

11 May 2000
Communication No. 147/95, 149/96

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Twenty-Seventh Ordinary Session
27 April - 11 May 2000

SIR DAWDA K JAWARA

v.

THE GAMBIA

DECISION

BEFORE: CHAIRMAN: Professor E.V.O. Dankwa
VICE CHAIRPERSON: Mrs. Julienne Ondziel-Gnelenga
COMMISSIONERS: Professor Isaac Nguema, Dr. Hatem Ben Salem, Mr. Kamel Rezag-Bara, Dr. Nyameko Barney Pityana, Mr. Andrew Ranganayi Chigovera, Mrs. Vera Mlangazuwa Chirwa, Mrs. Jainaba Johm

Citation: Jawara v. Gam, Comm. 147/95, 149/96, 13th ACHPR AAR Annex V (1999-2000)
Publications: IHRDA, Compilation of Decisions on Communications of the African Commission On Human and Peoples' Rights Extracted from the Commission's Activity Reports 1994-2001, at 108 (2002); Documents of the African Commission on Human and Peoples' Rights, Vol. 2, at 174 (Malcolm D. Evans & Rachel Murray eds., 2009); (2000) AHRLR 107 (ACHPR 2000)

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RAPPORTEUR

19th Session: Commissioner Kisanga

20th Session: Commissioner Umozurike

21st Session: Commissioner Umozurike

22nd Session: Commissioner Dankwa

23rd Session: Commissioner Dankwa

24th Session: Commissioner Dankwa

25th Session: Commissioner Dankwa

26th Session: Commissioner Dankwa

27th Session: Commissioner Dankwa

SUMMARY OF FACTS: COMMUNICATION 147/95

1. The complainant is the former Head of State of the Republic of The Gambia. He alleges that after the Military coup of July 1994, that overthrew his government, there has been "blatant abuse of power by ... the military junta". The military government is alleged to have initiated a reign of terror, intimidation and arbitrary detention.
2. The complainant further alleges the abolition of the Bill of Rights as contained in the 1970 Gambia Constitution by Military Decree No. 30/31, ousting the competence of the courts to examine or question the validity of any such Decree.
3. The communication alleges the banning of political parties and of Ministers of the former civilian government from taking part in any political activity. The communication alleges restrictions on freedom of expression, movement and religion. These restrictions were manifested, according to the complainant, by the arrest and detention of people without charge, kidnappings, torture and the burning of a mosque.
4. He further alleges that two former Ministers of the Armed Forces Provisional Ruling Council (AFPRC) were killed by the regime, asserting that the restoration of the death penalty through Decree No. 52 means, "the arsenal of the AFPRC is now complete".
5. He also alleges that not less than fifty soldiers were killed in cold blood and buried in mass graves by the military government during what the complainant terms "a staged-managed attempted coup". Several members of the armed forces are alleged to have been detained some for up to six months without trial following the introduction of Decree No. 3 of July 1994. This Decree gives the Minister of Interior the power to detain and to extend the period of detention ad infinitum. The Decree further prohibits the proceedings of Habeas Corpus on any detention issued under it.
6. The complainant alleges further that Decree No. 45 of June 1995, the National Intelligence Agency (NIA) Decree empowers the Minister of Interior or his designate to issue search warrants, authorise interference with correspondence, be it wireless or electronic.
7. Finally, the communication alleges disregard for the judiciary and contempt of court following the regime's disregard of a court order; the imposition of retroactive legislation following the Economic Crimes (Specified Offences) Decree of 25th November 1994, thus infringing on the rule and the due process of law.

COMMUNICATION 149/96

8. Communication 149/96 alleges violation of the right to life, freedom from torture and the right to a fair trial. The complainant alleges that not less than fifty soldiers have been summarily executed by the Gambian Military Government and buried in mass graves following an alleged attempted coup on 11th November 1994.

9. The complainant attaches the names of thirteen of the fifty soldiers alleged to have been killed and further alleges that a former Finance Minister, Mr. Koro Ceesay was killed by the government. He attaches a document from a former member of the AFPRC, Captain Sadibu Hydera, to support this allegation.

10. He went further to state that a former AFPRC member and former Interior Minister did not die from high blood pressure as claimed by the government but was tortured to death.

1. GOVERNMENT'S RESPONSE

11. In its submission on the question of admissibility, the Government raised the following objections:

12. The first point raised is what the government called lack of 'proofs in support', claiming that a communication should only be received by the Commission if the individual alleges, 'with proofs in support' a serious or massive cases of violations of human and peoples' rights.

13. The government asserts that the decrees complained of may on their face value be seen to be contrary to the provisions in the Charter, but claims that they must be "studied and placed in the context of the changed circumstances in The Gambia". Commenting on the freedom of liberty, the government claimed it was acting in conformity with laws previously laid down by domestic legislation. The government claims that the decrees do not prohibit the enjoyment of freedoms they are merely there to secure peace and stability and only those who want to disrupt the peace will be arrested and detained.

14. The submission further claims that since the take-over, not a single individual has been deliberately killed; and that during the counter - coup of 11th November 1994, soldiers of both sides lost their lives due mainly to the fact that the rebels were fighting back with soldiers loyal to the government.

15. The Government also claims that Mr. Koro Ceesay and Mr. Sadibu Hydera alleged to have been killed by the government died from an accident and natural causes respectively. Post-mortem reports on the two deaths are attached.

16. The Government further pointed out that the communication does not fulfil some of the conditions laid down in Article 56 of the Charter. Specifically, that the communications fails to meet the conditions set down in grounds 4 and 5 which states that: 56(4) ...are not based exclusively on news disseminated through the mass media...; and 56(5) ...are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged...

COMPLAINT

17. The complainant alleges violation of the following Articles of the Charter: Articles 1, 2, 4, 5, 6, 7 (1)(d) and (2), 9(1) and (2), 10(1), 11, 12 (1) and (2), 20(1) and 26 Procedure

18. Communication 147/95 is dated 6 September 1995 and was received on 30 November 1995 at the Secretariat of the Commission.
19. Communication 149/96 was received on 12 January 1996 at the Secretariat of the Commission.
20. At the 19th session in March 1996, the Commission decided to be seized of the communication and to notify the government accordingly and stated that decision on admissibility would be taken at the 20th session in October 1996.
21. At its 21st session in April 1997, the Commission decided to renumber the communication as 147/95 to reflect the length of time it has been with the Commission, it also decided to join the communication with 149/96 and declare both of them admissible. The Commission also requested further information from both sides and stated that a decision on the merits would be taken at its 22nd session.

LAW ADMISSIBILITY

22. The admissibility of communications by the Commission is governed by Article 56 of the African Charter.
 2. This article lays down seven conditions that, under normal circumstances must be fulfilled for a communication to be admissible. Of the seven, the Government claims that two conditions have not been fulfilled; namely; Article 56(4) and 56(5).
23. Article 56(4) of the Charter provides that '... are not based exclusively on news disseminated through the mass media'.
24. The Government claims that the communication should be declared inadmissible because it is based exclusively on news disseminated through the mass media, and specifically made reference to the attached letter of Captain Ebou Jallow. While it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word "exclusively"
25. There is no doubt that the media remains the most important and if not the only source of information. It is common knowledge that information on human rights violations is always gotten from the media. The Genocide in Rwanda, the human rights abuses in Burundi, Zaire, Congo, to name but a few, were revealed by the media.
26. The issue therefore should not be whether the information was gotten from the media, but whether the information is correct. Did the complainant try to verify the truth about these allegations? Did he have the means or was it possible for him to do so, given the circumstances of his case?
27. The communication under consideration cannot be said to be based exclusively on news disseminated through the mass media because the communication is not exclusively based on

Captain Jallow's letter. The complainant alleges extra-judicial execution and has attached the names of some of those he alleges have been killed. Captain Jallow's letter made no mention of this fact.

28. Article 56(5) of the Charter states that '... are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

29. The government also claims that the author has not attempted to exhaust local remedies. The government claims that the author should have sent his complaint to the police who would in turn have investigated the allegations and prosecuted the offenders 'in a court of law'.

30. This rule is one of the most important conditions for admissibility of communications, no doubt therefore, in almost all the cases, the first requirement looked at by both the Commission and the state concerned is the exhaustion of local remedies.

31. The rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matters through its own local system. This prevents the Commission from acting as a court of first instance rather than a body of last resort. [FN1] Three major criteria could be deduced from the practice of the Commission in determining this rule, namely: the remedy must be available, effective and sufficient.

[FN1] See Communications 25/89, 74/92 and 83/92 all joint

32. A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.

33. The Government's assertion of non-exhaustion of local remedies will therefore be looked at in this light. As aforementioned, a remedy is considered available only if the applicant can make use of it in the circumstance of his case. The applicants in cases Nos. ACHPR/60/91, ACHPR/87/93, ACHPR/101/93 and ACHPR/129/94 had their communications declared admissible by the Commission because the competence of the ordinary courts had been ousted either by decrees or the establishment of special tribunals.

34. The Commission has stressed that, remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant. Therefore, in a situation where the jurisdiction of the courts have been ousted by decrees whose validity cannot be challenged or questioned, as is the position with the case under consideration, local remedies are deemed not only to be unavailable but also nonexistent.

35. The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.

36. The complainant in this case had been overthrown by the military, he was tried in absentia, former Ministers and Members of Parliament of his government have been detained and there was terror and fear for lives in the country. It would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies.

37. There is no doubt that there was a generalised fear perpetrated by the regime as alleged by the complainant. This created an atmosphere not only in the mind of the author but also in the minds of right thinking people that returning to his country at that material moment, for whatever reason, would be risky to his life. Under such circumstances, domestic remedies cannot be said to have been available to the complainant.

38. According to the established case law of the Commission, a remedy that has no prospect of success does not constitute an effective remedy. The prospect of seizing the national courts, whose jurisdiction have been ousted by decrees, in order to seek redress is nil. This fact is reinforced by the Government's response of 8th March 1996, Note Verbale No. PA 203/232/01/(97-ADJ) in which it stated that 'The Gambian Government...does not intend to spend valuable time responding to baseless and frivolous allegations by a deposed despot..'

39. As to whether there were sufficient remedies, one can deduce from the above analysis that there were no remedies capable of redressing the complaints of the authors.

40. Considering the fact that the regime at that material time controlled all the arms of government and had little regard for the judiciary, as was demonstrated by its disregard of a court order in the T. K Motors' case, and considering further that the Court of Appeal of The Gambia in the case of Pa Salla Jagne v The State, ruled that 'Now there is no human rights laws or goals and objective laws in the country', it would be reversing the clock of justice to request the complainant to attempt local remedies.

41. It should also be noted that the government also claims that the communication lacks 'proofs in support'. The position of the Commission has always been that a communication must establish a prima facie evidence of violation. It must specify the provisions of the Charter alleged to have been violated. The State also claims that the Commission is allowed under the Charter to take action only on cases which reveal a series of serious or massive violations of human rights.

42. This is an erroneous proposition. Apart from Articles 47 and 49 of the Charter, which empower the Commission to consider inter-state complaints, Article 55 of the Charter provides for the consideration of "communications other than those of States Parties". Further to this, Article 56 of the Charter stipulates the conditions for consideration of such communications (see also Chapter XVII of the Rules of Procedure entitled "Procedure for the Consideration of The Communications Received in Conformity with Article 55 of the Charter"). In any event, the practice of the Commission has been to consider communications even if they do not reveal a series of serious or massive violations. It is out of such useful exercise that the Commission has, over the years, been able to build up its case law and jurisprudence.

43. The argument that the action of the Government is in conformity with regulations previously laid down by law is unfounded: the Commission decided in its decision on communication 101/93, with respect to freedom of association, that, "competent authorities should not enact

provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards". And more importantly, the Commission in its Resolution on the Right to Freedom of Association had also reiterated that: "The regulation of the exercise of the right to freedom of association should be consistent with States' obligations under the African Charter on Human and Peoples' Rights". It follows that any law which is pleaded for curtailing the enjoyment of any of the rights provided for in the Charter must meet this requirement.

For these reasons, the Commission declared the communications admissible.

MERITS

44. The complainant alleges that by suspending the Bill of Rights in the 1970 Gambian Constitution, the government violated Articles 1 and 2 of the African Charter.
45. Article 1 of the Charter provides that "The member States ... parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter...", while Article 2 reads: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter..."
46. Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter, automatically means a violation of Article 1. If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article. Its violation, therefore, goes to the root of the Charter.
47. The Republic of the Gambia ratified the Charter on 6 June 1983. In its first periodic report to the Commission in 1992, the Gambian government asserted that "Most of the rights set out in the Charter have been provided for in Chapter 3, Sections 13 to 30 of the 1970 Constitution...The Constitution predicts the Gambian accession to the covenants, but in fact gave legal effect to some of the provisions of the Charter". This therefore means that the Gambian government gave recognition to some of the provisions of the Charter (i.e. those contained in chapter 3 of its Constitution), and incorporated them into its domestic law.
48. By suspending Chapter 3,(the Bill of Rights), the government therefore restricted the enjoyment of the rights guaranteed therein, and, by implication, the rights enshrined in the Charter.
49. It should however be stated that the suspension of the Bill of Rights does not ipso facto mean the suspension of the domestic effect of the Charter. In Communication 129/94, the Commission held that "the obligation of ... a government remains unaffected by the purported revocation of the domestic effect of the Charter"
50. The suspension of the Bill of Rights and consequently the application of the Charter was not only a violation of Article 1 but also a restriction on the enjoyment of the rights and freedoms enshrined in the Charter, thus violating Article 2 of the Charter as well.

51. Article 4 of the Charter states that "Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".
52. While the complainant alleges that there have been extra-judicial killings, no concrete evidence was adduced to support this allegation. The Military government has provided official post-mortem reports on the causes of the deaths of Messrs. Koro Ceesay and Sadibu Hydara. The government does not dispute the fact that soldiers died during the counter coup in November 1994, but claims that "soldiers of both sides lost their lives due mainly to the fact that the rebels were fighting back with soldiers loyal to the government". It also claims that since the take-over, not a single individual has been deliberately killed.
53. It is not for the Commission to verify the authenticity of the post-mortem reports or the truth of the government's defence. The burden is on the complainant to furnish the Commission with evidence of his allegations. In the absence of concrete proof, the Commission cannot hold the latter to be in violation of Article 4 of the Charter.
54. Article 5 of the Charter reads: "... All forms of ... torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".
55. The complainant alleges that the Military perpetrated a reign of terror, intimidation and torture when it seized power. While there is evidence of intimidation, arrests and detentions, there is no independent report of torture.
56. The complainant further alleges that detention of persons incommunicado and preventing them from seeing their relatives constitutes torture. The State has refuted this claim and has challenged the complainant to verify the truth from those who were detained. To date, the Commission has received no evidence from the complainant. In the absence of proof therefore, the Commission cannot hold the government to be in violation of Article 5. In this regard, the Commission is relying on its decision in communication ACHPR/60/91: 27 where it held that " without specific information as to the nature of the acts themselves, the Commission is thus unable to find a violation of Article 5".
57. Article 6 of the Charter reads: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of this freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested".
58. The Military government has not refuted the allegations of arbitrary arrests and detentions, but has defended its position by stating that, its action must be "studied and placed in the context of the changed circumstances in The Gambia". It also claims that it is acting within the confines of legislation 'previously laid down by law', as required by the wordings of Article 6 of the Charter.
59. The Commission in its decision on communication 101/93 laid down a general principle with respect to freedom of association that "competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution or

international human rights standards". This principle therefore applies not only to freedom of association but also to all other rights and freedoms. For a State to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter. The Commission finds the arrests and incommunicado detention of the aforementioned persons inconsistent with Gambia's obligations under the Charter. They constitute arbitrary deprivation of their liberty and thus a violation of Article 6 of the Charter. Decree No. 3 is, therefore, contrary to the spirit of Article 6.

60. Article 7(1) (d) of the Charter reads:

"Every individual shall have the right to have his cause heard. This comprises: ... the right to be tried within a reasonable period of time by an impartial court or tribunal."

61. Given that the Minister of Interior could detain anyone without trial for up to six months, and could extend the period ad infinitum, his powers in this case, is analogous to that of a court, and with all intents and purposes, he is more likely to use his discretion at the detriment of the detainees, who are already in a disadvantaged position. The victims will be at the mercy of the Minister who, in this case, will render favour rather than vindicating a right. This power granted to the Minister renders valueless the provision enshrined in Article 7(1) (d) of the Charter.

62. Article 7(2) of the Charter reads:

"No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed."

63. This provision is a general prohibition on retroactivity. It is to ensure that, citizens at all times are fully aware of the state of the law under which they are living. The Economic Crimes (Specified Offences) Decree of 25th November 1994 which was deemed to have come into force in July 1994, is therefore, a serious violation of this right.

64. Article 9 of the Charter reads:

(1). "Every individual shall have the right to receive information". (2). Every individual shall have the right to express and disseminate his opinion within the law.

65. The government did not provide any defence to the allegations of arrests, detentions, expulsions and intimidation of journalists, made by the complainant. The intimidation and arrest or detention of journalists for articles published and questions asked deprives not only the journalists of their rights to freely express and disseminate their opinions, but also the public, of the right to information. This action is clearly a breach of the provisions of Article 9 of the Charter.

66. The complainant alleges that political parties have been banned, and that an Independent Member of Parliament and his supporters were arrested for planning a peaceful demonstration. In addition, Ministers and Members of Parliament in the former regime have been banned

from taking part in any political activity and some of them restricted from travelling out of the country; with a maximum sentence of three years for any default.

67. The imposition of the ban on former Ministers and Members of Parliament is in contravention of their rights to participate freely in the government of their country provided for under Article 13(1) of the Charter. Article 13(1) reads:

"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

68. Also, the banning of political parties is a violation of the complainants' rights to freedom of association guaranteed under Article 10(1) of the Charter. In its decision on communication 101/93, the Commission stated a general principle on this right, to the effect that "competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards". And more importantly, the Commission in its Resolution on the Right to Freedom of Association had also reiterated that: "The regulation of the exercise of the right to freedom of association should be consistent with States' obligations under the African Charter on Human and Peoples' Rights". This principle does not apply to freedom of association alone but to all other rights and freedoms enshrined in the Charter, including, the right to freedom of assembly. Article 10(1) provides:

"Every individual shall have the right to free association provided that he abides by the law."

69. The Commission also finds the ban an encroachment on the right to freedom of assembly guaranteed by Article 11 of the Charter. Article 11 reads:

"Every individual shall have the right to assemble freely with others"

70. The restrictions to travel placed on the former Ministers and Members of Parliament is also a violation of their right to freedom of movement and the right of ingress and egress provided for under Article 12 of the Charter. Article 12 provides:

(1) Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.

(2) Every individual shall have the right to leave any country, including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

71. Section 62 of the Gambian Constitution of 1970 provides for elections based on universal suffrage, and Section 85(4) made it mandatory for elections to be held within at most five years. Since independence in 1965, The Gambia has always had a plurality of parties participating in elections. This was temporarily halted in 1994 when the Military seized power.

72. The complainant alleges that the Gambian peoples' right to self-determination has been violated. He claims that the policy that the people freely choose to determine their political status, since independence has been "hijacked" by the military. That the military has imposed itself on the people.

73. It is true that the military regime came to power by force, albeit, peacefully. This was not through the will of the people who have known only the ballot box since independence, as a means of choosing their political leaders.

The military coup was therefore a grave violation of the right of Gambian people to freely choose their government as entrenched in Article 20(1) of the Charter. Article 20(1) provides:

All peoples shall ... freely determine their political status... according to the policy they have freely chosen. [FN2]

[FN2] See also Resolution ACHPR/RPT/8TH : Annex VII, Rev. 1994

74. The rights and freedoms of individuals enshrined in the Charter can only be fully realised if governments provide structures which enable them to seek redress if they are violated. By ousting the competence of the ordinary courts to handle human rights cases, and ignoring court judgements, the Gambian military government demonstrated clearly that the courts were not independent. This is a violation of Article 26 of the Charter. Article 26 of the Charter reads:

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

FOR THE ABOVE REASONS, THE COMMISSION finds the government of the Gambia in violation of the following provisions of the Charter: Articles: 1, 2, 6, 7(1)(d) and 7(2), 9(1) and (2), 10(1), 11, 12(1) and (2), 13(1), 20(1) and 26 of the Charter, for the period within which the violations occurred; urges the government of the Gambia to bring its laws in conformity with the provisions of the Charter.

Done in Algiers, Algeria on 11 May 2000.