

**IN THE COMMUNITY COURT OF JUSTICE  
OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES**

**SUIT NO ECW/CCJ/APP/05/11**

**BETWEEN:**

**SIKIRU ALADE**

Plaintiff

**and**

**THE FEDERAL REPUBLIC OF NIGERIA**

Defendant

**AMENDED APPLICATION**

Application Pursuant to:

- A. Article 33 of the Rules of the ECOWAS Community Court of Justice;
- B. Rule 11 of the ECOWAS Court Protocol (“The Protocol”);
- C. Article 59 of the ECOWAS Revised Treaty (“The Revised Treaty”);
- D. Articles 1, 2, 3, 6, 7, 8 and 26 of the African Charter on Human and Peoples’ Rights (“the African Charter”);
- E. Articles 2 and 10 of the International Covenant on Civil and Political Rights (“The ICCPR”).

**I. NAME AND ADDRESS OF THE PLAINTIFF**

- 1. Sikiru Alade is a Nigerian citizen currently detained at the instance of the state at Kirikiri Maximum Security Prison, Apapa, Lagos, in Nigeria.

**II. DESIGNATION OF THE DEFENDANT**

- 2. The defendant is the Federal Republic of Nigeria, a founding member state of the Economic Community of West African States (ECOWAS) and subject to the jurisdiction of this Honorable Court.

**III. SUBJECT MATTER OF THE PROCEEDINGS**

- 3. This case concerns the use of the “holding charge” to compel the indefinite detention of the plaintiff without charge, sufficient evidence, or due process. The “holding charge” is the

process by which a suspect is brought before a Magistrate Court that lacks jurisdiction over the offence for which the suspect has been detained. The Magistrate therefore cannot order the suspect's release, and has no option under the law but to remand him in custody on the basis of a holding charge, without any determination whether there are sufficient grounds for detention.

4. The use of the holding charge to detain a suspect indefinitely violates the plaintiff's rights under the African Charter. to liberty and freedom from arbitrary detention (Article 6 of the Charter), to have his cause heard and to trial within a reasonable time (Article 7 of the Charter), and to equality before the law (Article 3 of the Charter) in the following ways:
  - A. *Unlawful and Arbitrary Detention.* Any person who is arrested must be brought promptly before a judicial officer to consider whether detention is justified. In this case, the magistrate had no power to order the release of the plaintiff, failed to consider the sufficiency of the evidence justifying detention, and failed to provide any reasons for ordering detention. The detention therefore has no lawful basis, and is arbitrary, in breach of the right to liberty under Article 6 of the African Charter.
  - B. *Excessive Pre-Trial Detention.* The plaintiff has been detained without trial since 2003, which is excessive, violates the right to liberty and to a prompt trial protected by Article 7 of the African Charter. The authorities failed to regularly review his detention, and failed to demonstrate special diligence in preparing his case for trial. Any excuse based on lack of resources cannot be justified.
5. Pursuant to the Rules of Procedure of the Community Court of Justice and the decisions of this Court, the plaintiff sets out below a concise presentation of the facts of the case, including references to documents,<sup>1</sup> and a summary of the pleas in law on which the application is based.<sup>2</sup>

#### **IV. JURISDICTIONAL FACTS**

6. The Federal Republic of Nigeria has been a party to the Revised Treaty of the Economic Community of West African States (ECOWAS) since its entry into force 1995. It has been a party to the ECOWAS Court's Protocol since its entry into force on 5 November 1996; and a party to the Supplementary Protocol, which extended this Court's jurisdiction to hear human rights cases brought by individuals, since its provisional entry into force on 19 January 2005.
7. The Federal Republic of Nigeria ratified the African Charter on Human and Peoples' Rights (hereafter referred to as "African Charter") on 22 June 1983, and acceded to the International Covenant on Civil and Political Rights on 29 July 1993.

#### **V. SUBJECT MATTER OF THE PROCEEDINGS**

8. The plaintiff was born on 14 May 1975 in Oshogbo in the Osun State of Nigeria.
9. On 9 March 2003, the plaintiff was arrested near the old Lagos toll gate area by a person claiming to be a Police officer. The officer neither disclosed his identity nor gave to the plaintiff any reasons for the arrest.

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<sup>1</sup> *Musa Saidu Khan v The Republic of The Gambia*, ECW/CCJ/JUD/08/10, Judgment of 16 December 2010, para. 12.

<sup>2</sup> Article 33(1) of the Rules of Procedure of the Community Court of Justice.

10. The plain clothes police officer thereupon forcefully dragged the plaintiff to the Ketu Police Station in Lagos State, where he was detained from 9 May 2003 until 15 May 2003 when he was arraigned in the Magistrate Court Yaba, Lagos State on a charge of armed robbery under the procedure known and described in the Nigerian Criminal Jurisprudence as “Holding Charge”.
11. Section 35 of Nigeria’s 1999 Constitution prohibits the police from detaining any suspect for longer than 48 hours without a court order. The detention of the plaintiff from 9 March until 15 May 2003 was not authorized by any court of law.
12. The “Holding Charge” procedure as understood and applied under the Nigerian criminal justice system is that by which a criminal suspect who is arrested for a criminal offence in respect of which the Magistrate’s Court lacks trial jurisdiction is arraigned all the same before the Magistrates Court merely for the purpose of securing an order to remand the suspect in prison custody as a pre-trial detainee.
13. Since 15 May 2003, the plaintiff has been held in pre-trial detention at the Kirikiri Maximum Security Prison in Apapa, Lagos. He has not been returned to court nor has he been charged with a crime under any law before any court of competent jurisdiction.
14. The aim of the whole exercise is to give the detention of such accused some semblance of legality which upon a casual application of Articles 6 and 7 of the African Charter is illegal, null and void.
15. It was as a result of the said “holding charge” that the plaintiff was ordered to be remanded in prison by the Yaba Magistrate Court on 15 March 2003, notwithstanding that the plaintiff was arraigned for the offence of armed robbery being an offence over which the Magistrate clearly lacks jurisdiction under Nigerian Law.
16. At the time of the arrest of the applicant in March 2003, he had a nine year old daughter, though he was then separated from his wife.
17. On several occasions since his detention, the plaintiff has taken ill and needed medical attention. In 2010, he was recommended for an appendectomy (the removal of an inflamed appendix) at his own cost.
18. The plaintiff contends that his detention in the manner already described herein is contrary to Articles 1, 2, 3, 5, 6, 7, 8 and 26 of the African Charter on Human and Peoples’ Rights and of Articles 2(3)(1)-(2) and 10(1)-(2) of the International Covenant on Civil and Political Rights, which are binding on Nigeria.

## **VI. PLEAS IN LAW: JURISDICTION**

19. This application satisfies the requirements of admissibility within the Protocol of the Court, because the Court has the power to adjudicate human rights claims, including those involving arbitrary detention and fair hearings, the plaintiff has standing to litigate such a claim, and despite the fact that the plaintiff was initially detained before the Supplementary Protocol came into force for Nigeria, the human rights violations are ongoing and come within the temporal jurisdiction of the Court.

### **A. Jurisdiction *Ratione Materiae***

20. Article 9(4) of the Court’s Protocol grants this Court “jurisdiction to determine cases of violation of human rights that occur in any Member State.” In the case of *Hon. Dr. Jerry Ugokwe v. Federal Republic of Nigeria*, this Court held that the reference to the African Charter in Article 4 of the Revised ECOWAS Treaty, as well as in other provisions,

enables the Court to “bring in the application of those rights catalogued in the African Charter.”<sup>3</sup>

21. The Court has jurisdiction to enforce human rights provisions contained in the African Charter, which is part of domestic law in Nigeria by virtue of the African Charter on Human and Peoples Rights (Enforcement and Ratification) Law, Cap A9, Laws of the Federation of Nigeria 2004. This includes the right to liberty and to freedom from arbitrary detention (Article 6); and the right of every individual to have their cause heard, including the right to appeal to a competent national organ, to be presumed innocent, and to be tried within a reasonable time (Article 7).
22. The Charter also requires States parties to “adopt legislative or other measures to give effect” to the rights and freedoms enshrined in the Charter (Article 1). The Universal Declaration on Human Rights (UDHR), which has been recognized and applied by this Court,<sup>4</sup> and the ICCPR, which Nigeria has ratified and which is considered the legal codification of the UDHR, also provide that the State must provide individuals with an effective remedy for violations of their rights.<sup>5</sup>

### **B. Jurisdiction Ratione Personae**

23. Under new Article 10(d) of the Court’s Protocol, access to the Court is open to “individuals on application for relief for violation of their human rights.” The plaintiff is a Nigerian citizen and therefore has standing to bring this claim.

### **C. Jurisdiction Ratione Temporis**

24. This Court is competent to determine whether the Defendant has violated the plaintiff’s rights, even though his initial detention took place before the Supplementary Protocol entered into force on 19 January 2005, granting this Court jurisdiction to hear cases brought by individuals. At the time that the plaintiff was detained and remanded on the holding charge, Nigeria had already ratified the ECOWAS Treaty and had thus accepted an obligation to protect the human rights of its citizens. In addition, the unlawful detention has continued well after the Supplementary Protocol came into force.

#### 1. Rights Protected by the ECOWAS Treaty

25. At the time that the plaintiff was detained and remanded in custody on the holding charge, Nigeria was legally obliged to protect his human rights. By ratifying the ECOWAS Treaty in 1995, Nigeria agreed in Article 5 to “refrain from any action that may hinder the attainment of the ... objectives [of the Community]” and made an undertaking “to honour its obligations under this Treaty.”
26. Nigeria became a party to the Supplementary Protocol accepting the right of individuals to bring human rights cases on 19 January 2005. However, the acceptance of this procedural mechanism does not alter Nigeria’s existing substantive obligations. Any declaration by which a state accepts the jurisdiction of a human rights tribunal to hear individual complaints is merely a procedural act which does not bar the tribunal from reviewing that State’s compliance with its pre-existing substantive obligations, unless a State party has

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<sup>3</sup> *Hon. Dr. Jerry Ugokwe v. Federal Republic of Nigeria*, CCJ of ECOWAS, Judgment of 7 October 2005, at para. 29.

<sup>4</sup> See *Professor Moses Essien v. The Republic of Gambia & Another* (unreported), CCJ of ECOWAS, Judgment of 14 March 2007, Suit No. ECW/CCJ/APP/05/05.

<sup>5</sup> UDHR, Article 8; ICCPR, Article 2(3).

made a specific declaration to the contrary.<sup>6</sup> Such an interpretation of the temporal jurisdiction is consistent with the primary “object and purpose” of a human rights treaty,<sup>7</sup> which is to ensure respect for the basic rights of human beings under the parties’ jurisdiction, rather than their bilateral or multilateral state interests. Nigeria has made no declaration limiting this Court’s jurisdiction to violations that occurred after 19 January 2005.

27. Other regional human rights bodies have interpreted their jurisdiction in this way. The European Commission of Human Rights has held itself to be competent to hear cases that arose in the period between ratification of the European Convention on Human Rights and acceptance of the right of individual petition, unless the State party had made a declaration that *specifically* limited its jurisdiction to post-declaration facts or violations.<sup>8</sup> The European and Inter-American Courts have also considered cases in the context of situations of continuing violations, which are discussed below.<sup>9</sup>
28. In the context of the ECOWAS “integrated Community legal order,”<sup>10</sup> this Court should consider itself competent to hear all cases involving violations that occurred after entry into force of the Revised Treaty in relation to a state party, regardless of whether the violations occurred before or after the entry into force of the Supplementary Protocol on 19 January 2005. By making the Revised Treaty part of their domestic legal orders, and by choosing not to limit this Court’s competence when drafting or ratifying the Protocol, the Member

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<sup>6</sup> See, among others, Manfred Nowak, *UN Covenant on Civil and Political Rights: Commentary* (N.P. Engel, Kehl, 1993), at 679.

<sup>7</sup> Under the Vienna Convention on the Law of the Treaties, which codifies customary international law regarding the interpretation and implementation of treaties, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (Article 31). Parties must comply with their obligations under the treaties in good faith (Article 26), and are prohibited from taking any actions which would defeat the object and purpose of a treaty, even before it enters into force (Article 18).

<sup>8</sup> See inter alia *De Varga-Hirsch v. France*, European Comm. H.R., Decision of 9 March 1983 (Appl. no. 9559/81), in particular at 209-210; and *Demicoli v. Malta*, Comm. European Comm. H.R., Decision of March 15, 1989 (Appl. no. 13057/87). See also T. Zwart, *The Admissibility of Human Rights Petitions* (Martinus Nijhoff Publishers, Leiden, 1994), at 134-135.

<sup>9</sup> The question has not arisen for the African Commission on Human and Peoples’ Rights because no separate recognition of its competence to consider individual communications is required under the Charter. The United Nations Human Rights Committee (HRC) has taken the approach that it has no competence to review violations occurring in the interim period (between ratification of the ICCPR and acceptance of the right of individual petition in the First Optional Protocol). Dissenting Committee members and other influential commentators, including Professor Manfred Nowak, have criticized the position of the HRC on this question. See, for example, *Aduayom et al v. Togo*, UNHRC, Views of 12 July 1996, U.N. Docs CCPR/C/51/D/422/1990, 423/1990 and 424/1990, Dissenting Opinion of Mr. Pocar. The ICCPR is different from the ECOWAS Treaty and all other regional treaties protecting human rights standards in that the ICCPR provides for a secondary mechanism by which to review state compliance with substantive treaty obligations, absent acceptance of the right of individual petition. The period review mechanism established by the ICCPR mandates the HRC to regularly review the member states’ general human rights situation, irrespective of the states’ recognition of its competence to consider individual complaints. In contrast, the fully adjudicatory powers of this Court were clear to the ECOWAS member states from the outset.

<sup>10</sup> *Hon. Dr. Jerry Ugokwe v. Federal Republic of Nigeria*, Case No. ECW/CCJ/APP/02/05, Judgment of 7 October 2005, para. 32.

States have granted the Court full temporal jurisdiction, and waived the right to raise *rationae temporis* objections, in such cases.<sup>11</sup>

## 2. There is a Continuing Violation of the Treaty

29. Where prior situations *continue* to exist after the entry into force of a treaty, they give rise to state responsibility. The continuing violation” doctrine is firmly established in customary international law, as crystallized in Article 28 (Non-retroactivity of Treaties) of the Vienna Convention on the Law of the Treaties:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or *any situation which ceased to exist* before the date of the entry into force of the treaty with respect to that party”. (Emphasis added.)

30. In particular, international human rights case law and doctrine have interpreted this principle to mean that states are liable for situations or violations that straddle the time of ratification – known as continuing violations – as an exception to the general principle of non-retroactivity. This applies to both ongoing violations (such as a person’s continued arbitrary detention) and past situations with ongoing effects which themselves constitute violations (such as a person’s permanent loss of certain legal rights as a result of earlier state actions).
31. In *Pagnouille v. Cameroon*, the African Commission reviewed allegations that the victim had been denied a fair trial in a criminal process that resulted in a long prison sentence. The domestic trial pre-dated Cameroon’s ratification of the African Charter, but the detention continued after it. The Commission resolved the jurisdictional issue as follows:

“In conformity with Article 65 of the Charter, the Commission cannot pronounce on the equity of court proceedings that took place before the African Charter entered into force in Cameroon .... If however irregularities in the original sentence have consequences that constitute a continuing violation of any of the Articles of the African Charter, the Commission must pronounce on these.”<sup>12</sup>

32. This principle of law has also long been recognized and applied to human rights cases by the UN Human Rights Committee,<sup>13</sup> the Inter-American Court of Human Rights,<sup>14</sup> and the

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<sup>11</sup> Even the UN HRC agreed, on one occasion, to hear a similar case in which the state failed to raise *rationae temporis* objections, with the Committee implicitly treating such failure as a waiver of the state’s rights in this respect. *Parkanyi v. Hungary*, UNHRC, Views of 27 July 1992, U.N. Doc. CCPR/C/45/D/410/1990, para. 4.

<sup>12</sup> Comm. No. 39/90 (1997) (emphasis added). See also *Amnesty International and Others v. Sudan*, AfCommHPR Comms. Nos. 48/90, 50/91, 52/91, 89/93 (1999), in which the Commission held that where a domestic law is per se in violation of the Charter, its continued effectiveness after ratification would amount to a “continuing violation,” *ibid.*, para. 40.

<sup>13</sup> See e.g. *Lovelace v. Canada* (Comm. 24/77) (ongoing denial of Indian status); *Gueye et al v. France* (Comm. 196/85) (discriminatory treatment); *Kulomin v. Hungary* (Comm. 521/91) (ongoing extended pre-trial detention); and *J.L. v. Australia* (Comm. 491/92) (ongoing debarment of lawyer).

<sup>14</sup> See e.g. *Martin del Campo Dodd v. Mexico*, I-ACtHR, Judgment of 3 September 2004 (Preliminary Objections); *Serrano-Cruz Sisters v. El Salvador*, I-ACtHR, Judgment of 23 November 2004 (Preliminary Objections); *Caesar v. Trinidad and Tobago*, I-ACtHR, Judgment of 11 March 2005; and *Moiwana Village v. Suriname*, I-ACtHR, Judgment of 15 June 2005.

European Court of Human Rights;<sup>15</sup> as well as being recognized more generally in the International Law Commission Report on the law of the treaties.<sup>16</sup>

33. The European Court of Human Rights has also examined cases where a person was arbitrarily detained before the Convention entered into force for a country, but continued to be detained afterwards, and has found that this constituted arbitrary detention and violations of the right to liberty and to trial within a reasonable time.<sup>17</sup>
34. The arbitrary detention of the plaintiff has continued for over six years since Nigeria ratified the Supplementary Protocol in January 2005, and has at all times been based on his initial unlawful remand in custody based on a holding charge. In view of the above authorities, the plaintiff submits that his detention amounts to an ongoing violation of his rights under the African Charter.

#### **D. Three-year limitation period**

35. Given that the State's arbitrary detention of, and denial of due process to, the Applicants is ongoing, the 3-year statute of limitations period has not lapsed in relation to this action.<sup>18</sup>
36. This principle has been upheld by other human rights tribunals. For example, the European Court has held that its rule requiring applications to be filed within six months of the last court decision does not apply to ongoing violations. In such circumstances, time will only start to run "after [such a] state of affairs ha[s] ceased to exist."<sup>19</sup>

#### **E. Non-submission to other tribunals**

37. Consistent with new Article 10(d)(ii) of this Court's Protocol, this matter has not been submitted for adjudication to any other international tribunal.

#### **F. No need to exhaust Domestic Remedies.**

38. The plaintiff is not required to exhaust domestic remedies before seeking relief under laws applicable this honorable Court.<sup>20</sup>

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<sup>15</sup> See *Šilih v. Slovenia* [GC], ECtHR, Grand Chamber Judgment of 9 April 2009, paras. 148-167 (the Court also discusses the approach of other international bodies in paras. 109-118).

<sup>16</sup> UN Doc. A/CN.4/186 and Add. 1-7. Sir H. Waldock, "Sixth Report on the Law of Treaties," in *Yearbook of the International Law Commission* vol. 2 (1966), p. 63, para. 3.

<sup>17</sup> See e.g. *Kalashnikov v. Russia*, ECtHR, Judgment of 15 July 2002; *Klyakhin v. Russia*, ECtHR, Judgment of 30 November 2004. The Inter-American Court of Human Rights has also found continuing violations where a person was initially and unlawfully detained before the Convention entered into force, in the context of disappearances: see e.g. *Goiburú et al. v. Paraguay*, I-ACtHR, Judgment of 22 September 2006.

<sup>18</sup> Under new Article 9.3 of the Court's Protocol, any action against a State Member of the Community "shall be by statute barred after three (3) years from the date when the right of action arose."

<sup>19</sup> *McFeeley v. United Kingdom*, ECommHR, Decision of 1981, Appl. no. 8317/78, at 76. See also *Edwards v. UK*, in which the European Court considered the applicants' allegations of an ongoing state failure to properly investigate their son's death in custody. The Court held that it was reasonable for them to wait for the results of a government inquiry, "insofar as there were outstanding factual issues to resolve relevant to a possible civil claim," which they might have been required to exhaust before going to the European Court. Judgment of June 7, 2001, para. 3.

<sup>20</sup> *Hon. Dr. Jerry Ugokwe v. Federal Republic of Nigeria*, Case No. ECW/CCJ/APP/02/05, Judgment of October 7, 2005, para. 32.

## VII. PLEAS IN LAW—MERITS

39. The use of the holding charge violates the plaintiff's rights to liberty and freedom from arbitrary detention (Article 6 of the Charter) and to have his cause heard and to trial within a reasonable time (Article 7 of the Charter).

### A. Unlawful and Arbitrary Detention under the Holding Charge

40. Any person who is arrested must be brought promptly before a judicial officer to consider whether detention is justified. In this case, the magistrate had no power to order the release of the plaintiff, failed to consider the sufficiency of the evidence justifying detention, and failed to provide any reasons for ordering detention and lacked a discretion as to whether or not to detain the plaintiff. The detention therefore has no lawful basis, and is arbitrary, in breach of the right to liberty under Article 6 of the African Charter.

#### The Magistrate had no Power to Order Release

41. The requirement that any suspect who is detained must be promptly brought before a competent judicial officer is well entrenched in human rights law. In this case, however, the magistrate had no power to do anything except remand him in custody on the basis of a holding charge, and was therefore not a competent judicial officer with the power to order release. The detention of the plaintiff based on a holding charge was therefore arbitrary.

#### *Relevant Legal Standards*

42. Article 6 of the African Charter establishes the right to liberty: "No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Article 7(1) sets out the due process guarantees necessary to ensure this right: "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to *competent* national organs against acts of violating his fundamental rights" (emphasis added).
43. Any suspect who is detained must therefore be brought promptly before judicial officers empowered to decide on their detention or release. The African Commission stated in 1992 that fair trial protections, which apply from the earliest states of investigation, include the right to be "promptly brought before a judge or other officer authorized by law to exercise judicial power".<sup>21</sup> The Commission reaffirmed this in 2003, explaining that:

"Any form of detention and all measures affecting the human rights of a person arrested or detained shall be subject to the *effective control* of a judicial or other authority. . . . *The judicial official or other authority shall exercise control over the official detaining the person.*"<sup>22</sup>

44. This required that "Anyone who is arrested or detained on a criminal charge shall be brought before a judicial officer *authorized by law to exercise judicial power*", one purpose of which is to "give the detainee the opportunity to *challenge the lawfulness of his or her detention and to secure release* if the arrest or detention violates his or her rights."<sup>23</sup>

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<sup>21</sup> ACHPR /Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial (1992), adopted by the African Commission on Human and Peoples' Rights, in its Eleventh Ordinary Session, in Tunis, Tunisia, from 2 to 9 March 1992 (emphasis added).

<sup>22</sup> The African Union's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of May 2003, Guideline M(2)(h). Available at: [http://www.afrimap.org/english/images/treaty/ACHPR\\_Principles&Guidelines\\_FairTrial.pdf](http://www.afrimap.org/english/images/treaty/ACHPR_Principles&Guidelines_FairTrial.pdf)

<sup>23</sup> *Ibid.*, at Guideline M(3)(a) and (b)(vi) (emphasis added).

45. These principles are consistent with those applied by other human rights bodies. The UN Human Rights Committee (UNHRC) has explained that:

“While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive ... is that such review is, in its effects, real and not merely formal. [The ICCPR] requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.”<sup>24</sup>

46. Other regional human rights systems have also endorsed the principle that suspects must be brought before judicial officers empowered to substantively review the detention of the suspect, and order release if appropriate. The European Court has stressed that the judge or officer exercising judicial power to review the detention of a suspect “must have the power to make a binding order for the detainee’s release” if he finds that detention is not justified.<sup>25</sup> For example, an advisory committee that “did not have power to order their release and accordingly did not constitute a ‘competent legal authority’.”<sup>26</sup>
47. Under the law in Nigeria, because the Magistrate lacked the power to try the offences for which the plaintiff was detained, the Magistrate also lacked the power to order release, but could only issue a formalistic decision confirming the conduct of the police without examining its basis or legality. This does not constitute an independent or judicial power.

Failure to consider evidence for detention or give reasons

48. Any detention prior to trial must be based on a reasonable suspicion that the person committed an offence. The judicial officer must determine whether there is sufficient evidence to justify the continued detention of the suspect, and give reasons. In this case, the Magistrate did not examine and assess the sufficiency of the evidence justifying detention before ordering the plaintiff’s detention on a holding charge. Ordering detention without examining the evidence or giving reasons is arbitrary, violating the right to liberty under Article 6 of the African Charter.

*Relevant Legal Standards*

49. The African Commission has explained that the “purpose of the review before a judicial or other authority includes to (i) assess whether sufficient legal reason exists for arrest”, and that “unless there is sufficient evidence that deems it necessary ... States must ensure that [arrested persons] are not kept in custody pending their trial.”<sup>27</sup>
50. The UN Human Rights Committee has similarly ruled that detention on remand must not only be “lawful” but also “reasonable” and “necessary”, and that the State must adduce evidence supporting those factors,<sup>28</sup> finding that “remand in custody could be considered arbitrary if it is not necessary in all circumstances of the case, for example to prevent flight

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<sup>24</sup> *A v. Australia*, UNHRC, Decision of 30 April 1997, UN Doc. CCPR/C/59/D/560/1993, at para. 9.2. Article 9(4) of the ICCPR requires that “[a]nyone 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” (emphasis added).

<sup>25</sup> *Assenov v. Bulgaria*, ECtHR, Judgment of 28 October 1998, at para. 146; *Aquilina v. Malta*, ECtHR, Judgment of 29 April 1999, at para. 47; *Schiesser v. Switzerland*, ECtHR, Judgment of 4 December 1979, at para. 31

<sup>26</sup> *Ireland v. United Kingdom*, ECtHR, Judgment of 18 January 1978, at para. 199.

<sup>27</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Part M, Principles 1(e) and 3(b)(i).

<sup>28</sup> *H. van Alphen v. the Netherlands*, UNHRC, Views of 23 July 1990, U.N. Doc A/45/40 (vol. II), p. 115, para. 5.8.

or interference with evidence”, and that “detention should not continue beyond the period for which the State can provide appropriate justification.”<sup>29</sup> The UN Working Group on Arbitrary Detention similarly recommended that states eliminate detention orders grounded on insufficient evidence.<sup>30</sup>

51. Other regional human rights courts apply the same principle. The European Court of Human Rights has also affirmed that judicial officers must justify detention by assessing the sufficiency of evidence, and in particular that “The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention”<sup>31</sup> Therefore, for detention to be considered lawful, the judicial authority reviewing arrest and ordering remand must address not only the initial lawfulness of the arrest, but also “whether or not there is a reasonable suspicion that the arrested person has committed an offence”.<sup>32</sup>
52. The European Court of Human Rights has likewise declared that judicial authorities must provide reasons for detention following a thorough analysis of the evidence. A state must show “relevant and sufficient” reasons to justify detention, which cannot be “general or abstract.” The court examining whether detention is justified must “examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release.”<sup>33</sup>
53. In this case, the Magistrate failed to determine whether the detention of the plaintiff was necessary based on the circumstances of their case, or to give any reasons why pre-trial detention was justified. Detention was ordered automatically as a result of the Magistrate’s lack of jurisdiction over the offences, and not based on any factor relating to the plaintiff.

#### **B. Excessive Pre-Trial Detention**

54. The plaintiff has been detained without trial since 2003, which is excessive, violates the right to liberty, and to a prompt trial protected by Article 7 of the African Charter. The authorities failed to regularly review his detention, and failed to demonstrate special diligence in preparing his case for trial. Any argument based on lack of resources cannot be justified.

#### Excessive Detention and the Right to Trial within a Reasonable Time

55. The detention of the plaintiff without trial since 2003 is unreasonable as human rights law requires that pre-trial detention must never extend for an excessive or unreasonable period. Rather, detention prior to trial must be for the shortest period possible.

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<sup>29</sup> *A. v. Australia*, UNCHR, Decision of 28 October 2002, UN Doc. CCPR/C/76/D/900/1999, at para. 9.2-9.4.

<sup>30</sup> UN Human Rights Council, Report of the Working Group on Arbitrary Detention, Addendum 3, Mission to Colombia (1 to 10 October 2008), UN Doc. A/HRC/10/21/Add.3, 16 February 2009, at para. 103. Available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.21.Add3.pdf>.

<sup>31</sup> *O’Dowd v. the United Kingdom*, ECtHR, Judgment of 29 September 2010, para. 70; see also *Wemhoff v. Federal Republic of Germany*, ECtHR, Judgment of 27 June 1968, at para. 10.

<sup>32</sup> *McKay v. UK [GC]*, ECtHR, Grand Chamber Judgment of 3 October 2006, at para. 40; see also *Assenov v. Bulgaria*, ECtHR, Judgment of 28 October 1998, at para. 146; *Fox, Campbell, and Hartley v. UK*, ECHR, Judgment of 30 August 1990, at para. 32; *Nikolova v. Bulgaria*. ECtHR, Judgment of 25 March 1999, at para. 58.

<sup>33</sup> *Smirnova v Russia*, ECtHR, Judgment of 23 July 2003, paras. 58-63. See also *Wemhoff v. Federal Republic of Germany*, ECtHR, Judgment of 27 June 1968, at para. 10; *Tomasi v. France*, ECtHR, Judgment of 27 August 1992, at para. 84; *Punzelt v. Czech Republic*, ECtHR, Judgment of 25 April 2001.

### *Relevant Legal Standards*

56. The African Commission found in *Free Legal Assistance Group and Others v. Zaire* that “indefinite detention ... violates Article 6”.<sup>34</sup> It has also ruled that “the substantive rights enshrined in the African Charter rely on procedural rules for their enjoyment”,<sup>35</sup> and has therefore placed a clear obligation on states to establish adequate safeguards to protect the right to be free from arbitrary or excessive pre-trial detention under Article 6.
57. The UN Human Rights Committee has explained that “Pre-trial detention should be an exception and as short as possible”.<sup>36</sup> The Committee against Torture has also explained that “[u]ndue prolongation of this pre-trial stage represents a form of cruel treatment of the individual concerned, even if he is not deprived of his freedom,” and that the law must therefore “specify a reasonable time limit for pre-trial detention and for the completion of criminal proceedings”.<sup>37</sup>
58. The UN Working Group on Arbitrary Detention has similarly called on States “to establish maximum time limits for pre-trial detention in their domestic legislation” and “to ensure that warrants for pre-trial detention clearly establish the date of the expiry of the applicable time limit.”<sup>38</sup> The Working Group also urged States to prevent arbitrary detention or detention on remand or by providing “that prison authorities have the power and are obliged to release pre-trial detainees or prisoners automatically upon expiry of this time limit without a specific release order by a judge, magistrate, prosecutor, or other State authority”.<sup>39</sup>
59. The European Court of Human Rights has also ruled that national judicial authorities must ensure that in any specific case, the pre-trial detention of an accused person does not exceed a reasonable time.<sup>40</sup> The Court has deemed as excessive pre-trial detention periods lasting from two and a half<sup>41</sup> to nearly five years.<sup>42</sup>
60. This same obligation applies to the right to be tried without undue delay under Article 7. Article 7(1)(d) of the African Charter states that “[e]very individual shall have the right to have his cause heard. This comprises: ... (d) the right to be tried within a reasonable time by an impartial court or tribunal.”
61. The Human Rights Committee has explained that “[t]he right of the accused to be tried without undue delay ... [is] designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case.” The Committee has not prescribed absolute limits, but rather observed that “[w]hat is reasonable has to be assessed in the circumstances of each case, taking into

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<sup>34</sup> *Free Legal Assistance Group and Others v. Zaire*, ACommHPR, Decision of October 1995, Communication Nos. 25/89, 47/90, 56/91, and 100/93, at para. 42.

<sup>35</sup> *Women’s Legal Aid Centre (on behalf of Sophia Moto) v. Tanzania*, ACommHPR, Decision of December 2004, Communication No. 243/2001, at para. 45.

<sup>36</sup> UN Human Rights Committee, *General Comment No. 8*, at para. 3.

<sup>37</sup> Report of the Committee against Torture, UN Doc. A/53/44 (1998), at para. 68.

<sup>38</sup> UN Human Rights Council, Seventh session, Item 3 of the provisional agenda, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/7/4, 10 January 2008.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Smirnova v Russia*, ECtHR, Judgment of 23 July 2003, paras. 58-63.

<sup>41</sup> *Punzelt v. Czech Republic*, ECtHR, Judgment of 25 April 2000.

<sup>42</sup> *P.B. v. France*, ECtHR, Judgment of 1 August 2000.

account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.” However, the Committee emphasized that “where the accused are denied bail by the court, they must be tried as expeditiously as possible.”<sup>43</sup>

62. Nigeria recognizes its obligation to protect the right to a trial within a reasonable time or release pending trial in its own Constitution. Article 35(4) of the Nigerian Constitution states:

“Any person who is arrested or detained . . . shall be brought before a court of law within a reasonable time, and if he is not tried within a period of (a) two 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 . . . be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.”

63. In addition, section 35(1) provides that for detainees who have been charged and await trial: “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.”
64. In this case, the excessive period of detention is not justified by any particular complexity in the case against the plaintiff, nor by his own conduct.

#### No Fixed Return Date

65. Pre-trial detention must be kept under judicial review to ensure that it does not extend for an unreasonable period. Here, the authorities failed to keep the plaintiff’s detention under judicial review because they failed to set any date on which the plaintiff would be brought back before the court, allowing his pre-trial detention to extend for an unreasonable period, violating his right to liberty under Article 6 and to be tried within a reasonable time under Article 7(1)(d) of the Charter.

#### *Relevant Legal Standards*

66. International human rights law requires that State authorities establish a fixed return date to help ensure that suspects are remanded in custody for the shortest possible time. Establishing a fixed return date, instead of remanding in custody *sine die*, ensures that the detention will be subject to regular review by an independent judicial officer, who may determine whether or not the detention has become excessive or arbitrary.
67. A number of declarations by African bodies have emphasized the need to regularly review pre-trial detention. The 1996 Kampala Declaration on Prison Conditions in Africa, which was adopted in consideration of the general problem of pre-trial detention in Africa and of the fact that prison overcrowding is significantly influenced by the procedures and policies of criminal justice authorities, specifically recommends that “there should be a system for regular review of the time detainees spend on remand.”<sup>44</sup> The 2002 Ouagadougou

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<sup>43</sup> UN Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32 23 (2007), at para. 35.

<sup>44</sup> The Kampala Declaration was adopted by consensus at the closure of the International Seminar on Prison Conditions in Africa held from 19 to 21 September 1996. Delegates of forty African States were present, including Ministers of State, Prison Commissioners and Judges, as well as the President of the African Commission on Human and Peoples’ Rights, and international, regional and national non-governmental organisations. The Declaration has also been recognized by the UN Economic and Social Council Resolutions 1997/36 and 2007/24, and cited in the Mandate of the Special Rapporteur on Prisons and Conditions of Detention of the African Commission.

Declaration for Accelerating Penal Reform in Africa and Plan of Action stressed that preventive detention must be a last resort and for the shortest possible time, and recommended regular review of preventive detention cases, as well as the regular updating and efficient administration of prisoners' files.<sup>45</sup>

68. The UN Human Rights Committee has affirmed the principle that the lawfulness of pre-trial detention must be regularly reviewed. In *A. v. Australia* it ruled that remand decisions should be open for review every few months, to ensure that the reasons given for remand still exist;<sup>46</sup> and in *Ahani v. Canada* it observed that detainees who had not been convicted "must have appropriate access ... to judicial review of the detention, that is to say, review of the substantive justification of detention, as well as *sufficiently frequent review*."<sup>47</sup>
69. Here, the plaintiff has not been brought before a judge since 2003. The remand in custody *sine die* has been a key cause of his ill-treatment.

#### Lack of Special Diligence

70. State authorities must act with special diligence when investigating and preparing cases against suspects who are held in pre-trial detention. There is nothing to warrant the excessive delay in the investigation and prosecution of the plaintiff in this case.

#### *Relevant Legal Standards*

71. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa recognize the requirement that criminal cases be conducted expeditiously and with diligence. The Principles state that in the conduct of criminal investigations and legal proceedings, "Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and *expeditiously*, and respect and protect dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."<sup>48</sup>
72. This requirement of diligence is especially important when as a person who is presumed innocent is being detained prior to trial. The European Court of Human Rights has derived the principle of special diligence from right to trial within reasonable time,<sup>49</sup> and has explained that detainees are entitled to have their case given priority and conducted with particular expedition.<sup>50</sup> Even there may be reasons to justify continued detention, after a

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<sup>45</sup> The Ouagadougou Declaration resulted from the Second Pan-African Conference on Penal Reform in Africa, held in Ouagadougou, Burkina Faso, from 18 to 20 September 2002. It was intended to be a follow-up session on the Kampala Declaration. Delegates from 34 African countries attended these sessions whose objectives were to assess progress made since 1996 and further identify new African models for dealing with crime. It was adopted by the African Commission on Human and People's Rights during its 34<sup>th</sup> Ordinary Session held in November 2003 (Res.64(XXXIV)03).

<sup>46</sup> *A. v. Australia*, *A. v. Australia*, UNCHR, Decision of 28 October 2002, UN Doc. CCPR/C/76/D/900/1999, at para. 9.4.

<sup>47</sup> *Ahani v. Canada*, UNHRC, Decision of 29 March 2004, UN Doc. CCPR/C/80/D/1051/2002, at para. 10.2.

<sup>48</sup> Principle E, Section h (emphasis added).

<sup>49</sup> See, e.g. *Labita v. Italy* [GC], Grand Chamber Judgment of 6 April 2000, at paras. 152 and 153; *Nikolova v. Bulgaria* (No. 2), ECtHR, Judgment of 30 September 2004, at paras. 61 and 69; *Stögmüller v. Germany*, ECtHR, Judgment of 10 November 1969, at para. 5.

<sup>50</sup> *Wemhoff v. Germany*, ECtHR, Judgment of 27 June 1968, at para. 17.

certain period of time “the Court must also ascertain whether the competent national authorities displayed ‘special diligence’ in the conduct of the proceedings”.<sup>51</sup>

73. Even where a case is complex, the European Court has found authorities to have a duty to process the applicant’s case within a reasonable time. In *Assenov*, where the applicant had been charged with at least sixteen burglaries and it was feared that he would re-offend if released, the Court still found a violation of the right to trial within a reasonable time due to the lack of diligence in the conduct of the investigation: during one year of a two-year investigation, “virtually no action was taken in connection with the investigation ... no new evidence was collected and Mr. Assenov was questioned only once”.<sup>52</sup>
74. In this case, the Nigerian authorities have failed to exercise diligence in the investigation and preparation of the case against the plaintiff. No action appears to have been taken since 2003.

#### Lack of Resources is No Excuse

75. A lack of resources is no excuse for violations of the right to be free from arbitrary and excessive pre-trial detention, or violations of the right to be tried within a reasonable time.

#### *Relevant Legal Standards*

76. Under Article 1 of the African Charter the member states “undertake to adopt legislative or other measures to give effect to” the substantive rights set out in that Charter. Article 2.2 of the ICCPR similarly states that each state “undertakes to take necessary steps ... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”
77. The UN Human Rights Committee has affirmed that the lack of adequate resources is not a valid justification for the violation of the rights preserved in the Covenant. The Committee has reaffirmed that the requirement under Article 2.2 “to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or *economic* considerations within the State”.<sup>53</sup>
78. The Committee has also addressed this requirement in its jurisprudence, including in relation to arbitrary detention and the fair trial rights. In *Lubuto v. Zambia*, the Committee recognized the difficult economic situation of the State, but nevertheless stated that “the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe. Article 14, paragraph 3(c), states that all accused shall be entitled to be tried without delay...”<sup>54</sup> Likewise in *Fillastre v. Bolivia*, the Committee ruled that budgetary considerations cannot excuse judicial processes that result in unnecessarily long detentions:

“The lack of adequate budgetary appropriations for the administration of criminal justice alluded to by the State party does not justify unreasonable delays in the adjudication of criminal cases . . . In the present case, the Committee has not been informed that a decision at first instance had been reached some four years after the

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<sup>51</sup> *Tomasi v. France*, ECtHR, Judgment of 27 August 1992, at para. 84. See also *Punzelt v. Czech Republic*, ECtHR, Judgment of 25 April 2000, at para. 72-82.

<sup>52</sup> *Assenov and Others v. Bulgaria*, ECtHR, Judgement of 28 October 1998, paras. 157-158.

<sup>53</sup> UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 14 (emphasis added).

<sup>54</sup> *Lubuto v. Zambia*, UNHRC, Decision of 31 October 1995, UN Doc. GAOR, A/51/40 (vol. II), at p. 14, para. 7.3.

victims' arrest . . . The Committee concludes that there has been, in this respect, a violation of article 9, paragraph 3."<sup>55</sup>

#### **VIII. ORDERS SOUGHT BY THE PLAINTIFF**

79. The plaintiff seeks the following orders:
- (a) **A Declaration** that indeterminate detention without trial under the "Holding Charge" constitutes a violation of the right to fair trial within reasonable time, presumption of innocence and right to personal liberty guaranteed under the African Charter on Human and Peoples' Rights.
  - (b) **A Declaration** that the unlawful and excessive detention under the "Holding Charge" procedure since 15 May 2003 violates the plaintiff's rights under the African Charter;
  - (c) **A Declaration** that the continued detention of the plaintiff by the defendant is a violation of the plaintiff's right to personal liberty provided for under *Article 6 of the African Charter*;
  - (d) **An Order** compelling the defendant to release the plaintiff immediately;
  - (e) **General Damages** in the sum of N20,000,000:00 (Twenty Million Naira) against the defendant for the unlawful detention of the plaintiff;
  - (f) **Pecuniary Damages** for loss of earnings, in a sum to be determined;
  - (g) **An Order** that the Defendant pay the plaintiff's costs of this action, in accordance with Article 66 of the Court's Rules of Procedure.

#### **IX. NATURE OF EVIDENCE IN SUPPORT**

80. The following uncontroverted evidence is submitted in support of the claim.
- (a) The plaintiff is a non-convicted detainee in the custody of the defendant/respondent. He has been so detained since March 2003.
  - (b) All documents for the detention of the plaintiff are in the custody of the Respondent who has declined to release or make them available to the plaintiff.

**DATED THIS \_\_\_\_\_ DAY OF JUNE, 2011.**

**M. B. Ganiyu**  
**Pp: Smithworth Partners**  
Plaintiff's Counsel  
13, Military Street,  
Onikan, Lagos

**Stanley Ibe**

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<sup>55</sup> *Fillastre v. Bolivia*, UNHRC, Decision of 5 November 1991, UN Doc. CCPR/C/43/D/336/1988, at para. 6.5.

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***SERVICE MAY ALSO BE EFFECTED ON THE PLAINTIFF'S SOLICITORS BY ANY TECHNICAL MEANS OF COMMUNICATION IN ACCORDANCE WITH ARTICLE 33 RULE 2 THROUGH E-MAIL [mutiu.ganiyu@gmail.com](mailto:mutiu.ganiyu@gmail.com) &/or [sibe@justiceinitiative.org](mailto:sibe@justiceinitiative.org)***

**FOR SERVICE ON**

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