," and alleged that Saro-Wiwa told her that if she was not part of the Ogoni revolution she would be "consumed" by it.

Challenge to the Jurisdiction of the Tribunal

11.12. The defence argued that Decree 2 of 1987 required the President to appoint an investigation committee before appointing a CDST. Since there had been no investigation committee, the Auta Tribunal had no jurisdiction to hear the case. The prosecution replied that there was no requirement for the President to inform anyone of a decision to set up an investigation committee. Hence, they argued, there was no breach of proper procedure.

11.13. On 7 February the tribunal upheld the prosecution argument. According to press reports, the tribunal held that there was no requirement that an investigation committee be appointed prior to a CDST, and that neither party was in a position to say whether there had in fact been a committee. Auta J reportedly described the defence argument as "presumptuous, misconceived and lacks merit." He wondered how the defence had got the information that there had not been an investigation committee.

Comment

11.14. In my view Decree 2 does not require the appointment of an investigation committee prior to the appointment of a CDST. Nevertheless, it is surprising that the prosecution did not know whether there had been an investigation committee, and that the tribunal showed no interest in finding out. The findings of such a committee would have been of great interest and value to both sides. If there has been an undisclosed earlier investigation that exonerated one or more of those presently charged and/or implicated others as yet uncharged, then the potential for injustice is obvious.

Applications For Bail

11.15. On 13 March, the tribunal gave a reserved judgement on applications for bail by the five Group A defendants (a copy of which I have seen). Both sides had filed detailed affidavits supplemented by oral argument.

11.16. Decree 2 contains no provisions authorizing a CDST to grant bail. The defence argued that the jurisdiction to do so derived from the Criminal Code. They relied on the character of the defendants and their standing within the community as evidence that they would be unlikely to abscond. It was pointed out that a number of the defendants required medical treatment. Their detention in military or police custody rather than in an ordinary prison was said to be unlawful.

11.17. The only witnesses to allege that Saro-Wiwa told his followers on 21 May 1994 to "deal with" the "Vultures" are Charles S. Danwi and Nayone Akpa, who had made statements in June 1994. Subsequently, both had sworn affidavits alleging that they had been bribed to give false evidence. At the hearing on 21 February, Chief Fawehinmi read out the affidavit of Danwi as evidence of the weakness of the prosecution case. Some of the defendants also argued that the summary of the prosecution case disclosed no evidence against them.

11.18. The prosecution replied that the release of the defendants could jeopardize the fragile peace in Ogoniland and that enraged supporters of the murdered chiefs might attack the defendants if they were released. Hence detention in military or police custody was justified. Rather than granting them bail the tribunal should hear the case as soon as possible. The summary was said to be adequate and to disclose a sufficient case against all five defendants; the allegations of bribery were "too good to be true".

11.19. The tribunal refused the applications holding that there was a risk that the defendants might abscond. The tribunal had power by virtue of Section 236 of the Criminal Procedure Act to order their detention in prison "or other suitable place of security". In this case police or military detention was necessary because of a risk that the defendant's supporters might storm a prison to secure their release. The tribunal referred to

a recent and widely publicized incident in Kano, where Muslim fundamentalists had stormed a prison and decapitated a prisoner whom they believed guilty of blasphemy.

11.20. The tribunal rejected the argument that the summaries disclosed no evidence against some of the defendants: "What the prosecution is required to give the Tribunal and the accused is the summary of the evidence it intends to use against the accused." To consider the evidence at the bail application stage would be tantamount to allowing the defence to submit at the outset that there was no case to answer. Hence the defence argument was "at best premature."

Comment

11.21. Although the Benue State High Court has held that in non capital cases there is a basic right to bail, it is clear that bail in serious cases is granted less frequently in Nigeria than in England. It is rare in capital cases.

11.22. It may be, therefore, that the refusal of bail to any of the five defendants against whom there was some evidence of guilt disclosed in the summary was consistent with decisions in comparable Nigerian cases. The ruling that the defendants should stay in military or police custody is very disturbing. It is, to say the least, highly unusual. Other defendants in high profile criminal trials have been kept in ordinary prisons during their trial (e.g. Zamani Lekwot and Abiola). But without a detailed knowledge of the security arrangements at jails, military bases and police stations, I am unable to conclude that the decision was plainly wrong or biased. I note that on 25 April the tribunal ordered that Saro-Wiwa be immediately admitted to hospital for medical tests. (The order was reportedly not carried out until 3 May, when Saro-Wiwa was transferred to a military hospital.)

11.23. However, the ruling on the submission that the summary disclosed no case against some of the defendants seems to me to be an abdication of the tribunal's duty under Rules 1 and 2 of Schedule 2 to the Decree. Quite apart from the provisions of those rules, it is surely elementary that anyone charged with any offence is entitled to release if the prosecution appears to have no case against him: all the more so where he has spent months in custody without charge or appearance before a court.

The Argument about Disclosure

11.24. After the evidence of Dr Leton and Miss Vikue, the defence submitted that they were hampered by not having copies of the statements of the witnesses the prosecution proposed to call. They would consider withdrawing from the trial if their disclosure was not ordered. They relied on Section 33 of the Constitution which guarantees a fair hearing and adequate facilities for the defence and invoked Section 363 of the Criminal Procedure Act 1945:

The procedure and practice for the time being in force in the High Court of Justice in England in criminal trials shall apply to trials in the High Court in so far as this Act has not specifically made provision therefore.

11.25. Relying on current English practice, the defence argued that they should be given all the statements of proposed prosecution witnesses, all unused material in the possession of the prosecution and a full list of exhibits. The prosecution argued that the defence were entitled only to what an English defendant would have been entitled to in 1945. They offered to let defence counsel see the statements immediately after each witness had given evidence-in-chief.

11.26. On 23 March, the first day of my attendance, the tribunal ruled. It rejected the argument that the practices of 1945 should prevail. It ordered that by Monday 27 March the prosecution should supply the defence with all statements of anyone whom they proposed to call. However, it ruled that no case had been

made out for the disclosure of a list of exhibits and that in relation to the statements of witnesses the prosecution were not calling, the defence must establish a positive case for disclosure.

Comment

11.27. The ruling was plainly right as far as it went. However, if the tribunal was following current English practice it would have ordered a full disclosure of all unused material. I could see no reason to deny the defence a list of prosecution exhibits.

The Argument about Simultaneous Trials

11.28. In mid-March, the prosecution applied that the trial of Group B should immediately commence before the Auta Tribunal and that it should also try Group C. The argument continued on 24 March and the ruling was given on 28 March.

11.29. The defence strongly objected. (It should be noted that most of the defence counsel appearing in the group A trial also appear for one or more of the other defendants.) They argued that the prosecution proposal was unfair. Their main argument related to bias. The leading English cases on this topic were cited to the tribunal by both sides. The legal concept of bias does not necessarily mean a conscious partiality towards one side or the other. The test is whether there is a real danger that a judge (or a juror) might unfairly regard the case of one side or the other with favour or disfavour.

To take a trite example, no judge or juror should try a case involving a close friend. Strive as he may to be fair and impartial a (perhaps unconscious) preference for his friend's evidence or interests could cause injustice.

11.30. Thus, the defence argued that the tribunal, having once heard the evidence of a witness, could not approach his evidence a second time with a fresh mind. Further, the opportunity to call each of their witnesses twice (or more) before the same tribunal was bound to give the prosecution an unfair advantage.

11.31. It was also argued that, since Saro-Wiwa was named as having counselled and procured the other 10 defendants, their trial or trials would necessarily involve an issue as to his guilt. But he would not be a defendant in any such trial and would not be able to defend himself. The defence argued that if there was a second (or third) trial, then Saro-Wiwa should be joined as a defendant in that trial as well.

11.32. Once again the defence raised the question of the evidential inadequacy of the summary. It was pointed out on behalf of a number of the B and C defendants that they were not even mentioned in it: hence, it was improper to commence their trial.

11.33. The prosecution replied that they were not seeking to put Saro-Wiwa on trial a second time. They offered to amend the indictments against Groups B and C by deleting reference to Saro-Wiwa. It was argued that there was no impropriety in two or three simultaneous trials on the same evidence before the same tribunal. There was no risk of bias before a professional tribunal, two of whose members had taken a judicial oath.

11.34. The tribunal ruled that it was not necessary to join Saro-Wiwa as a defendant in the trial of the other 10 defendants. It was within the executive discretion of the President to decide on the number of tribunals to be appointed. The submission that it was necessary to constitute a second tribunal was "not made in good faith" and was rejected. After the ruling the prosecution indicated that they would probably consolidate the B and C defendants into one trial. The tribunal adjourned their trial to 30 March.

Comment

11.35. The main point here is surely bias. I did not follow the suggestion by the defence that Saro-Wiwa might be joined as a defendant in the second trial: to do so would expose him to a double risk of conviction. But the impropriety and unfairness of the prosecution's proposal and of the tribunal's ruling is to my mind glaringly obvious.

Evidential Double Jeopardy

11.36. In the strict sense "double jeopardy" means the risk that one may be tried a second time for an offence of which one had earlier been convicted or acquitted. Simultaneous trials do not involve a double jeopardy in that sense. But in a case such as this, they are likely gravely to prejudice a defendant whose guilt is decided after the same witnesses have been heard by the same tribunal in two trials at only one of which he has been present or represented. The witnesses will give evidence twice, but each defendant will have only one opportunity of challenge in cross-examination.

11.37. The statements served by the prosecution include those of many alleged eyewitnesses to the events of 21 May (see Appendix 9). At the time of the tribunal's ruling none of them had given evidence. It is reasonable to suppose that most will be called in both trials. Suppose that there are 15 witnesses common to both. By the conclusion of the prosecution evidence in the second trial, each of those witnesses will have been heard twice by the Auta Tribunal. If a witness does not give the evidence anticipated by the prosecution in the first trial, he or she may decide or be prevailed upon to do so by the time of the second. It may of course work the other way: the witness who "comes up to proof" in the first trial may turn hostile by the second. Or even where the evidence-in-chief is virtually identical in both trials the cross-examination may be entirely different in its detail, rigour and effect.

11.38. So any one defendant may find himself in the position where a crucial witness has given his most damaging evidence in the "other" trial, evidence which that defendant cannot effectively challenge — even if his counsel happens to be involved in the other trial. The possible injustice is all the more grave in a capital case.

Inhibition of Judicial Function

11.39. If the same tribunal has heard the same witness give evidence twice and his account has differed, which account does it act upon? Take a simple example: in the first trial the tribunal hears a witness whose evidence is crucial against a particular defendant. Accepting that witness as credible, the tribunal rules that defendant has a case to answer. Then, in the second trial, the same witness gives evidence again and either changes his account radically or is destroyed in cross-examination. What is the tribunal then to do? Can it take different views of the same witness in the two trials? Or take the converse: the witness is disbelieved in the first trial and the tribunal has in mind to rule that the particular defendant has no case to answer. But before the close of the prosecution case in the first trial, the witness gives evidence in the second and redeems himself as a credible witness. Can the tribunal properly take into account his evidence in the second trial so as to rule against a defendant in the first? These are obvious examples: it is possible to imagine many others more subtle and complex.

Where there are to be two trials with a large number of witnesses and issues in common, it is plainly not possible to predict the various evidential conflicts which might arise as between one trial and another. The potential for confusion and inconsistency is simply enormous.

Surrender of Control of the Trial

11.40. Of all the rulings that the tribunal has made the decision that it is within the executive discretion of the President to decide on the number of trials struck me as the most alarming. The very notion of fair trial

enshrined in the Nigerian Constitution and in many international human rights instruments implies that there are rights of the defendant which take precedence to the mere convenience of the prosecution. To hold that the government can dictate the number of trials is an insidious abdication of the duty of any impartial tribunal to protect the individual against the power of the state. As stated by the Nigerian Supreme Court:

In the unequal combat between those who possess power and those on whom such power bears, the court's primary duty is protection from abuse of power.

11.41. None of these difficulties is confronted in the ruling. I have not seen a transcript. But I took the best note I could. It seemed to me that the tribunal dealt neither with the issue of bias nor with the manifestly well founded criticisms of the summary. It dismissed the defence argument with the insulting observation that it was "not made in good faith".

11.42. It is no answer to any of this to point out that in England, for example, the same judge may preside over a number of criminal trials involving many witnesses and issues in common. The point is that in England the jury decides the facts. The judge merely manages the various trials, makes decisions of law and directs the jury. No one would dream of suggesting that the same jury should decide the facts of two separate but related trials.

Refusal of Request to Speak to the Defendants

11.43. There has been considerable concern over the state of health of Ken Saro-Wiwa who is known to have a heart condition. From time to time other defendants had been reported to be ill. When the defendants in Group C were arraigned one, whom I believe to be Daniel Gbokoo, was apparently unable to walk or stand and had to be supported by two of the others.

On 27 March I wrote a note to the tribunal asking for permission to see each group of defendants briefly in order to ask them about their health and the conditions of their detention. I made it clear that I did not wish to discuss either the merits of the case or their defence. I gave the note to the Clerk of the Court for delivery to the tribunal in chambers. A few moments later he returned to say my request was denied. No reason was given.

12. PROCEEDINGS SINCE 29 MARCH

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12.1. On 2 April 1995 I wrote a letter to counsel for both sides. In it I asked for additional documentation and information including a list of those in custody in relation to the Giokoo killings who had not been charged; a list of all those identified at identification parades; copies of transcripts; a plan of the Giokoo area; copies of any documents purporting to have been issued in the name of any defendant advocating violence, and copies of the affidavits of the witnesses who claimed to have been bribed. I also asked for progress reports on the course of the trial.

12.2. I did not hear from the prosecution. In the *Daily Champion* of 12 April, Chief Umeadi was reported as having said that trial observers were a "bunch of loafers looking for something to do" and that they attended the trial to find out "whether we behave or not as our colonial masters." In the light of this I do not expect to receive any further co-operation from the prosecution.

12.3. At the end of April I learnt that Mr Olisa Agbakoba, one of the principal counsel for the defence was about to visit London. I wrote him a letter asking to see him and setting out the basis on which I thought it proper to do so (Appendix 4). I met him on 28 April. The account below of proceedings between 30 March and 25 April is based on what he told me, confirmed by press reports.

12.4. On 30 March Groups B and C appeared. The prosecution filed an indictment consolidating both groups into one group of 10 and deleting the reference to Saro-Wiwa (see 5.3.). A defence objection to the form of the indictment was overruled. The trial of the 10 was adjourned until 2 May.

12.5. On 7 April the Group A defendants save for Saro-Wiwa appeared before the tribunal. Saro-Wiwa did not appear, maintaining that he was too ill. There was a medical report from Dr Wokoma of the University of Port Harcourt Teaching Hospital stating that that Saro-Wiwa was suffering from angina-like attacks; left temporal arthritis; pain probably due to a duodenal ulcer; bilateral peripheral neuritis; and intense psychological and emotional stress. It was argued that Saro-Wiwa should be admitted to hospital for tests, but the prosecution stated that they were concerned that his safety could not be guaranteed in a local hospital. The case was adjourned until 21 April for a medical report confirming that admission to hospital was necessary.

12.6. On 21 April the defence protested strongly that Saro-Wiwa had not yet been admitted to a hospital. It was agreed that the tribunal would take one witness-in-chief and then adjourn. Limpa Gbaa gave evidence. His account in the witness box was consistent with his statement (See Appendix 9). He added that Mitee had been part of Saro-Wiwa's retinue at the meeting of 20 May 1994 when Saro-Wiwa incited the killing of the "Vultures". He was not cross-examined. The case was adjourned to 25 April when the tribunal ordered that Saro-Wiwa be admitted to Port Harcourt Military Hospital where he remained as of mid-May. The reason for the delay is not entirely clear to me. The trial of Group A was adjourned to 3 May.

12.7 The trial of the 10 Group B and C defendants commenced in early May. On 8 May, Nigerian television reported that Kenwin Badara had given evidence in the second trial and that he had identified the first 7th and 9th of the 10 defendants "as some of those who participated in the killing". This appears to be a reference to Afa, Kpante and Kagbara. In the same report, it was said that Badara claimed to have heard a rumour of a directive by Saro-Wiwa that "Vultures" should be killed. If this report is correct, then a witness in the second trial has been allowed to give hearsay evidence against Saro-Wiwa in his absence. The exemplifies the objections to simultaneous trials outlined in 11.36-42 above.

13. THE INFLUENCE OF LT-COL OKUNTIMO

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13.1. On 26 June 1994 three people went to see Mitee at Bori Military Camp. They were Oronto Douglas and Uche Onyeagocha, both Nigerian lawyers, and Nicholas Ashton-Jones, a British representative of the environmental group Pro Natura. Douglas subsequently published a report on what happened in the magazine *Liberty*. On arrival at Bori, soldiers and a mobile policeman allowed them to see Mitee. Okuntimo then arrived, drew his pistol and berated the security men for allowing the visitors in. He kicked the policeman and had him put into a cell. On Okuntimo's orders the three visitors and their driver were flogged. Then Okuntimo drove them away in a jeep. He said that he had ordered that Saro-Wiwa be taken to an unknown place, chained and denied food; that Saro-Wiwa and Mitee would "never see the light"; that he and his men had risked their lives to protect Shell installations; that he would "sanitise" Ogoniland and that the visitors were lucky not to have got themselves killed. His first reaction had been to shoot their legs. The three visitors and their driver were detained until the morning of 29 June.

13.2. On 23 March 1995 I met Mr Onyeagocha. He told me that he had been detained for four days and given 100 lashes for trying to see the defendants. At that stage I had not seen Mr Douglas's article. Hence I did not discuss the details of the incident with him. On my return to England I wrote to Mr Ashton-Jones enclosing a copy of the *Liberty* article and asking whether it was correct. Mr Ashton-Jones replied on 8 April. Appendix 5A is a transcript of the relevant part of his letter, published with his permission. It will be seen that he agrees with the account given by Mr Douglas but makes the point that he was flogged less severely than the others.

13.3. On 21 February both Reuters and AFP reported an assault on defence counsel which had occurred that day. A Reuters' cameraman reported that there were heated arguments outside the courtroom and that a soldier slapped a defence lawyer. AFP reported:

An AFP correspondent at the court in this southwestern oil city said Gani Fawehinmi and Femi Falana were attacked after a row when the two refused to present accreditation Falana was slapped in the face and Fawehinmi's suit was ripped

13.4. I have not discussed this incident with Chief Fawehinmi or Mr Falana. But some of the other defence counsel who were present gave me a detailed account of it. Several vehicles carrying defence counsel were stopped by police who said that they must see Okuntimo to obtain accreditation. Fawehinmi refused. Police and soldiers tried to force Fawehinmi into a vehicle. He resisted. Falana protested and was slapped. A senior police officer arrived and apologised. Defence counsel raised the issue with the tribunal which ruled that no accreditation was necessary, but that a list of defence counsel should be submitted. Later that day Okuntimo insisted that defence counsel should leave the Assembly House in a police or military bus. They refused: counsel for the prosecution had left in their own vehicles. After about 45 minutes he allowed them to leave in their own car.

13.5. None of the defendants had seen his lawyers prior to 6 February 1995 when the tribunal ordered access. Defence counsel told me that all of the Group A defendants were held at Bori camp save for Kpuinen, who was held at the headquarters of the State Intelligence and Investigation Bureau (SIIB) in Port Harcourt. They said that Okuntimo insisted that he be given notice of all appointments to see the Bori detainees. Counsel had seen them on about seven or eight occasions always in Okuntimo's office. On each occasion save one he himself was present and within earshot for most of the time. On another occasion counsel wished to see the Bori detainees urgently but were refused access because no arrangement had been made with Okuntimo. I was told that Kpuinen's counsel had been able to see him at SIIB headquarters but again only in the presence of Okuntimo.

13.6. After the tribunal hearing on 27 March, counsel for the prosecution invited me back to their lodgings. We had a very frank and helpful discussion concerning the nature and legality of the trial and the evidential basis of the prosecution case. After about an hour Okuntimo walked in uninvited and sat down. I did not ask him to leave. It was not for me to do so and I was curious to see whether anyone else would ask him to go. Nobody did. He stayed for about half an hour. From time to time he got up and strolled about the room. He made a few contributions of his own to the discussion. When I asked about the legal qualifications of Lt-Col Ali, it was Okuntimo who told me what they were. He used words to the effect that he (Okuntimo) was the Chief of Ogoniland.

13.7. Other international observers to whom I spoke have confirmed my impression that Okuntimo is frequently present at the tribunal sittings and that he appears to be in charge of security arrangements at the trial.

13.8. Defence counsel expressed concern that Okuntimo might have direct access to the members of the tribunal. They believe that he is in charge of the soldiers who guard the members of the tribunal and counsel for the prosecution. In the nature of things it would be difficult to confirm this. But it is clear that the tribunal members occasionally have better information about the defendants than the defence.

13.9. On 13 March *Vanguard* reported an incident which had occurred at the hearing on the 10th. Falana told the tribunal that Mitee was sick and could not attend that day. He asked for an adjournment which the prosecution did not oppose. *Vanguard* reported that Auta J asked Falana "... whether he knew what was wrong with Mr Mitee. Mr Falana replied that he did not know since he was not a medical doctor. Justice Auta then said Mr Mitee was suffering from 'ordinary Malaria' and that a doctor had even attended to him. Justice Auta said Mr Mitee had wanted to come to court that morning but when he went to brush his teeth he discovered that he could not come. He said Mr Mitee was being attended to by the personnel (sic) physician of Lt-Col Okuntimo."

13.10. On 23 March, the first day of my attendance, the tribunal sat late. Auta J publicly explained the delay: Saro-Wiwa had been brought from detention wearing a T-shirt printed with a political slogan of some kind. He had then been taken back to the camp in order to change. It was not clear to me at whose behest this had been done, but defence counsel told me they had been unaware of the incident until Auta J mentioned it.

13.11. These incidents suggest at the least that the tribunal sometimes receives information from a military or police source. Defence counsel further alleged that from time to time Okuntimo addresses the tribunal when a matter relating to security is raised. Auta J refers to him as "Paul". In itself the use of a first name is not exceptional (the learned judge quite frequently addresses counsel by their first names) but it does at least suggest that they know one another fairly well.

13.12. I could not understand why Lt-Col Okuntimo should have any part to play in the security arrangements for the trial still less in arranging and/or in attending legal conferences. As I understand it, the prosecution's position is that the investigation in this case was carried out by the police whereas Okuntimo is a military officer in charge of the Internal Security Task Force in Ogoniland. In my view his insistence on arranging and attending defence conferences is bound to inhibit the preparation of the defence. His uninvited presence at my meeting with prosecuting counsel must give rise to fears that their independence has been compromised. There is some reason to suspect that he has private access to the members of the tribunal but the evidence is inconclusive.

PART D: LEGALITY AND HUMAN RIGHTS

14. THE CONSTITUTION AND HUMAN RIGHTS INSTRUMENTS

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14.1. In 1.12 I stated that my approach would be to assess the legality and fairness of the trial against standards which the Nigerian authorities profess to have adopted, whether in the Constitution or by accession to international human rights instruments. As recently as 28 February 1995, Chief Michael Agbamuche S A N, Attorney-General and Minister of Justice of the Federal Republic of Nigeria, said in his speech to the UN Commission on Human Rights:

In Nigeria we are fulfilling obligations entered into under human rights instruments by creating a positive environment for our people to enjoy basic human rights. The citizens are guaranteed the enjoyment and protection of their rights and freedoms within the provisions of the law. Infringements of rights can be redressed and are actionable within our legal system after thorough

investigation. To this end, therefore, this administration cherishes an independent judiciary free from all forms of encumbrances. The doctrine of the separation of powers contained in the 1979 Constitution is still respected as far as independence of the judiciary is concerned. Our judiciary has remained one of the most vibrant in the world. However, the State should not be precluded from enacting laws for the good governance of society and the maintenance of law and order. It is, therefore, the responsibility of the Nigerian State to promote and protect the well being of its citizenry by ensuring the peaceful co-existence of all segments of the society and it is also its duty to prevent acts prejudicial to law and order.

14.2. Appendix 6 consists of the relevant sections from:

(1) The 1979 Constitution. An asterisk against a provision of the Constitution indicates that it has been suspended by Decree 107 of 1993 which empowers the Abacha government to rule by decree and suspends certain sections of the Constitution.

(2) The Universal Declaration of Human Rights (UDHR)

(3) The International Covenant on Civil and Political Rights (ICCPR).

(4) The African Charter on Human and Peoples' Rights (ACHPR).

(5) Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty.

(6) Basic Principles on the Independence of the Judiciary (adopted by the UN General Assembly in 1985 and reaffirmed in 1990).

14.3. There is a fundamental consistency of approach between these international instruments and the Constitution of the Federal Republic as to the nature of the rights of an accused. I summarise them in this way:

- Right to trial by an independent and impartial tribunal;
- Right to legal representation;
- Right to adequate time and facilities for preparation of defence;
- Freedom from arbitrary arrest;
- Right to speedy trial;
- Presumption of innocence;
- Right to appeal;
- Right of access to national courts in order to enforce basic rights;
- Non retroactivity of laws;
- Right to a public trial;
- Prohibition of torture.

14.4. In my view the defendants are being allowed to exercise a number of their fundamental rights under the 1979 Constitution and international human rights instruments to which Nigeria is a party.

14.5. The defendants are represented by counsel. One (Mitee) who is legally qualified is allowed to represent himself. Defendants can challenge the prosecution evidence and may give and call evidence. They cannot be compelled to give evidence.

14.6. The chairman of the tribunal has indicated that the burden is on the prosecution to prove the case (see 11.4.).

14.7. The laws of murder under which the defendants are being prosecuted are not retroactive.

14.8. The restrictions on public access to the trial are arguably proper having regard to the sensitivity of the case, the possibility of public unrest, and the right of access afforded to members of the press and international observers (see 11.8).

14.9. Arguably the trial of the first five defendants has been commenced within a reasonable time, assuming that pre-trial delay is to be judged by the criteria of what is normal in the Nigerian courts. The Supreme Court has held that a pre-trial delay as long as 25 months was not so great as to nullify a conviction. On the other hand in another case it was held by the Oshogbo High Court that a delay of 71 days for the trial of a capital charge was excessive. My discussions with independent lawyers lead me to believe that by Nigerian standards the delay in the commencement of the trial has not been excessive. On the other hand timing cannot be seen in isolation: by the first day of the trial (6 February) the defendants had not been allowed to see their lawyers (see 9.5, 9.13 and 13.5).

14.10. I note that there have been allegations of ill-treatment of the defendants, including deliberate denial of adequate food and medical facilities and violence by the security forces. I was not in a position either to investigate them or to decide whether they amounted to torture and/or to breaches of the many domestic and international rules and human rights instruments relating to the treatment of detainees. However, I note with great concern the description of the treatment of Saro-Wiwa and Mitee allegedly given by Lt-Col Okuntimo (see Appendix 5).

14.11. Similarly, I have not investigated and therefore express no views about allegations of harassment and arbitrary arrest of relatives of some of the defendants. I note, however, that there have been a number of such allegations. For example, on 16 February defence counsel complained to the tribunal of assaults on the wife and mother of Saro-Wiwa and the arrest of Kiobel's wife.

15. RIGHT TO TRIAL BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL

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15.1. Independence and impartiality are distinct but related. Independence is a function of the relationship between the executive and a tribunal (using that word in its widest sense). Impartiality is a quality of the tribunal. The government might set up a tribunal in the hope of a hearing partial to its interest only to be disappointed by a healthy assertion of independence and fairness.

Independence

15.2. One vital question is why the Nigerian authorities have chosen to hold a trial before a CDST rather than an ordinary court. I posed this question twice during my visit. The first occasion was at a two-hour meeting with the Attorney-General, Mr Agbamuche. The second was at the meeting with prosecution counsel referred to in 13.6 above.

15.3. The arguments put to me at both meetings were similar:

(1) Nigeria is a country where there is from time to time serious communal violence. There is a need for this emotive trial to be held in very secure conditions to prevent public unrest and further violence.

(2) The Nigerian courts are slow. Trials take a long time to come on; sometimes years. The proceedings are often held up by lengthy argument on technicalities by long-winded counsel. In a press release dated 10 January 1995 the Attorney-General stressed that the government believed in the speedy administration of Justice:

I want specifically to mention that the tribunals constituted by this administration have all the paraphernalia of formal courts. The composition procedure, openness and participation of lawyers attract equal measure of respectability and integrity. Indeed the tribunals can be said to have the advantage of being less formal and demystified.

(3) The ordinary courts have very poor facilities for the recording of evidence whereas the tribunal has the advantage of computer assisted transcripts.

(4) The members of the tribunal all have legal training and two are judges. A firm judicial hand is required to deal with so difficult and controversial a case and to restrain the prolixity of counsel.

15.4. It may be that each of these arguments has a basis in fact. A number of independent Nigerian lawyers have told me that criminal trials are often very slow both to come on and in their progress. Counsel are sometimes prolix and over technical. On the other hand they claimed that where defence counsel is determined to secure a reasonably early hearing for a case he or she can generally do so. Undoubtedly many Nigerian courts are ill-equipped to make adequate and timely records of their proceedings. It may be that in this case special security precautions are necessary.

15.5. But none of these arguments meet the point. I agree with the views of Nnamani J of the Nigerian Supreme Court, expressed in a 1990 lecture to the Nigerian Bar Association:

If speed is the main consideration it would have been better to take definite steps to deal with the known factors for delay in the courts.

15.6. At both meetings I asked the question: why not find a robust and experienced judge to sit in a secure and properly equipped court to try the case as a matter of urgency, affording to the defendants the ordinary rights of access to the High Court and of appeal? To this question there was no answer other than a repetition of one or more of the four points noted above.

15.7. I have pointed out that strictly speaking this is not a military tribunal (see 7.4). But the fact is that a military government has appointed a tribunal with one military member and a military council as the confirming authority. This is all the more remarkable since the tribunal is by definition one which tries

cases of civil disturbance. It will also be a potential source of injustice if there is any allegation against the military by the defence.

15.8. One is also entitled to question why the Giokoo killings should have been singled out for trial before a CDST. Although there is a great deal of communal violence in Nigeria CDSTs are comparatively rare. CDSTs were appointed to deal with the communal strife which occurred in Kaduna in 1987 and 1992 and in Bauchi State in 1991. Just two months before the Giokoo killings the *Guardian* (Nigeria) reported that Mr Adokiye Amiesimaka, Attorney-General for Rivers State, had announced that a special State Tribunal would be appointed to try a range of offences including damage to property, arson and assault. He stressed that the new tribunal was necessary because of the frequency of communal clashes: "The regular courts have their hands full. So these tribunals will deal exclusively with communal clashes". He was also reported as saying that anyone dissatisfied with the verdict of a Rivers State Tribunal would have the right to appeal to the State High Court.

15.9. In fact the Rivers State Tribunal was not set up. Instead the Federal Military Government stepped in and appointed a CDST to deal with just one of many civil disturbances in the area (for background, see Section 9).

15.10. In a number of decisions, the UN Human Rights Committee has stressed that the right to trial by an independent and impartial Tribunal is fundamental: it is "an absolute right that may suffer no exception."

15.11. Article 4 of the ICCPR allows a state to derogate from (*inter alia*) this right "in time of public emergency which threatens the life of the nation ... to the extent strictly required by the exigencies of the situation." But the conditions for derogation are very strict: the State must inform the Secretary General of the UN of the provisions from which it is derogating and the reasons. In 1981 the Human Rights Committee held that:

A State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant.

15.12. Thus in 1994 the Committee held that a post-revolution trial in Nicaragua violated the right to fair trial in that the tribunal "depended entirely on the executive" which had provided no right of appeal.

15.13. In any event, the Federal Military Government has not claimed to be derogating from the right to trial by an independent and impartial tribunal on the grounds of public emergency: its official position is that the Task Force has now restored order in Ogoniland.

15.14. Thus there is no plausible, pragmatic reason for the appointment of a CDST in this case other than the desire of the government that any trial relating to the Giokoo killings should take place before a tribunal which it hopes will favour the prosecution and the desire to avoid the scrutiny of its case by the ordinary courts.

Impartiality

15.15. It is impossible to form a final view of the impartiality of the tribunal until the conclusion of the trial. But I have formed a strong provisional view.

15.16. Although bias in its narrow legal sense (see 11.29) may be unconscious, partiality is a matter of choice. To be partial to one side or the other is to be deliberately unfair. The UN Human Rights Committee has held that:

Impartiality of the Court implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.

15.17. The Tribunal has made some rulings favourable to the defence:

- (1) The ruling excluding the list of people killed which Dr Leton wished to produce (see 11.10);
- (2) The order for disclosure of statements of prosecution witnesses (see 11.26);
- (3) Counsel were allowed access to their clients;
- (4) Lt-Col Okuntimo's suggestion that defence counsel must in effect be vetted by him was rejected (see 13.4);
- (5) The tribunal has ordered that defendants who were apparently ill should be seen by doctors (Saro-Wiwa, Bera, Gbokoo). On 25 April it ordered that Saro-Wiwa be admitted to hospital.

15.18. On the other hand, bearing in mind the amount of attention to which the trial has been subjected, the tribunal could hardly have ruled other than as it did without incurring considerable odium.

15.19. There is unfortunately another side to the coin. It is important to bear in mind that one cannot condemn a decision as partial and deliberately unfair simply because one disagrees with it or because it appears to be supported by inadequate reasons. The test to my mind is this: has the tribunal made decisions which are so blatantly unfair that no reasonable tribunal could have believed them to be fair?

15.20. There are two cases which are borderline. The refusal of bail was, I believe, a harsh decision but not one which no impartial tribunal could conscientiously have reached. Again the refusal to allow me, as an international observer concerned about the health of the defendants, to meet any of them is difficult to justify: unless perhaps the tribunal thought that such a meeting was not strictly within the scope of my Order of Mission.

15.21. Finally there are two cases of apparent partiality. First, the tribunal has ignored the rule that before a trial commences it must be satisfied that the defendant appears to have committed an offence. It allowed the trials to proceed when it must have known that the prosecution summaries disclosed no evidence against some defendants. It has carried on with them even though the defence raised the evidential inadequacy of the summaries in two separate arguments. Secondly, I do not see how an impartial tribunal could have allowed the prosecution application for simultaneous trials.

15.22. For these reasons I believe that the tribunal has behaved in a way which strongly suggests that it is not impartial and is biased in favour of the government and the prosecution.

16. RIGHT TO ADEQUATE TIME AND FACILITIES FOR DEFENCE

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16.1. Nigerian Courts have frequently stressed the importance of the Constitutional guarantees of the right of fair trial and in particular the right to adequate time and facilities for preparation of defence. For example, as long ago as 1961 it was held that this right must prevail over any desire to dispose speedily of a case. In the 1988 case of Captain Eni, the Court of Appeal held that the defendant's lack of opportunity to brief counsel of his choice amounted to a breach of Section 33(6) of the Constitution.

16.2. The defendants have had some facilities: they have been allowed representation and the disclosure of some prosecution statements. But they were denied any access to lawyers until early February, in spite of a campaign by a number of human rights groups and in the case of Saro-Wiwa a Court order (see 9.5). I note that as early as 24 May 1994 Amnesty International was urging the Nigerian authorities to allow access to lawyers.

16.3. Even now the defendants can see counsel only with the consent and generally in the presence of a senior military officer who also has ready access to the prosecution (see 13.5-6). The denial of pre-trial access to counsel and the limited basis on which it is now permitted are breaches of the right to adequate time and facilities for preparation of the defence. Further the disclosure ordered is limited to the statements of the witnesses to be called by the prosecution.

Harassment of Defence Lawyers

16.4. There is compelling evidence:

(1) On 26 June 1994 two lawyers visiting Mitee were assaulted and detained for four days (see 13.1-2);

(2) On 12 January 1994 Femi Falana was arrested and held incommunicado until the 20th;

(3) On 21 February 1995, Okuntimo tried to insist that defence counsel required accreditation. Fawehinmi and Falana were assaulted by members of the security forces (see 13.3-4);

(4) On 3 April 1995, *The News* reported that Oronto Douglas was attacked en route to Port Harcourt by people he believed to be security agents seeking to intimidate him. They took money, his degree and law school certificates and his papers relating to the Saro-Wiwa case;

(5) Fawehinmi's passport was confiscated in 1991 and he requires a court order permitting any trips abroad. On 11 April 1995 he was detained by security agents at Lagos airport even though he had a court order permitting him to travel to London for an eye operation.

17. FREEDOM FROM ARBITRARY ARREST

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17.1. The freedom from arbitrary arrest is related to:

(a) the right to be informed promptly of the reason for arrest and the nature of the charge; and

(b) the right to be brought promptly before a court.

17.2. The combined effect of Decrees 11 and 14 of 1994 is to empower detention without charge or trial for three months and to remove the right to habeas corpus: hence indefinite detention without charge is permitted (see 4.11).

17.3. In *Captain Victor Eni v. The State*, Agbaje-Williams J stated that the purpose of s32(4) of the Constitution was

... to ensure that a person is not detained without trial for an inordinately long time, and if that would be the case, that the court is mandatorily empowered to release him either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

17.4. It is true that Section 32(7) can be read as excluding altogether the rights conferred by Section 32(4) where the offence is capital. But there is authority against this restrictive interpretation of Section 32 and in the present proceedings no one has suggested that it is correct.

17.5. The 15 defendants were arrested at various times between late May and late November 1994. None of them were brought before a court or tribunal of any kind until 16 January 1995 when (I believe) Bera and Kpuinen may have been before the tribunal. None of the other 13 defendants appeared until 6 February when all of Group A were present. I believe that the first appearance of any of the B and C defendants was in mid-March when the question of simultaneous trials was first argued.

17.6. It is not clear how many people are still in custody and uncharged. I did not receive an answer when I asked one of the prosecuting counsel. Appendix 7 is a list of the names of 27 people believed to be in custody and as yet uncharged.

Arbitrary Arrest

17.7. I know of no definition of this term. It seems to me that it is not enough that objectively or with the benefit of hindsight there appears to be insufficient grounds to justify the arrest. I think a fair test is this: an arrest is arbitrary if the person making or authorizing it does not believe at the time that there is a justification for it under the law of his country, or if he does not care whether it is so justified.

17.8. There is a great deal of evidence to suggest that there were many such arrests. Human rights groups reported that in the wake of the killings hundreds of Ogonis had been arrested, that some had been forced to pay bribes for their release and that others were held incommunicado for months. The affidavit of Danwi (see summary in Appendix 10) strongly supports the view that there were multiple arbitrary arrests. But then he is on his own confession a false witness and I cannot judge the truth of the other reports. Even if they were all true, it does not follow that any of the arrests of the defendants were arbitrary in the sense I have indicated. I was not in a position to investigate whether the defendants or anyone else had been arbitrarily arrested or whether those arrested had been given prompt information as to the reason for their arrest. Hence I express no views on those matters.

Right to be Brought before a Court and Charged Promptly

17.9. This is much simpler. It is plain that none of the detainees was brought promptly before a court or tribunal of any kind. Nor were they charged promptly (see 9.2 and 9.4). In every case months elapsed between the arrest of a defendant and his being brought before the tribunal and charged, even though by far the greater part of the evidence was available much earlier. These are plainly serious breaches of fundamental rights. Such breaches are still more flagrant in the case of anyone held in custody but not yet charged.

18. RIGHTS OF APPEAL AND OF ACCESS TO ORDINARY COURTS

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18.1. It is important to understand what rights of access and appeal the defendants or anyone as yet uncharged would have under the unsuspended 1979 Constitution and the 1945 Criminal Procedure Act.

18.2. There is a general right to seek redress from a State High Court for any actual or likely contravention of fundamental rights (s42 of the Constitution) and a right to apply for habeas corpus. The legislation has been construed as conferring the same jurisdiction on the Federal High Court in the States where that Court sits (e.g. Lagos).

18.3. A defendant charged with an offence such as murder appears before a committing magistrate. The prosecution witnesses can be required to give evidence and may be cross-examined. At the close of the evidence the defendant can submit that there is no case against him and that he should be discharged. The Court must discharge him if the evidence is "not sufficient to put him on trial".

18.4. A committed defendant would be tried before a State High Court from which he would have a right of appeal to the Court of Appeal and thence to the Supreme Court. In a capital case that appeal lies as of right.

18.5. None of this is permitted in the present case. The right to go to the State High Court is ousted by a number of decrees, and habeas corpus has been abrogated. There is no right to test the evidence or to make a submission of no case to answer prior to trial. Most important of all there is no right of appeal.

18.6. When I met the Attorney-General he maintained that Section 7 of Decree 2 of 1987 confers a right of appeal. It is plain that it does not. It merely means that the decision of the CDST is invalid until confirmed by a higher *military* authority. That authority might choose to have regard to representations made by an accused but it does not have to do so. There is nothing in the Decree to require a re-examination of the facts and the trial to see whether they establish guilt or whether there was a serious error of law or procedure by the tribunal. There is not even an explicit power to quash the conviction (see 8.15). Again the confirming authority is not independent of the government and need not give any reasons for its decisions.

18.7. There is a further point. It appears that the AFRC no longer exists. In the dying months of the Babangida administration, Decree 54 of 1993 established the National Defence and Security Council (NDSC) and transferred to it many of the powers of the AFRC. In turn Decree 107 of 1993, promulgated by the Abacha administration, established the Provisional Ruling Council (PRC). The PRC, like the AFRC and the NDSC before it, has the power to determine national policy, constitutional matters and national security matters (Decree 107, s10). As far as I can tell neither the AFRC nor the NDSC has been abolished, but it seems that neither body is operational. Presumably the PRC is now the confirming authority — by default if not by decree.

18.8. The crucial point is that the body which confirms the findings of the tribunal is an arm of the Federal Military Government. The procedure under which the defendants are being tried is calculated to deny them any right to challenge any decision of the tribunal before the ordinary courts of Nigeria or any right of appeal. This is all the more disturbing in that the tribunal has the power to impose the death penalty.

18.9. These breaches of fundamental rights of access and appeal are a matter for grave concern since there is no opportunity to correct errors or remedy miscarriages of justice before a body independent of the tribunal. Recent British experience confirms that a right of appeal is essential in any system of justice. In a number of well publicized cases, wrongful convictions have survived a first and sometimes even a second appeal only to be quashed years after conviction on the emergence of fresh evidence.

18.10. The lack of a right of appeal exemplifies the arbitrariness of the decision to convene a CDST. On the one hand rights of appeal are guaranteed by unsuspending sections of the Constitution. On the other hand Section 8 of Decree 2 of 1987 provides that the decisions of the tribunal shall not be questioned in any court of law. This prohibition is reinforced by Decree 55 of 1992 (see 4.18; 8.12). Yet when the Attorney-General of Rivers State announced the Rivers State Tribunal he said that there would be a right of appeal from its verdicts (see 15.8).

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APPENDIX 1: LIST OF DOCUMENTARY SOURCES

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Africa South of the Sahara (1994)

Amnesty International Reports

Civil Liberties Organisation (CLO), Reports (1991 - 1993)

US State Department Country Reports on Human Rights Practices

CLO - *Human Rights in Retreat* (1993)

Ugochukwh and ors. - *Suppression as Law* (1994)

Ajomo and Okagbue - *Human Rights and the Administration of Criminal Justice in Nigeria* (1991)

Ajomo and ors. - *Individual Rights under the 1979 Constitution* (1993)

Nwankwo and ors. - *Human Rights Practices in the Nigerian Police* (1993); *The Bail Process and Human Rights in Nigeria* (1993); *Nigeria: The Limits of Justice* (1993); *Guide to Human Rights Litigation in Nigeria*

Tobi - *Impact of the Constitution (Suspension and Modification) Decree on the Constitution* (1985)

Odinkalu - *Justice Denied. The Area Courts System in the Northern States of Nigeria* (1992)

Aguda - *Criminal Law and Procedure of the Southern States of Nigeria* (1982)*

Nwabueze - *Military Rule and Constitutionalism* (1992)

Okonkwo and Nash - *Criminal Law in Nigeria* (1980)*

Owaode - *Law of Homicide in Nigeria* (1990)*

Aguda - *Law of Evidence in Nigeria* (1974)*

Statutes, 1979 Constitution, Cases, Decrees

Press and News Agency Reports

Videos of Nigerian Television Broadcasts; Dauda Komo Press Conference 22 May 1994; "MOSOP the Ogoni and the Military. The True Position".

* latest edition

APPENDIX 5A: EXTRACT OF LETTER FROM NICHOLAS ASHTON-JONES

8 April 1995

"Oronto Douglas's account of the incident at Bori Camp in port Harcourt, and subsequent events at the SSS HQ are correct as I recollect them except in the description of the beatings. The three of us were put in a cell with 20 - 30 young Ogoni men (unspeakable conditions). Later (20 minutes) Onyeagusha and Douglas were dragged out and flogged very hard (enough to break the skins on their backs): I could only hear the sounds. Then I was taken out and told to lie face down on the floor and given about 9 strokes across my lower back and buttocks: painful but not enough to break the skin. The whip was made of a double length of 10mm electrical cable and the man who used it was clearly as afraid of Major (now Lt. Col.) Okuntimo as we were (I think he was the one who had the pistol pushed down his throat) so we did not feel anything bad about him. Later as we were pushed into the waiting car (to be shot, we were told by Okuntimo) we were repeatedly beaten on the backs but not severely. At this point, Femi, the Shell driver, was brought over, made to jump and then flogged I would say about 20 strokes."

APPENDIX 6: RELEVANT EXTRACTS FROM THE NIGERIAN CONSTITUTION AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

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The Constitution of the Federal Republic of Nigeria

Legislative Powers

4.—(8) Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law; and accordingly, the National Assembly or a House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

Right to Personal Liberty

32.—

(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law—

(a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;

(b) by reason of his failure to comply with the order of a court or in order to secure the fulfilment of any obligation imposed upon him by law;

(c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;

(d) in the case of a person who has not attained the age of 18 years, for the purpose of his education or welfare;

(e) in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or

(f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto:

Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.

* (2) Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.

* (3) Any person who is arrested or detained shall be informed in writing within 24 hours (and in a language that he understands) of the facts and grounds for his arrest or detention.

* (4) Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of—

(a) 2 months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or

(b) 3 months from the date of his arrest or detention in the case of a person who has been released on bail,

he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

* (5) In subsection (4) of this section the expression "a reasonable time" means—

(a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometres, a period of one day; and

(b) in any other case, a period of 2 days or such longer period as in the circumstances may be considered by the court to be reasonable.

* (6) Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this subsection, "the appropriate authority or person" means an authority or person specified by law.

(7) Nothing in this section shall be construed—

(a) in relation to subsection (4) of this section, as applying in the case of a person arrested or detained upon reasonable suspicion of having committed a capital offence; and

(b) as invalidating any law by reason only that it authorises the detention for a period not exceeding 3 months of a member of the armed forces of the Federation or a member of the Nigeria Police Force in execution of a sentence imposed by an officer of the armed forces of the Federation or of the Nigeria Police Force, in respect of an offence punishable by such detention of which he has been found guilty.

Right to fair hearing

33.—

(1) in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

(2) Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law—

(a) provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person;

(b) contains no provision making the determination of the administering authority final and conclusive.

(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.

(4) Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing within a reasonable time by a court or tribunal.

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty:

Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.

(6) Every person who is charged with a criminal offence shall be entitled—

(a) to be informed promptly in the language that he understands and in detail of the nature of the offence;

(b) to be given adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or by legal practitioners of his own choice;

(d) to examine in person or by his legal practitioners the witnesses called by the prosecution before any court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to the witnesses called by the prosecution; and

(e) to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence.

(7) When any person is tried for any criminal offence, the court shall keep a record of the proceedings and the accused person or any person authorised by him in that behalf shall be entitled to obtain copies of the judgement in the case within 7 days of the conclusion of the case.

(8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

(9) No person who shows that he has been tried by any court of competent jurisdiction for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.

(10) No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.

(11) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(12) Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

(13) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsections (1) and (4) of this section (including the announcement of decisions of the court or tribunal) shall be held in public:

Provided that—

(a) a court or such a tribunal may exclude from its proceedings persons other than parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of 18 years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;

(b) if in any proceedings before a court or such a tribunal a Minister of the Government of the Federation or a Commissioner of the Government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

Restriction on and Derogation from Fundamental Rights

41.—

(2) An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 30 or 32 of this Constitution; but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:

Provided that nothing in this section shall authorise any derogation from the provisions of section 30 of this Constitution, except in respect of death resulting from acts of war or authorise any derogation from the provisions of section 33 (8) of this Constitution.

Special Jurisdiction of High Court, and legal aid

42.—

(1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any rights to which the person who makes the application may be entitled under this Chapter.

(3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purpose of this section.

(4) The National Assembly—

(a) may confer upon a High Court such powers in addition to those conferred by this section as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section; and

(b) shall make provisions—

(i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim, and

(ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.

Universal Declaration of Human Rights

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any political offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

International Covenant on Civil and Political Rights

Article 2

3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations

under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would

prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

African Charter on Human and Peoples' Rights

Article 6

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.

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 violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
- (c) the right to defence, including the right to be defended by counsel of his choice;
- (d) the right to be tried within a reasonable time by an impartial court or tribunal.

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.

Basic Principles on the Independence of the Judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

35. Safeguards guaranteeing protection of the rights of those facing the death penalty

Approved by Economic and Social Council resolution 1984/50 of 25 May 1984

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or extremely grave consequences.
2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.
4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.
5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.
6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.
7. Anyone sentenced to death shall have the right to seek pardon, or commutation of a sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.
8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.
9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

APPENDIX 7: THOSE BELIEVED TO BE IN CUSTODY BUT NOT CHARGED

Name – home town – date/place of arrest

Elijah L Baadom

Sunday Badom – Bera - 21/1/95 Bera

John Banutu – Bera -14/6/94 Kpor

Israel Blessing - Bomu - 22/6/94 Oron-Akwa, Ibom

Kagbarah Basseeh – as above

Lucky Daalo

Gbaranen N Dube – Nweol - 25/1/95 Port H.

Paul Deekor – Bera - 6/6/94 Port H.

Godwin Gbodor – Lewe - 15/6/94 Eya-Onee, Telga

Jude Gbogbara

Friday Gburuma – Bera - 7/6/94 Port H.

Adam Kaa – Biara - 12/8/94 ? Biara

Benjamin Kabari – Nwebiara - 27/1/95 Kpopie

Golga John Koi – Biara - 21/1/95 Bori

Baritule Lebe – Bera - 8/6/94 Bera

Nyieda Nasikpo – Bomu - 30/5/94 Bomu

Baridor T Nazigha

Sampson Ntiginee - Teka-Sogho - 25/5/94 Kira Junc. Telga

Monday Oke Piam – arr. Bane ?

Nwinbari Abere Papah - K-Dere - 30/5/94 K-Dere

Zorzor Pogbara

Innocent Tonwee – Bera - 22/5/94 Baralo Junc. Golga

Taniye-op-Toobor – Biara - 18/1/95 Biara

Clement Tusima – Biara - 29/6/94 Port H.

Topsy U-Poro

Chief Babina Vizor – Giokoo - 4/10/94 Giokoo

Note: Spellings of names and places may vary

APPENDIX 8: INDEX OF STATEMENTS OF PROSECUTION WITNESSES

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These statements were served on counsel for the Group A defendants on 29 March 1995. I was given a copy by prosecuting counsel on the same day. The list shows the number of statements made by the witness and the date of each. An asterisk against a later statement indicates that it deals solely with one or more identifications by the witness.

Dr Garrick Barilee Leton 22/6/94

HRH W Z P Nzidee 8/6/94 17/6

Ignatius Kogbara 3/6/94

Dr Charles D. Kpakol Undated

Chief Kemte Giadom JP 31/5/94 1/6

Edward Adinkpa Akpa 8/7/94

Akpo Bari Benson Nwiyor 4/8/94

ASP Stephen Hasso 2/6/94

Limpa Gbaa 27/6/94

Ledor Vizer 4/6/94

Nayone Akpa 9/6/94 28/11*

Charles S Danwi 15/6/94

Celestine Yorfu Meabe 24/6/94 18/11/94 30/1/95 (motorcycle)

Alhaji Mohammed Kobani 31/5/94 27/6* 19/7* 16/8* 28/11*

David N Keenom 1/6/94 24/6* 19/7*

Kemwin Badara 2/6/94 27/6* 20/7*

Isaiah Menegbege 4/6/94

HRH Obadiah Nalelo JP 2/6/94 16/6 4/7

Chief Francis S Kpai 2/6/94 4/7

HRH Chief James Bagia 3/6/94 3/8

Victor Okon 3/6/94

Tomka Omon 3/6/94

Leesi Tusima 30/6/94

Peter Fii 1/6/94 26/6*

Uzormah Kpekpe 16/6/94

Erebeke Bariziga Orage 10/6/94

PC Friday Iziame 16/6/94

Saturday Iye 1/8/94

Smith Amakewari 31/10/94

Evangelist Michael Giasi 30/6/94

Biobaragha Rosalyn 23/5/94

Hon Nicholas Tenalo 16/6/94 23/6

APPENDIX 9: SUMMARY OF THE EVIDENCE OF PROSECUTION WITNESSES TO THE EVENTS OF 21 MAY

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Ignatius Kogbara

A community leader from Bodo. Invited to the Giokoo meeting he was unable to attend. At 09.00 he went to Bori to report an Andoni raid to the army. He was told to return at 12.30. On his second journey to Bori he met Chief Edward Kobani's driver who said thugs had barricaded the venue of the meeting. Kogbara took the driver in his own car to the venue. There Kobani's driver got out of Kogbara's car. Near the venue his car was

attacked by a crowd of people "with sticks stones and by hanging on the car with bore (sic) hands". The crowd chased the car running after it in an attempt to block its passage. Two motorcycles also chased the car. At Kpopie junction Kogbara told the police and army that there was a "break down of order at Giokoo". They said they could nothing about it as they had no instructions. He returned to Port Harcourt.

Chief Kemte Giadom JP

Lives at Diobu, Port Harcourt. He was at his home when he heard that a member of his family had died "in my neighbouring compound." His son drove him to the meeting in a van. On approaching the Gbenemene's palace he was hailed by Chief Edward Kobani's driver who warned him not to enter since the atmosphere in the palace was "charged and tense". Giadom's van drove through the market toward Kpopie Junction. On the way some youths tried unsuccessfully to block the van. At the Junction he pleaded with security men to go to the palace to disperse the crowd. They told him their superior officer was not available to order them to leave their posts. Giadom then drove straight to Bori police station where he made the same request and was given the same reason for inaction. "I pleaded with them to send some men to the Palace". He was told to wait at the Police Station for the Superior Officer.

While he was waiting Kiobel drove up "with leaves covering both front and back of his official car plate number". Shortly after Dr Owen Wiwa brother of Ken Saro-Wiwa arrived. He accused Giadom of being a Vulture. Giadom and his son reprimanded Dr Wiwa for his discourtesy. Then Kiobel took Dr Wiwa aside. They conversed "in low tones". Giadom could not hear what was said. Dr Wiwa left.

The Superior Officer arrived. Giadom again asked that men be sent to the palace. The SO declined to do so but asked Kiobel to go alone and talk to the crowd. Giadom was disappointed with the SO and also with Kiobel because the latter had not supported his request. He expressed his displeasure and left.

On 24 May one of his tenants handed him a note from Kiobel which read: "To Chief Kemte Giadom My Dear sir It is badly unfortunate that our Gokana boys having no respect, fear of God criminally killed our illustrious sons. Sir as Government Officer I have to intervene in trouble situations, I am innocent Sir"

ASP Stephen Hasso

At 07.00 he was given an itinerary of an intended rally to held by Mr Ken Saro-Wiwa. He was instructed to prevent the holding of any rally in all villages shown on the itinerary. Hasso went with about 30 troops and a Naval Officer and "did the posting" at the villages where the rally was to be held. (I take it this means that troops were posted at those villages). Then Hasso went to the first village, Sogho. Saro-Wiwa arrived in a car driven by Goodluck Diigbo and accompanied by someone who Hasso was told was a police officer. Hasso informed Saro-Wiwa that his rally was banned. Saro-Wiwa's car drove off towards Bori followed by Hasso. Hasso stopped Saro-Wiwa's car again.

"He told me he was going to attend the training with electoral officers in Bori. Since he was an aspirant I allowed him to attend. On reaching the Council Conference hall his people gathered round him and he started talking to them in his own language. I cautioned him that we don't want a situation that the training programme will deviate to the rally or I will stop him from the programme. He then spoke to his people again in his language and Latter (sic) said he will go back".

Mittee said he had food and drink for Saro-Wiwa in his village Kdere in Gokana. Initially Hasso allowed Saro-Wiwa and Mittee to go but en route decided to stop Saro-Wiwa.

"When he reached Giokko where the road is bad that he slowed and I overtook his car and blocked it. The naval officer and myself went and told him to go back. Barrister Mittee came out of his vehicle to Ken's vehicle and they 2 started talking in their language meanwhile his people started gathering round us in Giokoo. After much resistance and when he noticed that I have ordered the vehicle to block the road, he and Mittee were still discussing in their language. At a time he told his driver to turn back and he drove away. Meanwhile before then people have started gathering (along) around us. When he drove away I followed him till Noriva (sp? - possibly Nweo?)". Hasso then returned to the office.

"Immediately I came back to the office I met the Commissioner of Trade and Tourism waiting for me. He the Commissioner then told me he has come to confirm from me that some youths blocked him and told him Ken was arrested by some military men. I then told him Ken was not arrested but was stopped from having his rally and that I followed him till he left for Port Harcourt. He the Commissioner then told me he is going to Gokana to tell the youths."

Later in the day at about 17.30 a man from Gokana came to tell Hasso that three of their men were held hostage in Giokoo. Hasso was ordered to send his men to Gokana but when he arrived the 3 men had already been rescued.

Note: I presume that the "Commissioner" is Kiobel.

Limpa Gbaa

A farmer, resident of Botem village in Tua-Tua Tai, Tai-Elleme district. He knew of MOSOP but was never a member.

On 20 May he attended a rally at Kpite in support of Saro-Wiwa's candidacy for the election. There was a welcome address by one Aziaka.

"After the address Ken responded in Khana language which every Ogoni man understands. I heard when he spoke soliciting for the support of the Tua Tua people for the election. He continued and stated that information has reached him that one "BEDELE" - meaning vulture from Bodo in the person of chief Kobani has bought the form for the Constitutional Conference election and the government has given the said

vulture large sums of money to fight him (Ken) for the election. He also told the rally that NYCOP members should go out and watch and that anywhere the so-called vultures are holding their meeting they should kill them because the vultures were out to sell Ogoni peoples rights. After the speech one Otua Hart a customs officer from Korokoro (sp?) village serving in Warri spoke next. He said that he has got enough boys to descend on the vultures Finally the master of ceremony warned that apart from these delegates any other person that came out to vote on the election day would be dealt with. After the rally I was very sad. I as so afraid that on the election day I did not go out."

Note: The statement does not specify in which language the MC spoke.

Ledor Vizer

An office messenger attached to the Administration Department. Previously a fisherman. Resident of Bodo City.

He had heard about Saro-Wiwa and wanted to meet him. On 21 May he went to Biara to visit a friend. At about 11.00 he left to return to Bodo City. He got a commercial motor cycle towards Bodo City. On the way a white car passed. The motorcyclist told him it was Saro-Wiwa's car. Vizer told the motor cyclist to follow the car "so that I can know Ken Saro-Wiwa".

About a pole or 2 after Giokoo junction towards Mogho junction he saw that the white car had stopped and that an army lorry was blocking the road. There was also another car but Vizer did not pay much attention to it.

"I then asked the motor cyclist carrying me to stop by the side of the car so that I can know the man Ken Saro-Wiwa. The man said to be Saro-Wiwa was with some other persons in his car one of whom I believe to be his driver. Ken then put out his head through the window of his car as he was stopped and he spoke to the soldiers in reply in Gokana language. NOM BELI GBOBEDERE ADI GIOKOO NIALEELAIE. In English language this means "I don't blame you. It is the VULTURES meeting there in Giokoo that send you to stop me". The point where this took place there were over twenty people there apart from the soldiers and other motorcyclists. And myself and the motorcyclist rode away".

Nayone Akpa

Statement A of 9/6/94

A farmer from Bara in Gokana. He was invited to the meeting at Giokoo which was scheduled to begin at 10.00. He was late and left his home at about 11.45 so he hurried and got a commercial motorcycle to take him to the meeting. His house is about a kilometre from Giokoo. At a few minutes after 12 he came to a junction where a crowd had gathered. He saw security men in the crowd and an army vehicle. He also saw "many motor cycles with full lights on that afternoon". Even though he was late for the meeting

he decided to go and find out what was going on. Someone coming from the direction of the crowd told him that Saro-Wiwa had been stopped "I still decided to go into the crowd and find out myself." He saw the cars of Saro-Wiwa and Mittee blocked by an army truck.

"Ken was sitting at the back of the car and was on the right hand side of the road. At the time I arrived I did not meet him talking to the militarymen. Rather I heard him talking to the crowd. I heard him clearly when he spoke "The Vultures are the cause of my arrest. They are there at Giokoo doing meeting and sharing (?) money." He further told the crowd made mostly of youths to go to Giokoo and deal with the vultures. After this I saw his car reverse and drove away and they followed (word illegible) the uniformed foremen. I saw the crowd of youths rushing towards the venue of the Giokoo meeting. Those on motorcycles sped first those on foot followed suits and I also followed. By the time I arrived at the meeting premises I saw that the hall which was venue of the meeting had been surrounded by the crowd of youths, some of whom have entered the hall. I saw that the people inside the hall were being beaten and glasses being broken and also heard screaming for help from the hall.

At this stage I found the place very dangerous and therefore ran away on foot to my house at Bara. At the scene before I left I could recognise Baribor Nbera from Bera who was the person shouting (?) on the attacking youths to go inside the hall and kill the people there and also saw and recognised one John Kpuinen also from Bera among the attackers. I saw many other persons (word illegible) who were not easily recognised, but if I see them again I could identify them. The above statement by Ken was made in the Ogoni dialect."

Statement B of 28/11/94

"On the 22nd Nov, 94 I was travelling from home to Port Harcourt, I then called at Gems filling station at Baraobara (sp?) to buy some fuel. At the filling station I sited (sic) somebody I recognised to be one of those who attacked (word illegible) that led to the deaths of our leaders and then alerted the police at the police station near the filling station at Baraobara. And the police assisted us in arrested the suspect whom I later know his name to be Felix Nuate a native of Deyon in Gokana Local Government area. He was taken to the Divisional Police Head Quarters at Eleme."

Note: Compare statement E of Alhaji Mohammed Kobani also dated 28/11/94.

Charles S Danwi

A musician from Beka in Gokana. He was not a member of MOSOP and did not know its leaders.

On 21 May at 11.30 am he was going to the market at Kibagha. He saw a white car stopped by security men at a spot very close to Giokoo junction. The security men asked the driver of the car to go back.

"I saw so many people gathered round the place. There was a big argument that I came to know the man inside the white car who was arguing with the uniformed men was Ken Saro-Wiwa. I also saw Mr Ledum Mitee inside his own car near Ken Saro-Wiwa's car. After much argument when they were about to go back, I heard Mr Ken Saro-Wiwa said in Ogoni language "GBO BEDERE EBADI GIOKO EBAGE DONA KPEGE NI EBA LEELA GBO BE KO BAA SIMEE AALII SI - GIOKO A KOLA NU EALEEMAI ONAA NII - VA" meaning in English that it is those vultures who are at Gioko sharing money that send the uniform men to arrest me. He told the crowd who gathered around there that they should go to Gioko and deal with the Vultures. The whole crowd moved toward Gioko."

Danwi then went to the market to buy a cassette.

Celestine Yorfu Meabe

Statement A of 24/6/94

A civil servant from Biara in Gokana employed as a Principal Environmental Health Officer. A member of MOSOP and the co-ordinator of NYCOP for Gokana. John Kpuinen was the Vice President for Gokana of Nycop. In late October at the invitation of Kpuinen Meabe went to a meeting of the National Executive Council of Nycop at 24, Aggrey Rd. Goodluck Diigbo presided over the meeting which was attended by the entire NEC. (The witness does not suggest that any defendant other than Kpuinen was at the meeting.) A paper entitled News Flash was circulated among all the attenders. It made allegations against Vultures.

At the meeting it was decided that all those referred to in the Newsflash had betrayed the Ogoni revolution. Diigbo ordered Meabe to go to Gokana and deal with the Vultures "even if it involves their lives". Meabe was shocked. His suggestion of a meeting between Saro-Wiwa and the so called Vultures was turned down. Through the good offices of a friend Saturday Nwale the matter was reported to the Gokana Council of chiefs.

As a result a peace conference was proposed at a meeting of the Gokana Council of Chiefs. This in turn led to Meabe's expulsion from NYCOP, which was announced at a NYCOP Congress meeting by Kpuinen. He was branded a Vulture and accused of taking bribes.

Meabe was invited to the meeting of 21 May. He arrived at about 11.00 on his motorcycle. He spent about an hour in preparations for the meeting. The palace was then surrounded by a large crowd, the majority being youths. Meabe went into the "palour" where Albert Badey was giving his address. The crowd invaded the palour and stopped Badey from speaking. Meabe tried to tell the youths not to use violence.

Suddenly Baribor Mbera of Bera village who was now commanding the crowd took hold of Meabe by the shirt and ordered him to leave.

"I was just trying to ask him why when he shouted to the whole crowd saying "E-sho-be" and the whole crowd applauded him and he ordered this is the co ordinator who betrayed the Ogoni people MOSOP and collected 10 million Nira from Govt. (word illegible) to destroy MOSOP struggles. Kill him. And immediately the whole crowd impounded around us and beat me to a state of complete coma."

When he started to come round he found himself "in the hands of Chief Edward Kobani, Alhaji Mohammed Kobani and A T Badey." He had been stripped nearly naked. Kobani reassured him. He lost sight of Badey. Then he heard a crowd shouting "E-sho-be". They were dragging the corpse of Badey. The crowd trooped into the palour and attacked Edward Kobani "with all sorts of dangerous weapons" and then dragged his corpse to the verandah of the palace. Meabe escaped into an inner room and hid. He was discovered by the attackers and dragged out. He pleaded to be spared and was allowed to go, leaving on foot.

"Apart from Baribor Mbera whom I knew to have attacked me face to face, others that took part in the attack whom I saw that day like one Mr Saturday Dobe who also participated in the action can still be identified by me".

Meabe says he spent 5 weeks in hospital.

Statement B of 18/11/94

On 21 May Nordu Eawoh was "one of the major actors of the murder exercise." He came into the palace and took away late chief T B Orage saying that T B Orage was his father's brother. Meabe pleaded with Eawoh to take him along too. Eawoh said that Meabe should wait and that after he had taken Orage to safety he would return for Meabe. But Meabe did not see Orage again. (This statement is partly illegible and the implication seems to be that far from rescuing Orage, Eawoh must have meant him harm.)

Statement C of 30/1/95

Deals with the recovery of his motorcycle.

Alhaji Mohammed (A M) Kobani

Statement A of 31/5/94

A civil servant resident of Bodo City and brother of the deceased Chief Edward Kobani and a founder member of MOSOP.

On 21 May he left Bodo City to go to the Giokoo meeting at about 09.30. He was with his brother Edward and Chief Francis S Kpai in Edward's car. Prior to the meeting Dr Barinem Kiobel came to the venue leaving after a short time. The meeting then started between 11.00 and 12.00. Edward spoke first followed by Albert Badey. In the early stages of his speech a motor cycle drove up at great speed. The driver (Theophilus Ntoo)

said that Ken Saro-Wiwa, having been arrested, had accused those meeting at Giokoo of being responsible for his arrest. Saro-Wiwa had said that those at the meeting "were sharing money given to them by Government and Shell company and that they should come to that venue of the meeting to deal with you." He then left but returned with the attackers.

Within 3 minutes the venue was besieged by MOSOP and NYCOP members. They were confronted by 3 people one of whom was Celestine Meabe. Some of the intruders were on motor cycles, 3 or 4 to a machine, others were on foot. They came with clubs, machetes, bottles, rakes, broken blocks and stones. A M Kobani himself was attacked by "Baribor Mbera" but was rescued and taken into the hall by 2 men one of whom was Kenwin Badara. Someone commanded the attackers to come into the hall and bring out the vultures. The attackers led by Baribor Mbera directed the chiefs and elders to march out in single file, failing which they would be dealt with. Chiefs Naaleelo, Chiefs S N and T B Orage and Albert Badey were marched out.

A M Kobani prevented his brother Edward from leaving. When the others got outside the attackers pounced on them using bottles, clubs, machetes broken stones and an iron rod. As a result there was a general retreat of the besieged into the hall in the belief that it was a sacred place where they would not be attacked. The right eye of T B Orage had been pierced. Chief Kpai entered the hall only to be attacked again and then rescued by A M Kobani and some boys. The chiefs congregated in a corner of the dining hall where they were attacked yet again.

"Among the attackers I can recognise the following:

1. Mr Paul Levurah of Bomu
2. Mr Godwin Akpo of Bomu
3. Michael Akpa (sp?) of Bodo

are those I know their names but others could be identify".

Paul Levurah saw that T B Orage was injured and "express sympathy". Levura said "so you are among these people". Badey tried to sneak out but was later dragged back in no longer breathing. S N Orage was beaten to death by the attackers "on the spot" (I take this to mean within the hall). Then the corpses of Badey and S N Orage were dragged out of the hall by the attackers.

Meanwhile T B Orage and Edward Kobani were stripped nearly naked. Then Paul Levura who claimed to be a relation of T B Orage dragged him out of the hall. Chief Monday Mom was attacked but survived though badly wounded. Edward Kobani was now left alone and so the attackers concentrated on him. A M Kobani tried to defend his brother but was injured. They were unable to escape.

Edward was sliced with broken bottles by one assailant and attacked with a rake by the second, the teeth of the rake piercing his skull. A M Kobani would be able to recognise both again. Edward then died. A M Kobani took refuge in the shrine behind the palace where he found Chief Kpai lying unconscious.

The attackers surrounded the shrine but were afraid to enter because (it seems) of religious scruples. Kiobel arrived in a dark green Peugeot with the front number plate covered in leaves. He came out of the car and beckoned the NYCOP boys over to him. He spoke to them in a low tone but A M Kobani could not hear what was said. Then the Nycop group shouted "E-sho-be" 3 times. They then said they would complete the assignment. Kiobel drove away. The Gbenemene approached the shrine. The NYCOP boys told him to pour a libation: this would allow them to attack those inside the shrine. He refused and was decried as a Vulture. The Gbenemene then entered the shrine. The attackers threatened to burn it at 7 o'clock.

Statement B of 27/6/94

On 22 June he went to the Investigation and Intelligence Bureau at Port Harcourt. He met an officer who "briefed me that I will be shown a group of suspects who have been arrested in connection with the murder of (names of deceased set out) ... Later I was taken to an open place here many people said to be the suspects arrested were put on lines. The officer instructed me to look properly at everybody on the lines so that if I recognised any of the persons on the lines as among the crowd that attacked Gbenemene Palace Hall, I should point such person out.

I inspected the lines as directed and was able to identify 6 persons as among the attackers".

Statement C of 19/7/94

On 19/7/94 A M Kobani attended another ID parade. "I saw group of suspects in lines". A M Kobani "identified 5 people as among those that took part in the attack that resulted into the death of the 4 Ogoni Prominent Sons."

Statement D of 16/8/94

A M Kobani attended another parade on 16 August "where some suspect in the murder case were arrested and detained. Among those arrested and detained I identified the actual man who hit my late brother on the head with a rake. That man is now known to me as one John Banutu a native of Bera."

Statement E of 28/11/94

On 22 November A M Kobani was en route from his home to Port Harcourt. He stopped for fuel at Gems filling station at Baraobara. "At the filling station I sited (sic) someone I immediately recognised to be one of those who attacked us at Giokoo on 21st May 1994

that led to the death of my brother ... and 3 others. I then alerted the police at the Barobara Police post who assisted me in arresting the suspect who I later knew his name to be Felix Nuate." He was arrested and taken to Division police Headquarters at Eleme.

Note: Compare the statement E by A M Kobani with statement B by Nayone Akpa.

David N. Keenom

Statement A of 1/6/94

Resident of Barako village in Gokana. A civil servant. A member of Mosop he was elected Provost One of NYCOP. After the resignations from MOSOP of Leton and Albert Kobani a meeting was held at 24 Aggrey Rd attended amongst many others by Saro-Wiwa and Kpuinen. "Ken Saro-Wiwa directed members present at the meeting to deal the following for receiving money from Shell

(13 names listed including Edward Kobani, A T Badey, Dr Leton, and Chief S N Orage). Saro-Wiwa left. Goodluck Diigbo said that the youths should be directed to make sure that all 13 were killed and their houses burnt. When Keenom protested at these tactics he was branded a Vulture accused of corruption and expelled. He reported to the Gbenemene that things were getting out of hand.

He attended the meeting of 21 May. His account of the early part of the meeting and of the warning from the motor cyclist Theophilus Ntoo is very similar to that of A M Kobani Ntoo said inter alia that Saro-Wiwa "had sent NYCOP members to deal with the vultures at that Giokoo meeting".

NYCOP members invaded the meeting. Badey escaped. The attackers beat Chief S N Orage. The attackers were led by Baribo (sic) Bera. 4 people beat S N Orage to death in Kennon's presence: Godion Akpo (sp?), Baribo Bera, Miss Daughter Reedon (sp?), Saturday Dola (Bola?).

The attackers now faced Edward Kobani. Kennon and Meabe hid in a small room. He heard A M Kobani shout that his brother had been killed and the NYCOP members saying that they should put the corpses of Badey, S N Orage and Edward Kobani in a white VW car. The attackers discovered Keenom and Meabe in their hiding place and set upon them robbing Keenom and carrying Meabe outside. Bera ordered the attackers to stop. Having sworn that he was not a Vulture Keenom was escorted to his home village by 3 men.

Among the attackers were Nwabani Nweoi (sp?), Lebetan Gbo, Dumon Hue, Sunday Nwate, ? Deekoo, Monday Teton, Daughter Reedon and Kenneth Piaro.

Statement B of 24/6/94

Attended ID parade on 22 June. Was told by police that "some persons suspected to have participated in the attack have been arrested and would be put on lines for me to identify if any of the attackers were among them." He was told to place his hand on anyone he recognised "as being among the attackers of 21/5/94 at Giokoo Gokana". He identified 5 people.

Statement C of 19/7/94

On 19 July he attended another parade. The same procedure was followed. He identified one person "as being the group that attacked us at the meeting on 21/5/94 during which A T Badey and 3 others were killed."

Note: There is a curious postscript to his evidence. PC Friday Iziane states that on 16 June he saw "David Kornen (sp?) a native of Baroko village" who identified one Dopgbana Zorza of Biara village as a murderer of the Ogoni leaders. They went together to arrest Zorzor and took him to SIIB police headquarters.

This appears to be a reference to Keenom. But he does not mention Zorzor in any of his statements.

Kemwin Badara

Statement A of 2/6/94

A farmer from Baranyonwa, Gokana. Chairman of Gokana Nycop Vigilante. Meabe told him of orders to eliminate Vultures. He and Meabe refused to comply.

He attended the meeting of 21 May. After the warning from the motorcyclist a group of armed men and women surrounded the hall. Baribor Bera said "Naami Efena" meaning "let us kill them". Bera dragged Meabe. The attackers "descended" on Chief Edward Kobani. Badara was set upon by about 5 people he did not know. He saw the killing of Badey: "I saw when A T Badey got killed." Badara was then dragged away "into a small bush in (illegible) village far from the venue." His attackers said "Leave him. He is a small Vulture".

Statement B of 27/6/94

Attended ID parade on 25/6/94. He saw a group of people in lines. The officer asked him if he could identify those referred to in his statement as "could be identify if seen".

"I was able to identify 3 persons as among the people who attacked and killed Chief Albert Badey, Chief Edward Kobani, Chief Samuel Orage and Chief Theophilus Orage".

Statement C of 20/7/94

Attended a parade on 19 July where he saw that a "group of persons arrested in connection of the case were put on lines." He was asked to identify "any of those that I saw among the attackers at Giokoo on 21/5/94. He picked out 1 person.

Note: Although in statement B he purports to identify killers of all 4 chiefs, in statement A he claims to have seen only one of the killings - that of Badey. See also 12.7. above.

Isaiah Menegbege

A teacher from Bomu. He was not a member of MOSOP. He arrived at the Giokoo meeting at 09.45. When he arrived more than 30 people were already there. After the message from the motorcyclist the attackers invaded the venue. He escaped not having seen anyone beaten or killed. On arrival at the Kibangha Market Square he saw Badey and Chief Kpai behind him. They looked roughened. Menegbege tried to get them into a taxi but the crowd was too much for him. He did not see what happened to Badey or Kpai.

He returned to Bomu. There he learnt of the death of Badey. He returned to Giokoo. He then saw Chief S N Orage on the ground fatally wounded on the forehead. He was close to his car. He was still alive but very weak. The attackers "ran in". Orage was attacked again and carried away from the hall premises.

Note: It is not entirely clear whether this witness is saying that the final attack on S N Orage took place inside or outside the hall.

HRH Obadiah Nalelo JP

Chairman of the Gokana Council of chiefs. A resident of Biara-Gokana.

He drove in his VW Beetle to the Giokoo meeting arriving before 10.00. While he was waiting for others to arrive Kiobel came. After a brief conversation he left to go home. The meeting commenced at about 11.00 when about 40 were present.

When the hall was surrounded he heard some people shouting that those at the meeting were responsible for the arrest of Saro-Wiwa. The leader of the mob was shouting "E-sho-be". The mob surged forward. Nalelo was attacked, hit on the head with a bottle and robbed. His left ring finger was nearly severed. Because of the seriousness of the attack he could not recognise the attackers.

He nearly lost consciousness. "When I recollected myself a bit I observed that the attackers had shifted to other people". He got up and managed to leave. One of his boys took him away on a bicycle. As he neared his home 3 of the attackers on a motorcycle overtook and demanded that he return to the venue to be killed. He begged them to let him go and they did so. As he was leaving the venue he saw that his car was still where he had left it.

Later he learnt that his car had been dragged away and burnt.

Note: His second statement of 16 June does not add anything of substance. His third of 4/7/94 deals with the disagreements within the Ogoni community prior to the Giokoo meeting.

Chief Francis S Kpai

Resident of Bodo City. Member of MOSOP.

Statement A of 2/6/94

The meeting of 21 May started at about 10.30. When the "Mosop fanatics" attacked the meeting Badia and Badey left and went to the market square at Kibangha. They then tried to get to the Methodist Church but could not do so since they were being chased. A woman let them shelter in her house showing them into a room which she locked. But, when threatened with death by the fanatics, the woman opened the room. Kpai was then dragged to the market and Badey was dragged to Nwcol village. Kpai was beaten stripped and dragged back to the meeting hall. In the hall Chiefs Edward Kobani, S N Orage, T B Orage and Obinalilo were struggling with the fanatics. Kpai saw Edward being beaten and his brother A M Kobani trying to rescue him. Kpai and A M Kobani managed to reach the shrine. The Gbenemene entered the shrine and though urged to libate for killing libated for peace. Some of the fanatics then fetched fuel to set fire to the shrine. One of the fanatics Sunday Ereba relented and told his companions to desist. He came into the shrine and asked how he could save Kpai. Kpai told him to report to the authorities. About 30-40 minutes later he heard the security forces firing. As the soldiers arrived the fanatics ran away.

Statement B of 4/7/94

Deals with the campaign against the so-called Vultures and a meeting of the chiefs in November at which Celestine Meabe said that the allegations against them were false.

HRH Chief James Bagia

Statement A of 3/6/94

He is the Gbenemene of Gokana. Although present at the early stages of the meeting of 21 May he left "at some minutes past eleven in the morning" in order to attend to his sick daughter.

Hence he was not present when the killings took place.

He returned to Giokoo at about 16.00 "when I heard crying and wailing of people around me." He entered the palace shrine via a rear door. Kpai and A M Kobani were there.

When asked by the attackers to libate and to hand over Kpai and A M Kobani for killing he refused.

He had this to say about Kiobel: "I did not see the Commissioner in the morning of 21/5/94 before the meeting but the Commissioner met me at the shrine with Chief F. Kpai and Alhaji M. Kobani. When the Commissioner wanted to talk to me the attackers prevented him and threatened to kill the commissioner (Dr Kiobel) The Commissioner left with fear of death."

After the incident Bagia contacted his 17 chiefs of Gokana and informed them that they should struggle for the release of the Commissioner.

Statement B of 3/8/94

When he entered the shrine A M Kobani shouted "They have killed my brother". When Kiobel arrived the mob did not allow Bagia to speak to him. They insisted that Bagia could only talk to Kiobel in their hearing otherwise they would kill both of them. Kiobel said that Bagia should go back to the shrine and he went away.

Tomka Omon

A relative of Badey. Badey's driver was Victor Okon. On 21 May Okon drove Badey and Omon to the meeting arriving at about 11.00 before it had started. During Badey's speech a motorcyclist arrived on a red Yamaha. The motorcyclist said "those people in the house are Vultures ... and that they are going to deal with them today because they are the people who conspired and arrest Ken Saro-Wiwa ...". Then a group of people "came in mass" and said that they would not allow the meeting to be held. They went into the meeting and started to bring people out and beat them before pushing them back into the hall.

Omon saw Badey and Kpai leaving the premises. Omon and Okon decided to look after the car. Cars parked outside were damaged by the attackers. Chief Nalelo came out and was beaten up and pushed back to the hall. Omon and Okon decided to leave. As they did so they saw Kpai being beaten. Further on they saw Badey with blood all over his body. Omon took hold of him. He sat Badey down on a bench. The mob said that they would kill him. Omon pleaded with them to spare Badey but they started to beat him again.

Omon dragged Badey to a shed but the mob came and beat him to death using "all types of things such as bottles stones sticks blocks and any other things that they can lay hand on." Badey died.

Omon went to look for a vehicle in which to put the body. When he returned it had been removed. He searched for it and later saw the mob taking the body to Giokoo.

Victor Okon

His evidence is consistent with that of Omon.

Peter Fii

Statement A of 1 June 1994

On 21 May he went fishing. He returned home at about 14.00 and shared out his catch with his people. He and one Kpekpe then went towards Barak. On the way they saw a large group of people pushing a white Beetle car. He recognised 2 members of his community, Godwin Akpu and Paul Levura. Fii and Kpekpe were made to kneel down and swear that they would not reveal what they had seen.

In the car he saw the naked body of a fat man. 2 other corpses were being carried on an "improvised stretcher". Of these 2 one was the body of T B Orage. The man dragging Orage's body put a mask over his face. He then went to the Barako Road where he heard people shouting that they have killed Kobani Orage and Badey. He went to the "Kobani Compound" where he told Charles Kobani what had happened. Charles told him to wait while he went to report to the police. Fii "waited a bit " and then left to go to Bomu to inform the Orage family. Having done that he returned home.

Statement B of 26/6/94

I quote in full:

"Further to my statement made on 1/6/94 I have to state that the four people which I identified at SIIB Port Harcourt on 26/6/94 are the people I saw at Gbenemene's palace Hall at Giokoo on 21/5/94. I do not know the name of the four of them and I did not know them before but I saw them among those people who killed the four prominent leaders of Ogoni sons. After the identification I came to know their names to be

1. (Sunday) Samson Ntignee
2. Baridom Nazigha
3. Friday Buruma and
4. Nyede Nasikpo

These people I do not know before but I saw them at Gbenemene Palace Hall premises that day 21/5/94. I am very sure that I did not make mistake in their identification."

Note I do not understand Statement B at all. Statement A gives no indication that he was ever at the Hall. Even if he was it must have been well after the murders had been committed.

Uzormah Kpekpe

Statement A of 16/6/94

A fisherman from Bomu. Statement A is written in a fractured ungrammatical English. It reads as if the person who took it down was purporting to reproduce Kpekpe's mode of speech. It is not signed but on each page there is a thumb print. The substance of the statement is similar to that of Fii relating to the sighting of the Beetle car, the dead bodies and the later reports to the Kobani and Orage families.

He identifies 2 people as among the crowd he saw: Paul Levura "wearing knicker" and Nanage Gbege. This extract exemplifies the style of statement A:

"As we dey go we meet the people they hurry me say make I pass pass but I still try to look inside the car and I see some people wey be like they say them die inside the Beetle car. No cloth for their body. I come see two people two men wey put something like masque made to cover their face, the people wey cover face come hold one man, them they drag the man walk the man never die but blood all the man body."

Statement B of 26/6/94

I quote in full:

"Further to my statement made on 16/6/94 I have to state that on the 22/6/94 I was called to show the people I saw at Gbenemene's palace Gionkoo on 21/5/94 the four people I saw that day are on the line among other people I do not know their names but I saw them at Gbenemene's Palace Gionkoo on 21/5/94. I identified the four of them, their names was later known after I identified them to be

1. Saturday Doobee
2. Friday Bunim (sp?)
3. Samuel Asigha and
4. Godwin Bodo.

I have to state that I saw the four of them there that very day, they are among of the people who killed the four prominent leaders of Ogoni sons that day."

Note: Statement B does not bear a thumb print. There is squiggle which is perhaps meant to be a signature. Again as in the case of Fii there is a central inconsistency: Statement A gives no indication that he was ever in the Palace or that he saw any killing. In Kpekpe's case there is the additional question whether he could have used anything like the precise words attributed to him in Statement B.

It is plain from the handwritten originals that both Statements B were written by the same person.

Evangelist Michael Giasi

A resident of Bomu village he is the brother of Mrs T B Orage.

At about 15.30 he was on his way to Port Harcourt from Bomu. He saw a motor mechanic called Clement Tusima riding a motorcycle away from Giokoo. People were rushing away from Giokoo so Giasi stopped Tusima and asked what had happened.

He replied that people were being beaten and the tension was very high. Tusima said that "Yellow Orage" (T B) had been beaten unconscious and asked where his family lived. Giasi said that T B was married to his sister. Giasi begged Tusima to take him to see his sister so that he could tell her what had happened. Tusima agreed.

At the Orage house Clement explained that T B had been beaten, and that he had tried to protect T B "look at my back you will see your husband's blood when I was protecting him." Giasi looked at Tusima's shirt and saw that it was bloodstained. Orage's daughter and 2 sons then went to Giokoo on motorcycles.

On 29 June Giasi was arrested by 2 police officers. The next day he went with the police to Tusima's home where they recovered the shirt which had been washed.

Erebeke Baraziga Orage

Daughter of T B Orage. On 21 May she was staying in the family house in Bomu village. Between 13.00 and 14.00 Michael Giasi came to the house on a motorcycle. Giasi and the motorcyclist spoke to her mother who screamed out that her father was dead. The motorcyclist told her "they have beaten your father you need to rescue him. I tried to rescue him but I couldn't." Miss Orage arranged for the hire of 2 motorcycles and together with her brother and sister went to Giokoo, a distance of about 2-3 km. When she reached the Gbenemene Palace Hall there were crowds of people making it impossible for the motorcycles to go further. A car was burning. A young man in the crowd Peter Vikor (sp?) tried to persuade her to go back home but she was trapped in the crowd and was badly beaten. She and her siblings were pursued by the attackers. They managed to get away on the motorcycles.

Her most persistent attacker a young man about 5'5' tall tried to strip her naked as she made her escape. Someone shouted "slit her throat."

Leesi Tusima

Clement's daughter. Her father gave her his shirt to wash on 21 May. Part of the back of the shirt was bloodstained. The police recovered the shirt on 30 June.

Saturday Iye

A farmer. At about 17.00 on 21 May he was in his compound on Mogho when he saw Michael Vizor Vice President of Nycop running towards him. He was telling people to run for dear life because the Vultures had been killed.

Hon. Nicholas Tenalo

He was at the meeting of 21 May. He escaped when the attackers started to surround the palace during Badey's speech. His statement is of some assistance on the timings. Having made his escape He took refuge in a friends home between about 12.00 and 18.00. "Around this time of day" he heard soldiers shooting.

Biobaragha Rosalyn

Police Officer. Instructed on 22 May to go to the crime scene and to recover the bodies if possible. His statement is not very precise. At the Palace "every furniture had been destroyed". In the bush here were foot prints and tyre marks. There was a VW car which had been pushed into thick bush and burnt. Portions of flesh were found (it is not very clear where) suspected to be the remains of the 4 murdered men.

APPENDIX 10: SUMMARY OF AFFIDAVITS ALLEGING BRIBERY

Charles Danwi

Affidavit dated 16 February 1995.

He went to see Gani Fawehinmi in his chambers on 14 February. At the request of Fawehinmi he wrote everything he knew about the Ogoni case on 5 pieces of paper. A video and photographs were taken as he wrote the statement. He says that the statement is true.

In the statement of 14 February he says that he attended the Giokoo meeting but ran away when the disturbance started. Later he was arrested. He refused to make a statement. He was "house arrested" at Chief Edward Kobani's house for some days. He saw Mr Kogabra, Miss Vikue and A M Kobani. They told him he must make a statement because his compound was near Giokoo and the military government could do what it wanted to him. Other youths told him they had made statements and "they are save". He was told (it is not clear by whom) to copy out a statement already written and under duress did so.

He was told that he would be given a house, a contract from Shell and Ompadec and some money. He was also placed on level 5 in the Gokana Local Government along with others such as David Keenom, Kenwin Badara, Celestine Meabe and Peter Fii. He was given 30,000 Naira; "others were given second class promises". At a later meeting

security agents, government officials and the Kobani, Orage and Badey families, representatives of Shell and Ompadec were all present and they all agreed". He was given 30,000 Naira. The total amount (I presume he is referring to bribes) was over a million Naira.

He was told to identify anyone that the military arrested. Most of those identified never went to Giokoo.

Nayone Akpa

The affidavit sworn on 27 February gives his name as Nkpah.

In May 1994 he made a truthful statement to FIIB in which he did not implicate anyone. Later he was taken to FIIB and police showed him a statement implicating and incriminating Saro Wiwa and Mittee. He refused to sign. A M Kobani was present and showed Akpa 30,000 Naira. A M Kobani said that if Akpa signed he would receive the 30,000 Naira, employment with the Gokana Local Government at Grade Level 5, weekly allowances and contracts with Ompadec and Shell. He signed and A M Kobani gave him the 30,000.

He had received his monthly salary form the Gokana Local Government since May even though he had not worked for them. His conscience troubled him so he went to see Gani Fawehinmi on 25 February 1995.

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