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HUMAN RIGHTS QUESTIONS: HUMAN RIGHTS SITUATIONS AND REPORTS
OF SPECIAL RAPPORTEURS AND REPRESENTATIVES

Letter dated 23 May 1996 from the Secretary-General addressed
to the President of the General Assembly

I have the honour to refer to General Assembly resolution 50/199 of 22 December 1995, as well as to my letters to you dated 26 February 1996 and 19 March in which I informed you of my decision to send a fact-finding mission to Nigeria.

The mission submitted its report to me on 23 April 1996. I sent a copy of the report to the Head of State of Nigeria, His Excellency General Sani Abacha, by hand of my Special Envoy, Mr. Lakhdar Brahimi. The Special Envoy visited Nigeria from 10 to 14 May 1996. Following the visit of my Special Envoy, the Special Adviser (Legal Matters) to the Head of State of Nigeria, sent me a letter on 21 May 1996 on behalf of General Abacha.

I hereby enclose the report of the fact-finding mission (annex I), as well as the interim response received from the Government of Nigeria (annex II). I should like to take this opportunity to assure you that I will continue to discharge my good offices mandate in the implementation of the above-mentioned resolution and will report on any further progress achieved.

I should be grateful if you could bring this information to the attention of the members of the General Assembly.

(Signed) Boutros BOUTROS-GHALI

ANNEX I

Report of the fact-finding mission of the Secretary-General
to Nigeria

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I. INTRODUCTION

1. It may be recalled that on 10 December 1995, the Head of State of Nigeria wrote to the Secretary-General supporting the suggestion that a fact-finding mission be sent to Nigeria to gain first-hand information on the country.

2. On 22 December 1995, the General Assembly adopted resolution 50/199 on the situation of human rights in Nigeria. In paragraph 7 of that resolution, the General Assembly requested the Secretary-General "to undertake discussions with the Government of Nigeria and to report on progress in the implementation of the present resolution and on the possibilities for the international community to offer practical assistance to Nigeria in achieving the restoration of democratic rule". Meanwhile, the Government of Nigeria maintained contact with, and requested by letter dated 19 December 1995 the assistance of, the Secretary-General concerning the sending of a fact-finding mission to address itself to the trial and execution of Mr. Ken Saro-Wiwa and others and to the plans of the Government of Nigeria to implement its declared commitment to restore the country to civilian democratic rule.

3. The Secretary-General, after consultation with the Government of Nigeria, set out the terms of reference of the fact-finding mission. The Secretary-General constituted the fact-finding mission, hereafter referred to as the mission, composed of Justice Atsu-Koffi Amega, former Minister for Foreign Affairs of Togo and former President of the Supreme Court of Togo and a member of the African Commission for Human and People's Rights; Justice V. S. Malimath, member of the National Human Rights Commission of India; and John P. Pace, Chief of the Legislation and Prevention of Discrimination Branch, Office of the High Commissioner for Human Rights/Centre for Human Rights.

4. On 26 February 1996, the Secretary-General informed the President of the General Assembly and the Secretary-General of the Commonwealth of the establishment of the mission and its composition.

II. TERMS OF REFERENCE

5. The terms of reference of the mission read as follows:

"1. At the request of the Government of Nigeria, the Secretary-General has decided to send a fact-finding mission to Nigeria composed of three persons internationally recognized for their judgement and independence of mind to look into two issues of concern to the international community.

"2. The first matter to which the mission will address itself is the recent trial and execution of Mr. Ken Saro-Wiwa and others. In this connection, the mission will examine the judicial procedures of the trial in the context both of the various international human rights instruments to which Nigeria is a party and of relevant Nigerian law. Consultations will be held, inter alia, with representatives of the Ogoni communities, the Administrator of Rivers State, the ministers of Internal Affairs and Foreign Affairs, the Attorney-General of the Federation, the Chief Justice

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of Nigeria, members of the Ogoni Tribunal, the Chairman and members of the National Human Rights Commission, as well as lawyers both for the Prosecutor and for the defence.

"3. The second matter to which the mission will address itself is the plans of the Government of Nigeria to implement its declared commitment to restore the country to civilian democratic rule. In this connection, the mission will hold consultations with members of the various organs established to implement the Government's transition programme, including the National Electoral Commission, the National Reconciliation Committee and the Transition Implementation Committee. It will study the various relevant instruments and laws and hold consultations with representatives of other institutions, political parties, non-governmental organizations, the press and trade unions. It may also conduct interviews with some of the personalities currently in detention.

"4. The mission will present a report to the Secretary-General. This report will include recommendations for action which, in the mission's view, could usefully be taken, inter alia, by the Government of Nigeria.

"5. The Government of Nigeria has undertaken to cooperate fully with the mission and to ensure its access to all persons, places and information which the mission feels necessary for the discharge of its mandate."

III. ORGANIZATION OF WORK

6. While organizing its work, the mission had before it the terms of reference, correspondence between the Secretary-General and the Head of State of Nigeria and background information provided by the Secretariat relating to the matters making up its terms of reference as well as other pertinent information on Nigeria.

7. The members of the mission were convened at United Nations Headquarters on 26 March 1996. They agreed to designate Justice Amega leader of the mission. The mission was briefed by the Under-Secretary-General, the Assistant Secretary-General of the Department of Political Affairs, and the Acting Director of the Africa II Division. The mission also met with the Special Adviser to the Secretary-General, the Legal Counsel, the Permanent Representative of Nigeria to the United Nations and the Permanent Observer for the Organization of African Unity to the United Nations.

8. On 27 March 1996, the Permanent Representative of Nigeria presented to the mission a draft programme for its visit to Nigeria.

9. The mission arrived in Lagos on 29 March 1996. Its proposed draft programme was further discussed with Nigerian Government officials in Abuja upon the mission's arrival there on 30 March 1996. These discussions dealt with the duration of the mission, its itinerary as well as the need to have free access to information and individuals.

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10. The mission visited Abuja on 29, 30 and 31 March and 1, 2 and 11 April; Lagos on 3, 4, 12 and 13 April; Borno State on 5 April; Enugu and Osun States on 6 April; Kano on 7 April; and Rivers State on 8, 9 and 10 April.

11. The mission issued four press statements while in Nigeria, with a view to providing the public and the media with information about its task and inviting individuals and organizations interested in providing information or in being interviewed by the mission to contact it.

12. During its visit, the mission was informed by some persons and organizations that had attempted to make contact with it or had been interviewed by it that they had been arrested and/or detained. The mission raised the issue with the Federal Government and, in the case of the incident which had taken place in Rivers State, with the military administrator of that state.

13. The mission was able to interview several organizations and individuals, including some detainees, without the presence of Government officials.

14. The mission resumed its work in New York on 15 April 1996 and finalized its report on 22 April 1996.

IV. SUMMARY OF INFORMATION AND VIEWS ON THE TRIALS OF MR. KEN SARO-WIWA AND OTHERS

15. The mission gathered information from the families of the victims (the four murdered chiefs), the families of Mr. Saro-Wiwa and others and Mr. Ledum Mitee - who had been acquitted in the trial - with a delegation from the Movement for the Survival of the Ogoni People (MOSOP). It interviewed two of the members of the special tribunal, three members of the prosecution team, and some members of both the defence counsel retained by the accused and those appointed by the tribunal. On 11 April 1996 in Abuja, the mission interviewed leading counsel for the defence, Chief Gani Fawahinmi, and the second counsel, Mr. Femi Falana, currently held in detention. On 9 April 1996, in the course of its visit to the Ogoni areas, the mission visited Jiokoo, the site where the murders took place and Bani, the home of Mr. Ken Saro-Wiwa. The trials were also discussed by the mission in the course of its meetings with the Minister for Foreign Affairs, the Minister of Justice/Attorney-General and his top aides, the Chief Justice, representatives of the Bar Association, political leaders, non-governmental organizations and political associations, in Abuja, Lagos, Port Harcourt and the other states visited by the mission.

16. The following paragraphs give a summary of the information received from the sources described in the preceding paragraphs.

17. The Ogonis (estimated at 500,000) constitute one of a number of minority ethnic groups living in the Niger delta region. They live in an area approximately 200 square kilometres wide in the Rivers State of Nigeria. The members of the Ogoni community complain that their area has been neglected, proper roads have not been maintained, adequate medical facilities have not been provided, the problem of large-scale unemployment has not been attended to and they are suffering from pollution of the environment, in particular of the land

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and rivers on which they depend for their livelihood. This situation is all the more aggravated by the fact that oil is produced in Rivers State, including the areas inhabited by the Ogonis. Shell Oil Company used to have an active presence in the Rivers State, including head offices, oil extraction and other oil infrastructures. The Ogoni communities have felt for a long time that while oil was being extracted and produced from this state, inhabitants were not benefiting from the wealth of their land. Demands for improvement in the economic and social conditions were made by traditional chiefs as well as political leaders and environmentalists. These concerns were echoed by the traditional rulers of the area in the course of the visit of the mission to Port Harcourt. These grievances had motivated the leaders of the Ogoni communities to establish MOSOP in 1990, and the formulation of the Ogoni charter of demands in what is described as the "Ogoni Bill of Rights".

18. One of the objectives of MOSOP was to implement the provisions of the Ogoni Bill of Rights. Negotiations were held between the Federal and state governments on the one hand, and MOSOP on the other. However, in 1993 MOSOP became divided between the youths (who declared their support for Ken Saro-Wiwa), on the one hand, and the traditional rulers, on the other. The events of 21 May 1994, when four prominent Ogoni leaders were killed, constituted the basis for the prosecution of Ken Saro-Wiwa and the other persons accused with him.

19. The main arguments used against the trials and executions were advanced by several organizations, including MOSOP, the Nigerian Bar Association, the Civil Liberties Organization, Amnesty International (Nigeria section), the lawyers for the defence who resigned protesting against the rulings of the tribunal during its consideration of the case, and others. The following legal issues were raised:

(a) The validity of the Civil Disturbances (special tribunal) Act of 1987 was attacked on the ground that it denies fair trial, a right which is a guaranteed fundamental human right, both under the Nigerian Constitution and the International Covenant on Civil and Political Rights;

(b) The constitution of the special tribunal is not valid for the reason that it was not preceded by the constitution of an investigation committee, a thorough investigation by the said committee and submission of its report as required by section 1 of the above-mentioned Act;

(c) The tribunal tried the defendants in two groups, in two concurrent trials, examining the same witnesses twice, thus causing grave prejudice to the defence;

(d) The refusal of the request of the defence by the tribunal to present a videotape showing the Military Administrator of Rivers State accusing Ken Saro-Wiwa of the murders at a press conference in May 1994, before the case was submitted to the tribunal; this ruling of the tribunal is evidence of bias against the defendants;

(e) The refusal of the tribunal to admit a videotape as evidence to bring out the contradiction in the testimony of a prosecution witness given before the tribunal is another circumstance indicating bias;

(f) The lack of right of appeal against the decision of the tribunal represents serious deficiency in the dispensation of justice;

(g) The haste with which the sentences were confirmed by the Provisional Ruling Council (PRC) implies that the Government had made up its mind and was not interested in a fair consideration of the case;

(h) The PRC confirmed the conviction and sentence even before the records of the trial were received. At any rate, it was impossible for the tribunal to provide within eight days (the period between the date of the judgement and the date of confirmation) original or certified copies of the records and the judgement to all the 25 members of the PRC;

(i) The failure of the defence lawyers (who were appointed by the tribunal after the withdrawal of the original defence lawyers in protest) to present the case of the defendants before the PRC in order to commute the sentences showed that the lawyers provided failed to protect the rights of the accused, thus violating their basic rights;

(j) The presence of a military officer on the tribunal affected its independence and impartiality;

(k) The tribunal proceeded with the trial even when their case was pending before the High Court wherein the accused had requested a stay of further proceedings on the ground that the members of the tribunal were biased.

20. The lawyers for the prosecution, the judges of the Ogoni Tribunal, the defence lawyers appointed by the Tribunal and Government officials argued that the procedures followed were consistent with Nigerian law and international humanitarian law. Their views may be summarized as follows:

(a) The Civil Disturbances Act of 1987 is consistent with the Nigerian Constitution. It has been applied in a number of cases since colonial times. Civil disturbances cannot be satisfactorily dealt with by regular courts because legal process is very long and time-consuming and this might exacerbate the situation unless immediate action is taken. The average case takes 5 to 10 years from the lower court to the Supreme Court. Cases of civil disturbance, therefore, may have to be dealt with by a special tribunal to ensure speedy trial. Similar tribunals have been constituted to try cases of armed robberies, drug trafficking and arms trafficking;

(b) The tribunal comprised two judges and a military officer specialized in criminology;

(c) The tribunal followed the Nigerian laws and held its sessions in the open, and the Government did not interfere in its proceedings;

(d) The tribunal examined all witnesses for the prosecution and defence. On some occasions it rejected motions by the prosecution and on others, by the defence;

(e) The original defence lawyers resigned because they felt that they would lose the case and not because of bias of the tribunal;

(f) The fact that the Vice-President of MOSOP, Mr. Ledum Mitee, was acquitted in this case shows that the trial was not motivated by any extraneous factors;

(g) The sentences were duly confirmed by the PRC and there is no evidence to show that the case was mishandled by the Government;

(h) The Government felt that it had a primary responsibility to maintain law and order in the country. It maintained that it had to take firm and effective steps to combat disorder and chaos. It believed that the speedy trial of Ken Saro-Wiwa and the others was necessary to prevent disintegration of the country.

V. SUMMARY OF INFORMATION AND VIEWS ON THE TRANSITION PROGRAMME

A. Transition programme for restoring civil and democratic rule

21. In conformity with its terms of reference, the mission, throughout its visit to different parts of Nigeria, discussed the plans for transition to civil and democratic rule. These discussions showed a sharp division of views on this issue affecting the entire country, and more particularly since the annulment of the June 1993 presidential elections.

22. The military first took power in Nigeria in 1966; this was followed by the Biafra war. The end of the civil war, however, led to the consolidation of power by the armed forces. It was also stated that the armed forces had intervened, on occasions, at the request of the political leadership when the latter failed to resolve their differences and the country was faced with civil disorder and chaos. The mission was informed that the current military Government had been encouraged to take power by the political parties, supported by professional organizations, trade unions, women's groups and individuals.

23. Subsequent to the assumption of power by the current military Government in 1993, a Constitutional Conference was convened in 1994, two thirds of the delegates to which had been elected and one third designated by the Government. Upon conclusion of the work of the conference, a draft Constitution was proposed together with measures to be taken to assist the country to change over to civil democratic rule. On 1 October 1995, the Head of State announced a transition programme to culminate with the election of a president and the restoration of civil and democratic rule with effect from 1 October 1998. The transition was to take three years and was to be assisted by the establishment of a number of commissions designed to bring it about. These commissions are the following:

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Transition Implementation Commission; State Creation, Local Government and Boundary Commission; National Electoral Commission; National Reconciliation Commission; and the Federal Character Commission.

24. As stated above, Nigerian society is polarized. The opposition represented by a number of political associations, human rights activists and individuals, including former Cabinet ministers, governors and members of Parliament, were vehement in their opposition to the programme. They considered it a ploy by the military leadership to maintain power. They referred to similar arguments advanced by the previous regime and expressed apprehensions that the same tactics would be used when the time for departure of the military from power arrives in 1998. They pointed out that on the pretext of transition to civil and democratic rule, General Babangida continued in power for eight years, and likewise that the current military regime planned to continue its rule for as long a period of five years. Furthermore, they considered the programme too long, cumbersome, and a waste of time and resources. Moreover, the 1995 draft Constitution and the related arrangements were liable to be - and had been - altered by the military Government and there was therefore no guarantee that the transition programme would be implemented.

25. On the other hand, some of the opposition groups called for the handing over of power to an interim national Government which would immediately hold a national conference of all political forces to discuss the crises facing Nigeria. The proposed national conference should address itself to issues like the federation, the distribution of resources and institutions dealing with the democratization process and draft a new constitution.

26. Among those who had expressed grave doubts about the transition programme, some stated that the general framework of the transition programme could be used to bring about democratic rule if certain measures were taken. These measures might include, as a minimum, the following:

- (a) Immediate release of all political prisoners and detainees;
- (b) Abrogation of Decree No. 2 of 1984, which confers arbitrary power of detention without charge;
- (c) Immediate restoration of the power of the courts to issue writs of habeas corpus;
- (d) Abrogation of all decrees which exclude the jurisdiction of regular courts;
- (e) The commitment to respect and obey all court orders;
- (f) The commitment to end the practice of seizing passports, thus denying Nigerian citizens their right to freedom of movement;
- (g) The commitment to end the harassment by the police and security forces of opponents of the regime;

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(h) Amendment of Decree No. 1 of 1996, concerning the transition programme, in particular section 6, to remove sanctions for criticism of the programme and the tribunal envisaged under that decree to try offences under it;

(i) Repeal of Government decrees that interfere with the provisions of the Constitution;

(j) The commitment to ensure that the National Electoral Commission is composed of members of all the political parties contesting the elections;

(k) Supervision of the Nigerian elections by United Nations and other international observers to ensure fairness;

(l) The commitment of the international community, particularly the United Nations, to be vigilant and follow closely the developments in Nigeria to maintain the pressure on the military Government not to reverse the democratic process at the last moment, as has been the case in the past.

27. During its meetings with Government officials, the mission was informed of the irrevocable commitment to implement the transition programme. The sincerity of the commitment of the military Government is evidenced by the important steps it has taken, which include:

(a) Several decrees have since been promulgated to give legal backing to the entire programme;

(b) Various commissions and other bodies have been established under these decrees, such as the National Electoral Commission of Nigeria (NECON), which will conduct all elections, register political parties, delimit constituencies, etc.;

(c) NECON has just conducted elections to all the 589 municipal authorities, otherwise known as local Government Councils. The Government asserts that the elections were conducted peacefully, the turnout by voters was massive and the election was fair;

(d) The elections can be challenged in the newly established election tribunals.

28. The mission raised the issue of ouster clauses in decrees issued by the Government that precluded courts from inquiring into the validity of orders made under such decrees. Government officials pointed out that Nigerian courts had always asserted their judicial independence and had in a number of cases questioned the validity of such orders despite the ouster clauses, in the exercise of their inherent judicial powers conferred on them by the 1979 Constitution as amended. They cited the challenge to the decree concerning the closure of the premises of the newspaper The Guardian.

29. The Government cited the emergency situation in the country as a justification for Decree No. 2 of 1984, which provides for detention without trial.

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30. It was submitted, on behalf of the Government, that the civil and democratic rule in the country had failed on several occasions, paving the way for military rule whenever a president from one region was elected, resulting in great disappointment and agitation by the people from the other regions. It was stated that the new Constitution had resolved this problem by ensuring due participation of all sections/parts of the State in running the Government and equitably sharing power. Reference was made in this connection to the following statement delivered by the Head of State on 1 October 1995:

"The national political offices which will be filled by candidates on a rotational basis are: President, Vice-President, Prime Minister, Deputy Prime Minister, Senate President and Speaker of the House of Representatives. This power-sharing arrangement which shall be entrenched in the Constitution shall be at Federal level and applicable for an experimental period of 30 (thirty) years."

31. Government officials requested that the mission take cognizance of the fact that peace and stability prevailed in Nigeria. They compared conditions in the country with those of other countries in Africa and beyond and emphasized that Nigeria was a free country. They also cited the contributions of Nigerian forces to United Nations operations in different parts of the world and to the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG) in Liberia. Furthermore, it was pointed out that the whole of the west African region depended on and was linked to the Nigerian economy and harming Nigeria economically would affect the whole region. The mission wishes to indicate that many non-governmental organizations, particularly women's groups, expressed the view that economic sanctions against Nigeria would be devastating to the country, particularly to women and children.

32. The Foreign Minister accused certain opposition groups of being financed and managed from abroad to harm Nigeria. He assured the mission that the programme for transition to civil democratic rule was irreversible, that three years were needed to bring about a multi-party democracy representing all the States in the Federation and that the military leadership had no intention of staying in power beyond October 1998.

B. Political prisoners and detainees

33. In the fulfilment of its mandate, the mission raised the issue of political prisoners and detainees, notably at its meetings with the Minister for Foreign Affairs, the Minister of Justice and other authorities.

34. Release of political prisoners and detainees is of great importance to the democratization process. It was stressed by several persons and organizations appearing before the mission that no programme for transformation to democratic rule could be taken seriously while people were or could be detained in the country for their political beliefs.

35. Accordingly, on 1 April 1996, the mission addressed a letter to the Minister for Foreign Affairs requesting that arrangements be made for the mission to interview 12 specifically named political prisoners. On

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4 April 1996, the mission addressed a second letter to the Minister for Foreign Affairs furnishing an additional list of three political prisoners and requested for arrangements to be made to interview them as well.

36. On 6 April 1996, the Minister for Foreign Affairs replied to the Chairman of the mission stating that five of the persons listed by the mission were not detained (Chief Michael Ajasin, Chief Anthony E. Enahoro, Rear Admiral Ndubuisi Kanu (Rtd.), Chief C. C. Onoh and Col. Yohanna Madaki) and that of the remaining 10, 4 were categorized as having been already convicted and serving a sentence (General Olusegun Obasanjo, Major-General Shehu Musa Yar'Adua (Rtd.), Mr. Beko Ransome-Kuti and Mrs. C. Anyanwu), 1 was in police custody under judicial order awaiting trial (Chief M. K. O. Abiola) and 5 were detained for acts prejudicial to State security and public order but not yet arraigned before a court of law (Mr. Femi Falana, Chief Gani Fawehinmi, Mr. Nosa Igiebor, Mr. Frank Kokori and Mr. Milton Dabibi).

37. The Nigerian Government expressed the view that the mission's proposal had been to meet and interview persons that had been convicted and were serving a sentence was not in consonance with the terms of reference of the mission. However, arrangements would be made for the mission to meet Chief M. K. O. Abiola and some of the detainees listed by the Government as being detained for acts prejudicial to State security and public order. The Foreign Minister informed the mission that the modalities as well as the time and place for the meetings would be worked out to suit the schedule and convenience of the mission. On the same day, 6 April 1996, the mission replied to the Minister for Foreign Affairs acknowledging his letter and reiterating the view of the mission that its terms of reference necessitated that it interview all the persons mentioned in the letter of the Foreign Minister and described as being in detention, irrespective of whether they had been convicted and were serving a sentence or whether they were held in custody "awaiting arraignment before a court".

38. On 11 April 1996, in Abuja, the mission interviewed Chief M. K. O. Abiola, Chief Gani Fawehinmi, Mr. Femi Falana and Mr. Nosa Igiebor.

39. All four detainees with whom the mission met complained that they were not being provided with proper medical care, that newspapers and reading materials were not provided, that the members of their families and their lawyers were not allowed to meet and that they were being held in solitary confinement. The mission has taken account of the information obtained in the course of these interviews in the appropriate sections of the present report.

VI. ANALYSIS AND OBSERVATIONS

A. Trials of Mr. Ken Saro-Wiwa and others

40. The mission is required under its terms of reference to address itself to the procedures followed in the trial of Mr. Ken Saro-Wiwa and others, in the context both of the relevant international human rights instruments, to which Nigeria is a party, and of relevant Nigerian law.

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41. The constitution of special tribunals has been established in Nigerian law since colonial times. Special tribunals have been constituted for specific offences such as armed robbery, drug trafficking and illegal bankruptcy. Indeed, special tribunals were set up in the past, as early as in 1981 and 1986. In both those instances, the tribunals were established in conformity with the procedures envisaged in the Act; investigation committees were established prior to the decision to constitute a tribunal. Whereas special tribunals do form an integral part of the regular judicial system of Nigeria, the special tribunal that tried Ken Saro-Wiwa was established without a report by a duly constituted investigation committee.

42. The establishment of the special tribunals is governed by section 2, part II, of Act No. 2 of 1987. Under part I, section 1, the Act envisages the constitution of a civil disturbance investigation committee whenever the President, Commander-in-Chief of the Armed Forces, forms the opinion that any one of the following four conditions exists:

(a) There have occurred civil disturbances, commotions or unrest in any part of the Federal Republic of Nigeria;

(b) There has been a breach of the peace that would have the effect of destabilizing the peace and tranquillity of the nation;

(c) The public order and public safety of Nigeria is being threatened by any disturbance;

(d) There has occurred or may likely occur a riot or civil disturbances of a riotous nature resulting or likely to result, as the case may be, in loss of life and property and injury to persons.

43. The Act requires the investigation committee to conduct an investigation into the civil disturbances and to make recommendations for the trial of any person or persons involved in the civil disturbances. The committee thus constituted shall consist of such persons as the President may appoint and may, subject to any general or specific directions that may be given in that behalf by the President, regulate its own proceedings as it may deem fit.

44. It is necessary to point out that the copy of the order made by the President under section 1 constituting the investigating committee and the copy of the report of the investigation committee were not produced either before the tribunal or before the present mission even though ample opportunity was available to the Nigerian Government to do so. It was not contended before the tribunal that the investigation committee had been constituted and that it had submitted its report. There is also nothing to indicate that the President had formed an opinion about the existence of any one of the conditions specified in clauses (a) to (d) of subsection 1 of section 1 of the Act. The names of the members constituting the investigating committee and a copy of the report of the investigation committee were not made available to the mission. The mission is therefore of the opinion that the President had not constituted a civil disturbance investigation committee and there is no report as contemplated by section 1 of the Act.

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45. Part II, section 3, provides that the special tribunal shall try the offences specified in the first schedule of the Act; and the jurisdiction of the regular criminal courts is ousted. The provisions of the Act which oust the jurisdiction of the regular courts have to be strictly construed. The conditions for the constitution of a special tribunal must be found to exist before its constitution. The procedure prescribed by the Act for ascertaining these conditions must be strictly followed. In the context, the expression "may constitute a special investigation committee" used in section 1 of the Act has, in the opinion of the mission, to be construed as being mandatory in character and the word "may", in the context, means "shall". The special tribunal to try Mr. Ken Saro-Wiwa and others, constituted in violation of section 1 of the Act, had no jurisdiction to try Mr. Ken Saro-Wiwa and others.

46. Section 8, which ousts the jurisdiction of the court of law to inquire into the validity of any decision, sentence, judgement, confirmation, direction, notice or order given or made under the Act, cannot be successfully invoked in this case, firstly because the contention regarding constitution and jurisdiction of the tribunal was not raised before a court of law but before the special tribunal itself and, secondly, for the reason that the contention does not bear on the validity of any decision or order, the order constituting the tribunal being void ab initio and therefore non est.

47. Furthermore, the procedures actually followed in the course of the trials were not fair, as may be illustrated by the following:

(a) Denial of access to counsel for a long period prior to the opening of the trials. The mission notes that Mr. Saro-Wiwa and others were detained on the night of the incident, on 21 May 1994, without charge, and brought to trial on 6 February 1995. During this period they were held in inhuman conditions and denied access to counsel;

(b) Whereas after the opening of the proceedings, the tribunal accorded two weeks for the defence counsel to prepare the brief, access to counsel was limited by the condition of detention of the accused in a military base;

(c) The military was involved in all phases of the trial, as a result of which serious allegations were made affecting the credibility of witnesses, freedom of access to the tribunal and intimidation of the accused, their relatives and other members of the public;

(d) The defence counsel were harassed by the military personnel by requiring them to request permission of them to enter the courts and submitting them in the process to hardship, indignities and waste of time;

(e) Instead of furnishing the copies of the statements of witnesses as recorded by the investigation agency, only the summary of the statements of witnesses were furnished to the accused;

(f) A videotape which was relied upon by the defence as an important piece of evidence was not permitted to be produced before the tribunal;

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(g) Mr. Ken Saro-Wiwa had a prepared statement which he tendered to the commission to be taken into consideration as his statement. The tribunal refused to receive the statement;

(h) Affidavits on behalf of the defence by some of the witnesses examined by the prosecution stating that they had been bribed by the authorities to make their statements were not received in evidence;

(i) The tribunal refused to stay further proceedings even though a request was made to that effect on the ground that an appeal had been preferred requesting the Appellate Court to stay the further proceedings before the tribunal on the ground that its members were biased against the accused.

48. Part III, section 7, provides for "confirmation" of the sentence as follows:

"7. (1) Where a tribunal finds the accused guilty of any offence referred to in this Act, the record of the proceedings of the tribunal shall be transmitted to the confirming authority for confirmation of the sentence imposed by the tribunal.

"(2) Any sentence imposed by the tribunal shall not take effect until the conviction or sentence is confirmed by the confirming authority and pending such confirmation the convicted offender shall be kept in such place of safe custody as the tribunal may determine.

"(3) The confirming authority may confirm or vary the sentence of the tribunal.

"(4) For the purposes of this Act, the confirming authority shall be the Armed Forces Ruling Council."

49. This procedure does not provide for judicial review by way of appeal or revision. The limited review contemplated is in the process of confirmation of the conviction and sentence contemplated by subsection 2 of section 7.

50. The mission was not informed of the procedures, if any, followed by the PRC under this provision. It notes that the death sentences handed down in both trials on 30 and 31 October were confirmed on 8 November 1995, and the executions carried out within 48 hours, namely on 10 November 1995. It was submitted to the mission that, within that time-frame, the records of the proceedings were not yet completed and that therefore the provisions of section 7 (1) could not have been complied with. It was said that the convicted persons were thus deprived of the right to have their death sentence reviewed. The mission was informed that in at least one earlier case a death sentence handed down by a civil disturbances special tribunal had been commuted by the confirming authority to a sentence of five years' imprisonment.

51. Subsection 2 of section 7 provides that any sentence imposed by the tribunal shall not be carried out until the conviction or sentence is confirmed by the Armed Forces Ruling Council. Subsection 3 says that the confirming

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authority may either confirm or vary the sentence of the tribunal. If both subsections 2 and 3 are read together, it would follow that the confirming authority is statutorily required to apply its mind to the records of the case in order to decide as to whether the conviction on merits is justified or not and if the conviction is justified as to whether the sentence imposed is excessive.

52. Examination of the records of the case, which means consideration of the entire evidence and the judgements, has to be made by the PRC in order to satisfy the provisions of section 7. It was submitted before the mission that the records in this case as well as in the connected cases covering several thousand pages were not ready and were therefore not sent to the confirming authority before it took the decision to confirm the conviction and sentence. The period between the date of pronouncement of the judgement and the date of confirmation is hardly eight days. Even with the best of efforts and diligence, it was not humanly possible to achieve the feat of preparing the records and transmitting the same from Port Harcourt to Abuja. As the two trials were conducted concurrently, the records of both the cases had to be prepared and dispatched and the PRC was required to peruse those records before it took a decision to confirm the conviction and sentence on 8 November 1995. Having regard to the circumstances, it is obvious that the confirmation was recorded without the application of mind by the members of the Council to the records of the case as required by section 7 of the Act. The requirements of section 7 being mandatory, confirmation by the confirming authority is not legal and valid.

53. The President, it was submitted before the mission, has the power of according clemency and such power was in fact exercised on several occasions. In this connection, the International Covenant on Civil and Political Rights provides, in article 6, paragraph 4, as follows:

"Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."

In order to enable the person convicted to petition the President for clemency, he should be provided with a copy of the judgement and given a reasonable period to study, prepare and submit the petition for clemency. In the present case, the period between the date of the judgement and the date of confirmation was eight days and the period between the date of confirmation and the date of execution was two days. By any reasonable standards this can hardly be regarded as a reasonably sufficient period for the convicted persons to submit a petition for clemency.

54. The mission notes that the right of appeal is recognized in Nigerian law in all cases tried under criminal law; this is especially the case when the offence is one of murder. Moreover, right of appeal is recognized in the International Covenant on Civil and Political Rights (article 14 (5)). In this context, the mission was informed that at the time of the executions, an appeal filed on 25 July 1995 to the Court of Appeal from a decision of the High Court, rejecting the application for stay of proceedings on the ground of procedural and personal bias in the tribunal, was still pending.

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55. In the view of the mission, the composition of the special tribunal is not in conformity with the standard of impartiality and independence set out in applicable human rights law as found in the African Charter on Human and People's Rights (article 7 (1) (d) and article 26) and the International Covenant on Civil and Political Rights (article 14 (1)). The presence of a military officer on the tribunal is, in the view of the mission, contrary to these provisions.

B. Implementation of the transition programme

56. The second matter to which the mission has addressed itself is the plan of the Government of Nigeria to implement its declared commitment to restore the country to civil democratic rule. These plans and this commitment are to be found in the statement made by General Sani Abacha on 1 October 1995. The mission notes that, since then, a number of steps have been taken to implement this commitment. Local government elections (on a non-party basis) were held in March of this year. In January 1996, three decrees were promulgated, namely, Decree No. 1, entitled "Transition to Civil Rule (Political programme)"; Decree No. 2, "Transition to Civil Rule (Lifting of Ban on Politics)"; and Decree No. 3, "National Electoral Commission of Nigeria". These three decrees set out the details of the calendar of transition, which is the process of electing local governments, State governments and a President by 1 October 1998, the date set for the return to civil rule.

57. The information received by the mission on this issue may be grouped in three parts: (a) the views according to which these plans and the activities carried out thereunder constitute the best response by the Government to the recognized need to return to civil democratic rule; (b) the opposite view that the plans are doomed to failure and may only be considered, at best, a pretext to perpetuate military rule in Nigeria; and (c) the view according to which, regardless of the intentions, the plans could be successfully implemented if the current climate were to be improved to provide greater assurance and confidence among all sectors of Nigerian society.

58. The mission found that the division in Nigerian society is quite sharp. Positive efforts on behalf of the Government, political associations and individuals are important to heal the wounds in society and move forward towards civil democratic rule. Therefore, confidence-building measures are needed in order to ensure the success of the programme.

59. The release of political prisoners and detainees is one of the major steps in confidence-building.

60. The abrogation of Decree No. 2 of 1984, concerning arrest without trial of political opponents of the regime, and section 6 of Decree No. 1 of 1996, concerning the promulgation of the transition programme which prescribes fines and imprisonment for those who criticize the programme, as well as other decrees restricting political activities and freedoms are essential steps to achieve national reconciliation.

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61. The mission found the press in Nigeria to be vigorous and alert. Whereas a large measure of freedom is enjoyed, there is disturbing evidence of harassment of some journalists and closing of newspapers.

62. Opposition groups are not willing to cooperate with the Government in the implementation of the programme until the restrictions on the enjoyment of fundamental freedoms by all are removed.

63. While at the moment the opponents of the regime refuse to cooperate with it or to participate in the election process, the mission feels that these rigid postures would soften if confidence-building measures were taken by the Government.

64. Both the Government and the opposition welcome the role of the United Nations and of international observers to monitor the elections.

65. There was general opposition to any sanctions against Nigeria. It was pointed out that sanctions would hurt only ordinary people and had a negative impact not only on Nigerian society but also on the whole West African region.

66. It would appear to the mission that there is consensus in Nigeria on the following: (a) the military Government must come to an end and civil democratic rule should be restored; (b) the electoral process should involve international observation/monitoring; and (c) persons detained without charge and other persons currently in prison for political reasons or offences should be released before the elections.

67. The mission received numerous expressions of concern stemming from various aspects of the current situation. It was pointed out that at present the judiciary is not in a position to carry out the constitutional responsibilities entrusted to it in protecting fundamental human rights as its jurisdiction is curtailed by the issuance of decrees that have made serious inroads into the authority of the courts in regard to both fundamental issues of substance, such as basic human rights provisions, and procedures such as the resort to special tribunals.

68. Furthermore, the mission noted expressions of concern about interference in the right to freedom of association of certain sectors such as the labour organizations, the Medical Association and the Bar Association, and the National Association of Businessmen. This attitude of the Government has created a situation in which the plans for transition were viewed with considerable scepticism and suspicion, strengthening the view among those who felt that a military Government could not conceivably usher in a truly civil democratic rule.

69. Another criticism recorded by the mission was that the bodies supervising the transition did not have adequate representation from all sections of society. The case of the National Election Commission was cited as being particularly significant as it was essential for that body to enjoy nationwide recognition and respect for its authority.

70. Numerous persons and organizations interviewed by the mission expressed the view that the transition calendar was unnecessarily prolonged and that this constituted a threat to the success of the process, casting doubt on the bona fides of the transition programme. Others expressed the view that the longer duration of the transition was justified because, in addition to the process of election, other steps had to be taken for devolution of power and resources before full civil democratic rule could be restored.

71. A Constitution Conference was convened on 27 June 1994. The Conference prepared a draft Constitution, which was presented to the President on 7 June 1995. The draft Constitution, as proposed by the Conference, was further modified by the Provisional Ruling Council before it was approved. On 1 October 1995, the President announced plans for the transition and gave details of the timetable leading up to 1 October 1998, which was set as the date for swearing in the newly elected president and the final disengagement of military rule. In the same address, the President announced the establishment of a number of committees, consistent with the recommendations of the Constitutional Conference, for the purpose of facilitating the transition programme. Apprehension was however expressed by several others who felt that in the absence of adequate guarantees there was no possibility of successful completion of the transition programme. Moreover, the role of the military in controlling the transition process was a source of scepticism concerning the sincerity of the transition process. Some others echoed the view that the transition to democracy should be conducted by a sovereign national conference.

72. The mission observes that the differences of views reflected in the report of the Constitutional Conference as regards the duration of the transition and the role of the military in that transition, still persists today. This has created a situation which, in the view of the mission, constitutes a serious threat to the successful realization of the transition. However, in the view of the mission, any attempt to interrupt or reverse the momentum that is being generated could prove counter-productive and further delay the realization of the goal to bring about civil democratic rule. In the opinion of the mission, there is a need to take appropriate confidence-building measures.

73. We have given as fair an account as possible of what we were able to gather during our visit to Nigeria. Our meetings and discussions with General Sani Abacha and others have given us the impression that the Head of the State is sincere in his commitment to restore civil democratic rule by 1 October 1998 in accordance with his declared commitment. The Nigerian people as a whole are against continuance of the military rule.

74. The current military Administration appreciated the efforts of the Secretary-General in sending the mission; this appreciation was also expressed by those who oppose the military Administration. It was hoped that these efforts of the Secretary-General would help to restore to Nigeria its rightful place in the comity of nations.

75. The Head of the State has displayed statesmanship by his willingness to be transparent by inviting a neutral United Nations fact-finding mission to Nigeria. This indicates the willingness of the military Administration to consider proposals that may be made by the mission.

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76. The mission is of the opinion that sanctions against Nigeria at this stage may prove unhelpful and retard the progress towards positive improvement. The mission would like to make some helpful and constructive recommendations to build up confidence and to improve the situation, which, we hope, the Nigerian Government can be persuaded by the Secretary-General to accept and implement in the spirit in which the Nigerian Government and the Secretary-General agreed to send this mission.

VII. RECOMMENDATIONS

77. As required by its terms of reference, the mission makes the following recommendations for action which, in the view of the mission, could usefully be taken, inter alia, by the Government of Nigeria:

In regard to the trial of Mr. Ken Saro-Wiwa and others

(a) The Government of Nigeria should repeal the Civil Disturbances (Special Tribunal) Act of 18 March 1987 so that offences of this type are tried by the ordinary criminal courts;

(b) In the alternative, the mission recommends that the following amendments be effected to the said Act:

- (i) Section 2 (2b) of the Act providing for appointment of the serving member of the armed forces as a member of the special tribunal should be deleted;
- (ii) A specific provision should be incorporated to the effect that the members of the special tribunal shall be appointed on the recommendation of the Chief Justice of the Supreme Court of Nigeria;
- (iii) Section 7 of the Act should be amended to provide for confirmation of the order of conviction and sentence by the Nigerian Court of Appeal in place of confirmation by the Provisional Ruling Council;
- (iv) Section 8 of the Act which excludes the jurisdiction of the courts of law to review the decision of the special tribunal should be deleted and the power of the superior courts to issue writ of habeas corpus should be restored;
- (v) A specific provision should be made to provide for an appeal against the decision of the special tribunal to the Supreme Court of Nigeria;

(c) In the case of the trials of Ken Saro-Wiwa and others, the Government of Nigeria should consider establishing a panel of eminent jurists, nominated by the Chief Justice of Nigeria, to establish the modalities to determine who and to what extent financial relief could be accorded to the dependents of the families of the deceased;

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(d) All the trials pending and contemplated under the Civil Disturbance (Special Tribunal) Act should be suspended and further action taken only after the above-mentioned amendments are carried out.

In regard to the situation of the Ogoni people

The mission recommends the constitution of a committee comprised of representatives of the Ogoni community and other minority groups in the region to be chaired by a retired judge of the High Court for the purpose of introducing improvements in the socio-economic conditions of these communities, enhancing employment opportunities, health, education and welfare services and to act as ombudsman in any complaint/allegations of harassment at the hands of the authorities. This committee may make recommendations for the Government to carry out.

In regard to the transition programme

The mission recommends that the Government:

(a) Strengthen the existing committees and commissions established to usher in democratic civil rule by incorporating persons holding different shades of opinion, those representing professional associations, political groups and ethnic minorities;

(b) Invite an international team, composed of observers from the United Nations and/or the Organization of African Unity (OAU), to be stationed in Nigeria to monitor the implementation of all the remaining stages of the transition programme, including the elections;

(c) Designate a review committee under the chairmanship of a judge of the superior court to examine the decrees promulgated by the military Government to date to identify and recommend the repeal of such of those decrees or provisions thereof that encroach on the human rights provisions of the Constitution or otherwise hinder the supremacy of the rule of law;

(d) Ensure that the executive branches of Government and, in particular, the various State and armed forces security agencies respect and promptly carry out the decisions, orders and judgements of the courts;

(e) Release all persons detained under Decree No. 2 of 1984 and similar decrees and grant amnesty to persons who have been convicted for political offences;

(f) Lift the existing restrictions in law, in fact and in practice and refrain from imposing other restrictions on political and professional associations, and labour unions, in accordance with the national and international norms on freedom of association;

(g) Remove restrictions on the right of freedom of expression of the press, release journalists and refrain from harassing the media;

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(h) Give wide publicity to and make available copies of the 1995 draft Constitution.

78. The mission recommends that the Secretary-General continue the dialogue with the Head of the Federal Republic of Nigeria in creating conditions for the restoration of civil democratic rule.

Read and adopted at United Nations Headquarters today, the twenty-third day of April, nineteen hundred ninety-six.

(Signed) John P. PACE (Signed) V. A. MALIMATH (Signed) Atsu-Koffi AMEGA

ANNEX II

Interim response of the Government of Nigeria to the
report of the fact-finding mission

Letter dated 21 May 1996 from the Special Adviser (Legal
Matters) to the Head of State of Nigeria addressed to the
Secretary-General

I have been directed by the Head of State, General Sani Abacha, to communicate to you the underlisted as his interim response to the various recommendations contained in the said report which was submitted to him by Ambassador Brahimi, your Special Envoy.

1. The Civil Disturbances Act under which Mr. Ken Saro-Wiwa and eight others were tried and convicted will be amended: (a) to exclude members of the armed forces from serving on the tribunal; and (b) its verdict and sentence shall be subject to judicial review at the appellate level before confirmation by the confirming authority.
2. The Oil and Mineral Producing Areas Development Commission (OMPADEC) will be directed to look into whether there are peculiar ecological and environmental problems in the Ogoni area with a view to ameliorating them. The Federal Government will, with vigour, join the concerted efforts currently being undertaken by the Administrator, Rivers State, to reconcile all the parties in the Ogoni area.
3. The Head of State has directed the immediate review of the cases of all persons currently being detained without trial under Decree No. 2 of 1984 as amended. Very shortly, such persons will be released based on an assessment of the individual merit of each case.
4. Decree No. 2 of 1984, as amended, which presently permits the detention of persons suspected of engaging in acts prejudicial to State security without trial and for an indefinite period will be amended to allow for the periodic review of each case by a body comprising the Chief of General Staff, the Inspector General of Police and the Attorney General of the Federation at an interval of three months.
5. Decree No. 14 of 1994 which ousts the jurisdiction of courts to issue the writ of habeas corpus to persons detained under Decree No. 2 of 1984, as amended, will be repealed.

I am also to assure Your Excellency that other aspects of the report are currently under serious consideration and the Government will in due course convey its decisions on them.

Finally, I am to further assure Your Excellency that the Head of State, General Sani Abacha, deeply appreciates the understanding and support which you have consistently shown to him personally and to the people of Nigeria in these trying times. He also warmly welcomes the ongoing dialogue between him and Your

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Excellency under your good offices which is aimed at assisting his Administration in its current efforts to return the country to a democratically elected civilian administration in 1998 in accordance with the transition to civil rule programme launched on 1 October 1995.

(Signed) Auwalo Hamisu YADUDU
Special Adviser (Legal Matters)
to the Head of State
