

A REVIEW OF THE UNITED NATIONS WORKING GROUP'S OPINION ON NNAMDI KANU'S ARBITRARY DEPRIVATION OF LIBERTY

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Abstract

Human rights laws have played a significant role in protecting the human rights of extradites wanted by a requesting state to face criminal charges. However, states in their zeal to secure the presence of these individuals within their territory in order to try them under their domestic laws, tend to circumvent international extradition norms and processes, thereby placing these individuals beyond the law's protection. Nigeria is no exception: for example, in the case of Nnamdi Kanu, the leader of a group campaigning for the independent Republic of Biafra in Nigeria's South-Eastern region, who was allegedly forcefully abducted and detained in Kenya before his extraordinary extradition to Nigeria. The United Nations Working Group on Arbitrary Detention (WGAD) is established to ensure personal liberty of persons who have been arbitrarily deprived in such circumstance. This article adopts the doctrinal methodology to examine the legal issues raised in the WGAD's opinion which determines whether Kanu's liberty was arbitrarily deprived by the Kenyan and Nigerian Governments.

Keywords: Extraordinary rendition, Human Rights, Working Group on Arbitrary Detention, Arbitrary deprivation of liberty

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1.0 Introduction

The Indigenous People of Biafra (IPOB), is a group campaigning for the independent Republic of Biafra in the South-Eastern region of Nigeria. Its leader was detained by the Nigerian government in October 2015. He was charged to stand trial before the Federal High Court in Abuja, Nigeria with eleven counts of terrorism, treasonable felony, and illegal possession of firearms which were amended on March 16, 2018 to a four-count charge. These charges related to conspiracy to commit treasonable felony, treasonable felony, publication of defamatory matter¹ and improper importation of goods.²

In April 2017, due to poor health, Kanu was granted bail with strict conditions attached to it. He jumped bail and fled from Nigeria, alleging that he had to leave Nigeria as his life was in danger when security men unlawfully invaded his home in September of that year.³ In May 2021, Kanu travelled from England, on his British passport to Kenya where he was lawfully present. He was reportedly arrested on 19 June, 2021 at the Jomo Kenyatta International Airport, by Kenyan Special Forces when he went to pick up a friend. Kanu was allegedly arrested without an arrest warrant neither was he notified why he was being arrested according to reports. He was then allegedly taken to an unknown and undisclosed place, which was a private security facility where it was alleged that he was severely ill-treated and tortured by the Kenyan Special Forces for eight

¹ S. 516, 41(c) and 375 of the Criminal Code Act, Cap C77, Laws of the Federation of Nigeria, 2004.

² S. 47(2) of the Customs and Excise Management Act, Cap C45, Laws of the Federation of Nigeria, 2004.

³ Kayode Lawal, 'Why I jumped bail, escaped from Nigeria – Nnamdi Kanu', *Daily Post* (June 29, 2021) <<https://dailypost.ng/2021/06/29/why-i-jumped-bail-escaped-from-nigeria-nnamdi-kanu/>> accessed 29 August, 2023

days.⁴ Thereafter, he was extraordinarily renditioned to Nigeria on 29 June, 2021,⁵ and was tried in Abuja by a Federal High Court. Kanu appealed against the trial court's decision to the Court of Appeal.

Kanu's rendition to Nigeria is not unique, as states in their determination to prosecute potential extraditees under their national laws tend to circumvent international extradition norms and processes, through the use of extraordinary rendition.⁶ Extraordinary rendition is a form of human rights violation, denying one their right to defend their extradition from the state which was sought as a safe haven. In most cases, this form of extradition results in the violation of an individual's right to personal liberty, which is considered as one of the most fundamental human rights of an individual. This right may be violated by an arbitrary arrest, enforced disappearance, torture, denial of access to consular officials, and forcible transfer, all of which Kanu experienced.⁷

Historically, individuals were denied the opportunity to protest against violations of their rights as international law focused only on the action of states.⁸ These rights which were based on the positivist school of thought,

⁴ Human Rights Council Working Group on Arbitration Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its ninety-third session 30 March – 8 April 2022, A/HRS/WGAD/2022/25, 17 August 2022, paras 5 and 34.

⁵ *Nnamdi Kanu v Federal Republic of Nigeria*, Appeal No: CA/ABJ/CR/383/2015, lead judgment p 4

⁶ See for example, Ker and Soblen cases discussed in M. Cherif Bassiouni 'Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition' (2021) 7 *Vanderbilt Law Review* 25; David Weissbrodt & Amy Bergquist 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 *Harv. Hum. Rts. J.* 123, 128 (stating that though this term has been used by the U.S. Department of Justice since the late 1980s it referred to the practice of abducting suspects abroad and bringing them to the United States or another country to stand trial).

⁷ See generally and Working Group's decision, Human Rights Council Working Group (n 4).

⁸ Kai I. Rebane 'Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights' (1995) 19 *Fordham International Law Journal*

were only recognised when explicitly provided for in treaties or in the rules of nations.⁹ However, as the law on extradition developed, the rights of individual's in their own standing began to be recognised by international law.¹⁰ For instance, consequent to World War II, the naturalist school of thought, in replacing the positivist theory, recognised that individual rights were universal and perpetual, deriving from the natural order of things.¹¹ At the same time as the extradition process developed it became more formalised through bilateral, multilateral and regional treaties and municipal laws, containing provisions which acted as defenses to extraditing an individual.¹² The defenses were based on principles such as specialty,¹³ dual (or double) criminality¹⁴ and the political offence

1635, 1640; See also Thomas Rose 'A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada' (2002) 27 *The Yale Journal of International Law* 193 (stating that extradition has been a reflection of, and an exercise in the supremacy of the states over the individuals).

⁹ Rebane (n 8) 1640

¹⁰ Rebane (n 8) 1638.

¹¹ Rebane (n 8) 1641

¹² Rebane (n 8) 1647 and 1648.

¹³ Under the specialty doctrine, the extraditee may only be tried by the extraditing state for those crimes which were specified in the extradition request. As this principle became broadly recognised in international law and practice, it has become a rule of customary international law. Gavan Griffith and Claire Harris 'Recent Developments in the Law of Extradition' (2005) 6 *Melbourne Journal of International Law* 33, 49; Kent Wellington 'Extradition a fair and effective weapon in the war against terrorism' (1990) 51 *Ohio State Law Journal* 1447, 1456 (noting that an exception to this doctrine is where the requested state consents to the extraditee being tried for a crime other than that for which he was surrendered. The reasoning behind this exception is based on the fact that the specialty doctrine is a privilege granted to the requested state to protect its dignity and interests, therefore an accused person does not have an inalienable right).

¹⁴ Under the dual (or double) criminality doctrine, the alleged crime must be illegal in both the requesting state and the requested state. Wellington (n 13) 1457 states that this doctrine does not prevent extradition if 'defenses may be available in the requested state that would not be available in the requesting state, or that different requirements of proof are applicable in the two states.'

exception.¹⁵ The development of the Universal Declaration of Human Rights (UDHR),¹⁶ which is regarded as the foundation of international human rights law and international instruments such as the International Covenant on Civil and Political Rights (ICCPR) which has 173 State parties,¹⁷ the African Charter on Human and Peoples Rights (ACHPR)¹⁸ and the Rome Statute of the International Criminal Court,¹⁹ also play an

¹⁵ The political offence exception prohibits extradition by the asylum state for crimes which are of a political nature. See Christine Van Den Wijngaert 'The Political Offence Exception to Extradition: Defining the Issues and Searching a Feasible Alternative' (1983) 741, 744, being a Report presented at the International Seminar on Extradition, International Institute of Higher Studies in criminal Sciences, note (stating that as most extradition laws and treaties do not define what constitutes a political offence, the task of defining it has been left to judicial interpretation and administrative discretion. Secondly, the requested state decides whether or not an offence qualifies as a political one). For the historical background to the political offence exception. See James J Kinneally III 'The Political Offence Exception: Is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End?' (1987) 2 *American University International Law Review* 203. 205-207.

¹⁶ G.A. Res 217A, 10 Dec. 1948. See for example arts. 3 and 10 UDHR

¹⁷ Adopted and opened for signature, ratification and accession by GA resolution 2200A (XXI), entered into force 23 March 1976, in accordance with article 49. See for example art. 6 which provides for the inherent right to life, art. 9 provides for the right to liberty and security of person, art. 12 – right to liberty of movement, art 13 - expulsion from a state dependent on a decision reached in accordance with law and art. 14 - provides for the right to a fair trial.

¹⁸ CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). See art 5 which grants individuals 'a right to the respect of the dignity inherent in a human being' and also prohibits 'torture, cruel, inhuman or degrading punishment and treatment'. Art. 7(1)(a) provides for a right to a fair trial which 'comprises of the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'.

¹⁹ Rome Statute to the International Criminal Court, UN Doc A/CONF 183/9, 17 July 1998, 2187 UNTS 90, 37 ILM 1002 1030, which came into force on July 1, 2002. Art. 101 of the Rome Statute, for example, which states the principle of specialty provides that:

(1) A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the

important role in protecting the potential extraditees' rights in international law.

Kanu's extraordinary rendition to Nigeria from Kenya portrays how the international community responds in defending rights to personal liberty, when states circumvent international extradition norms and processes. One of the methods used by the international community to respond to such situations is by instituting the United Nations Working Group on Arbitrary Detention (WGAD),²⁰ which is the only body in the international human rights system with a specific mandate to receive and examine cases of arbitrary deprivation of liberty. In discharging its mandate, the WGAD 'investigates cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the UDHR, ICCPR, and other relevant international legal instruments accepted by the states concerned.'²¹ It also utilizes non-binding international human rights instruments such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of

crimes for which that person has been surrendered.

- (2) The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with Article 91 [relating to contents of request for arrest and surrender]. States Parties shall have the authority to provide a waiver to the Court and should endeavor to do so.

²⁰ The WGAD was established by the former Commission on Human Rights (replaced by the Human Rights Council in 2006), at its forty-seventh session, in 1991, by resolution 1991/42. Its mandate was extended by the Human Rights Council resolution 51/8 of 6 October 2022, para 15, for a further three-year period.

²¹ Center for Human Rights and Humanitarian Law, 'The Legal Methods and Jurisprudence of the United Nations Working Group on Arbitrary Detention' (March 2021) <<https://www.wcl.american.edu/impact/initiatives-programs/center/publications/documents/the-legal-methods-and-jurisprudence-of-unwgad/>> accessed 13 September, 2023. See Methods of Work of the Working Group on Arbitrary Detention, U. N. Doc. A/HRC/36/38, para 7 (13 July 2017) which lists twelve other legal instruments the Working Group considers in drafting its opinions

Principles)²² and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),²³ resolutions and declarations, and also guidance issued by international organisations and tribunals in carrying out its mandate. A person's right to personal liberty is violated when the individual is arbitrarily deprived of such a right, thus placing that individual outside the law's protection.

Having been informed by a source of Kanu's arrest and detention by the Kenyan and Nigerian Governments, and his extraordinary rendition to Nigeria, the WGAD transmitted to both governments a communication on 30 December, 2021 concerning Kanu.²⁴ It requested certain information from them regarding the allegations made and that response should be provided by states concerned to it by 28 February, 2022.²⁵ The Kenyan Government chose not to respond, neither did it ask for the time limit to be extended, though it had earlier denied being involved in Kanu's arrest and extradition to Nigeria through media reports.²⁶ Although, the Nigerian Government's response was received by the WGAD on 25 January, 2022, the government stated that as the case against Kanu was ongoing before its

²² Adopted by General Assembly resolution 43/173 of 9 December 1988.

²³ Resolution A/RES/70/175 adopted the revised Rules and also approved that they should be known as the 'Nelson Mandela Rules.' These Rules provide States with detailed guidelines for protecting the rights of persons deprived of their liberty, from pre-trial detainees to sentenced prisoners

²⁴ Human Rights Council Working Group (n 4) para 2

²⁵ Human Rights Council Working Group (n 4) para 27

²⁶ Sahara Reporters News, 'Kenyan Authorities React To Nnamdi Kanu's Arrest' *Sahara Reporters* (2 July 2021) <<https://saharareporters.com/2021/07/02/kenyan-authorities-react-nnamdi-kanu%E2%80%99s-arrest-extradition-nigeria>> accessed 29 August, 2023, The Whistler News, 'Nnamdi Kanu: What FG, Kenya, Lawyer Did Not Tell ...' *The Whistler* (3 July, 2021) <<https://thewhistler.ng/nnamdi-kanu-what-fg-kenya-lawyer-did-not-tell-nigerians-about-ipob-leaders-arrest-extradition/>> accessed 29 August, 2023

domestic courts any reaction by its government will be unethical.²⁷ Based on information provided from the source the WGAD issued its opinion.²⁸

This article examines the WGAD's opinion which determines whether Kanu was deprived of his liberty arbitrarily by the two governments. To this end Part 2 of this article considers the WGAD's definition and scope of arbitrary deprivation of liberty, in order to set the picture of its determination of Kanu's case. In examining the WGAD's opinion, Part 3 identifies those facts which are indicative of arbitrary detention and engages in an incisive analysis of legal issues raised in assessing the lawfulness of his detention. Part 4 provides a brief summary of Kanu's trial before the Nigerian courts after his extraordinary rendition to Nigeria, while Part 5 in considering Kanu's case and the Julian Assange case argues that states do not necessarily consider the WGAD's opinion when they have an interest which they seek to pursue. Part 6 concludes with recommendations.

2.0 The Definition and Scope of Arbitrary Detention of Liberty by the Working Group under Customary International Law

The WGAD is a United Nations body, with one of the special thematic procedures of the United Nations Human Rights Council. Five experts preside in their independent capacities on the WGAD. The mandate of the WGAD is to receive and investigate cases of arbitrary deprivation of liberty imposed arbitrarily or inconsistently with the international standards set forth in the UDHR, as well as the relevant international legal instruments accepted by the states concerned. Once it considers communications received from an individual or entity, the WGAD renders its opinion relating to whether the detention is arbitrary or not and recommends actions to be taken by the state concerned. As observed below, the WGAD in carrying

²⁷ Human Rights Council Working Group (n 4) para 30

²⁸ Human Rights Council Working Group (n 4) para 32 (stating that its opinion was rendered in conformity with paragraph 15 of its methods of work). See also Methods of Work of the Working Group on Arbitrary Detention (n 21) para 15

out its mandate gives a broad interpretation to this term and also when determining if the right of an individual's liberty is arbitrary.

2.1 Interpretation of 'deprivation of liberty' by the Working Group

International human rights instruments prohibit the arbitrary deprivation of one's liberty, thereby protecting the right of an individual's personal liberty. The UDRC in its article 3 for example, provides that '[e]very one has the right to life, liberty and the security of person' whilst article 9 of the ICCPR provides for the right to liberty and security of persons. Major regional instruments such as, the ACHPR,²⁹ the Arab Charter on Human Rights,³⁰ the American Convention on Human Rights³¹ and the European Convention for the Protection of Human Rights and Fundamental Freedoms also protects the right to personal liberty of an individual.³² National constitutions such as the Nigerian³³ and Kenyan³⁴ Constitutions also provide for the prohibition of arbitrary deprivation of one's liberty.

²⁹ See art 6

³⁰ See art 14

³¹ See art 7(1)

³² See art 5(1)

³³ See Constitution of the Federal Republic of Nigeria, 1999 (as amended), art 35(1)

³⁴ See Constitution of Kenya, 2010, art 29 - Freedom and security of the person, art 48 - Access to justice, art 49 -Rights of arrested persons and art 51 - Rights of persons detained, held in custody or imprisoned. See also Persons Deprived of Liberty Act, 2014, No. 23 of 2014, which is an Act of Parliament to give effect to articles 29(f) and 51 of the Constitution and for connected purposes

Customary international law prohibits deprivation of liberty which is arbitrary³⁵ and constitutes a *jus cogens* norm.³⁶

Unfortunately, when the former Commission on Human Rights established the WGAD in 1991, it did not define the term ‘detention’. Instead, different terminologies such as, arrest, detention, holding, apprehension, incarceration, custody and remand were used, resulting in different interpretations of the term.³⁷ The UDHR for example, in article 9 prohibits arbitrary arrest, detention and exile, whilst article 9(1) of the ICCPR provides an individual with the right to liberty and security. It also provides that an individual’s arrest or detention must not be arbitrary. That one can only be deprived of their liberty except on those grounds which have been established by law and procedures likewise.

In order to resolve the differences in interpretation between these different terminologies, the former Commission on Human Rights settled for the term ‘deprivation of liberty’, in its resolution 1997/50.³⁸ Resolution

³⁵ Many of the ICCPR’s provisions for example, are considered to be part of customary international law. State parties to the ICCPR have also enshrined in their national constitutions and legislation the prohibition of arbitrary deprivation of liberty. Even States which are not party to the ICCPR, have enshrined in their national constitutions and legislation prohibitions of arbitrary arrest and detention. This is evidence of the recognition of the customary nature of the prohibition of the arbitrary deprivation of liberty by non-States parties to major human treaties. See for example, art 37 of China’s Constitution, art 26 of the United Arab Emirates Constitution and Qatar’s art. 40 of the Code of Criminal Procedure

³⁶ See Working Group on Arbitrary Detention, Compilation of Deliberations, Deliberations no, 9, paras 42 – 51(2012) <https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/CompilationWG_ADDeliberation.pdf> accessed 14 September, 2003 (explaining how prohibition of arbitrary deprivation of liberty is part of treaty law, customary international law and constitutes a *jus cogens* norm).

³⁷ The Working Group on Arbitrary Detention, Revised Fact Sheet No 26, 6 February 2019, p5

³⁸ Ibid

1997/50 which provides for the renewal of the WGAD's mandate, entrusts it with the responsibility of investigating deprivation of liberty cases which have been imposed arbitrarily.³⁹

The terminology deprivation of liberty allows the WGAD to broadly interpret deprivation of liberty in all its forms. As to whether an individual's liberty is deprived is a question of fact, as detention by itself does not necessarily violate a person's human rights. It is important that the individual in question was able to leave at his own accord, and that the checks against arbitrary detention are complied with. The WGAD therefore considers as detention all forms of deprivation of liberty, such as, when it analyses if an individual's liberty has been deprived either before, during or after trial. Deprivation of liberty also includes an analysis by the WGAD of detentions in criminal justice settings such as, detentions at the police station, ports and airports which amount to arbitrary deprivation of liberty,⁴⁰ and also arbitrary deprivation of liberty through administrative detention.⁴¹ Secret and/or incommunicado detention may also amount to a deprivation of a person's liberty.⁴²

2.2 When deprivation of liberty can be said to be arbitrary

An individual's right of liberty is not absolute as there are times when depriving one's liberty is justified, such as, when enforcing laws which are criminal in nature or emergency powers. The ICCPR, for example, is one

³⁹ WGAD (n 36) para 54

⁴⁰ Ibid, para 59 (stating that 'placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty.

⁴¹ Administrative detention, also known as security detention is detention which occurs when an individual has been deprived of his or her freedom without a trial. Such detention normally amounts to arbitrary detention as other effective measures addressing the threat, as well as the criminal justice system, could have been used.

⁴² See the joint study on global practices in relation to secret detention in the context of countering terrorism, A/HRC/13/42 which gives a detailed account of secret detention

of those international instruments to recognise that there are instances when such deprivation may be justified, as it provides that an individual's deprivation of liberty may be justified only such grounds which have been established by law and in accordance with such procedure likewise.⁴³ Although the law may authorise a detention, that detention may be considered arbitrary, for example, where the detention is premised on legislation which is arbitrary or inherently unjust.

Though international instruments codify the prohibition on detention which is arbitrary, these instruments do not spell out what arbitrariness is.⁴⁴ Neither did the former Commission on Human Rights define the term 'arbitrary', when it established the WGAD and determined its mandate. Resolution 1997/50 which extended and clarified the WGAD's mandate stipulates that deprivation of liberty is not arbitrary where a 'final decision has been taken in such cases by domestic courts in conformity with domestic law, with the relevant international standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the states concerned'.⁴⁵ Therefore, where a decision has not been taken in such cases, depriving an individual of his liberty will be considered arbitrary when it is not carried out according to the law which is applicable and its procedure, and is not 'proportional to the aim sought, reasonable and necessary'.⁴⁶ Arbitrariness must not be equated with 'against the law', but should be 'interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law'.⁴⁷

⁴³ S9(1) ICCPR, third sentence. See also General comment No 35. Article 9 (Liberty and Security of person), CCPR/C/GC/35 (16 December 2014) para 14 (stating that article 9 recognises that individuals may be detained on criminal charges).

⁴⁴ See for example, arts 9 UDHR and 9(1) ICCPR.

⁴⁵ WGAD (n 36) para 54

⁴⁶ WGAD (n 36) para 61

⁴⁷ WGAD (n 36) para 61 referring to the drafting history of article 9 of the ICCPR.

2.3 The legal categories of deprivation of liberty regarded as arbitrary under customary international law by the Working Group

There are five legal categories under which the WGAD Group regards deprivation of liberty cases as arbitrary under customary international law. In determining these cases the WGAD may refer to one category, more than one category or to all the categories.

These categories which are reproduced below are:

- (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty, as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her (category I);
- (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13-14 and 18-21 of the Universal Declaration of Human Rights and, insofar as state parties are concerned, by articles 12, 18-19, 21-22 and 25-27 of the International Covenant on Civil and Political Rights (category II);
- (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the states concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
- (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
- (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims

towards or can result in ignoring the equality of human beings (category V).⁴⁸

The WGAD's opinions on whether a person's imprisonment or detention is lawful, have helped in getting such persons released. In 2022, for example, 88 opinions were adopted by the WGAD which concerned 160 persons who were detained in 50 countries. In those states which remedied the situations of those individuals who were detained, they were released.⁴⁹ Well known complaints, for example, relate to Jason Rezaian, a journalist, in the United States of America and Iran, who was detained by Iranian authorities for 544 days, and Mohamed Nasheed, the founder and leader of the Maldivian Democratic Party, who was detained by the Maldives authorities.⁵⁰ Jason Rezaian was released in January 2016 and Mohamed Nasheed in 2015.

The next section considers the WGAD's opinion on the allegations made as to whether Kanu deprivation of his liberty by the Governments of Kenya and Nigeria was arbitrary.

3.0 The opinion of the Working Group on Kanu's Arrest and Detention

The WGAD considered whether the allegations relating to Kanu's deprivation of liberty by the Kenyan and Nigerian Governments were

⁴⁸ Methods of Work of the Working Group on Arbitrary Detention (n 21) para 8

⁴⁹ See for example, Report of the Working Group on Arbitrary Detention, A/HRC/54/51, 31 July 2023 where the Working Group gives a table listing its Opinions adopted at the ninety-third, ninety-fourth and ninety-fifth sessions. In this table the Working Group lists the states to which the Opinions were addressed to, the Governments which responded to its request for information relating to the alleged arbitrary detention of the person(s) concerned, the person(s) concerned, under which category it considered its Opinion and follow up information received.

⁵⁰ See Opinion No. 44/2015 concerning Jason Rezaian (Islamic Republic of Iran), A/HRC/WGAD/2015, 16 December 2015 and No.33/2015 (Maldives), Communication addressed to the Government on 12 May 2015, Concerning Mohamed Nasheed, A/HRC/WGAD/2015, 12 October 2015

arbitrary under different categories as recognised in its working methods. The allegations made against both governments were examined separately. The first part of this section begins by considering the WGAD's opinion on the allegations made against the Kenyan Government, whilst the second part considers its opinion on the allegations made against the Nigerian Government.

3.1 The Working Group's findings on the allegations made against the Kenyan Government

The WGAD considered whether Kanu's arrest and detention by the Kenyan Government amounted to arbitrary detention under three of its categories, that is, categories I, II and III.

3.1.1 Category I - A clear impossibility to invoke any legal basis justifying the deprivation of liberty

This was the first category under which the WGAD considered if Kanu had been arbitrarily deprived of his liberty by the government of Kenya. An individual's detention under this category must be based on law and must also be carried out according to the rule of law.

When Kanu was arrested by the Kenyan Security Forces at the Jomo Kenyatta International Airport in June 2021, he was not taken to a police station or a conventional detention center. Instead, he was taken to a location which was undisclosed and unknown, where he was a subject to severe ill-treatment and torture for eight days, and thereafter extraordinarily renditioned to Nigeria.⁵¹ No arrest warrant was presented to Kanu when he was arrested neither did the Kenyan authorities inform him as to why he was being arrested.

Under international law, an arrest warrant must be given to a detainee at the time of his arrest, which must be obtained from a competent judicial authority, which is independent and impartial. Upon his arrest, a detainee must be informed immediately why he is being arrested and of the charges

⁵¹ Human Rights Council Working Group (n 4) paras 5 and 6

made against him. These rights are ‘procedurally inherent in the right to liberty and security and the prohibition of arbitrary deprivation of liberty’⁵² and are provided for under the ICCPR, the Body of Principles and the UDHR.⁵³ Article 9(1) of the ICCPR provides that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with the such procedure as are established by law.⁵⁴

Thus, article 9(1) requires that deprivation of an individual’s liberty must be carried out in line with the rule of law. It prohibits arbitrary arrest or detention, and unlawful deprivation of liberty. Article 9(2) of the ICCPR, provides two specific safeguards for the protection of persons deprived of their liberty. It provides that at the time of one’s arrest, that person should be informed as to why he is being arrested and must immediately be informed of what the charges made against him are.⁵⁵ The reasons given must include the legal basis for his arrest, and also enough factual specifics to substantiate the complaint made.⁵⁶

The Body of Principles also has similar provisions to the ICCPR’s. Just as the ICCPR strictly provides that the deprivation of one’s liberty should have a legal basis, the Body of Principles states that an arrest must be carried out according to the law, by officials who are competent or persons who are authorised to carry out the arrest. The same conditions would apply when

⁵² Human Rights Council Working Group (n 4) para 36. See also opinion No. 34/2020, para. 46

⁵³ See arts 3 and 9 UHDR

⁵⁴ Art 9(1) ICCPR

⁵⁵ See also art 14(3)(a) ICCPR which stipulates that in determining any criminal charges against one, that person is entitled to be informed promptly of the nature and cause of the charge against him.

⁵⁶ General comment No 35 (n 43) para 25

detaining or imprisoning an individual.⁵⁷ It also provides that when an individual is arrested, that person must be informed of the reason for the arrest and immediately informed of the charges made against him.⁵⁸ The WGAD concluded that Kanu's rights had been violated as the Kenyan authorities had not complied with international law when Kanu was arrested. The Kenyan authorities arrested Kanu without a warrant of arrest and had not told him why he was being arrested. There was no legal basis in depriving him of his liberty. His rights had been violated under article 9 of the UDHR, article 9 of the ICCPR and principles 2, 4, 10, and 36 (2) of the Body of Principles.⁵⁹

With regards to Kanu's detention at a private security facility, the WGAD concluded that he had been a subject of enforced disappearance because he was held at an unknown detention facility, and no member of his family and lawyers were aware of his whereabouts or could get in touch with him. Kanu was forcibly kept at this location until he was extraordinary renditioned to Nigeria. This was in violation of his rights under article 9(1) of the ICCPR which prohibits not just arbitrary arrest but also arbitrary detention, of which enforced disappearance can be classified as a form of aggravated arbitrary detention.⁶⁰ The International Convention for the Protection of All Persons from Enforced Disappearance defines enforced disappearance as:

The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to

⁵⁷ Principle 2 Body of Principles. See also principle 4 which provides that any form of detention or imprisonment or such which affects one's human right 'shall be ordered by, or subject to the effective control of, a judicial or other authority.'

⁵⁸ Principle 10 Body of Principles. See also principle 36(2).

⁵⁹ Human Rights Council Working Group (n 4) para 38

⁶⁰ Human Rights Council Working Group (n 4) para 40. See also General comment No. 35 (n 43) para. 17

acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁶¹

Confining Kanu at a secret location which was undisclosed and unknown to his family and lawyers, subsequently led to a denial of his right to challenge the legality of his detention before a court, thus violating his human right, which is a self-standing one. Kanu was thereby prevented from exercising his right to an effective remedy as provided under international law.⁶² His right to challenge before a court of law the legality of his detention was denied. This placed him outside the protection which the law provides to an individual, which violated his right to be recognised as a person before the law under article 6 of the UDHR and article 16 of the ICCPR.

The WGAD also concluded that detaining Kanu after his arrest constituted a pre-trial detention, which violates article 9(3) of the ICCPR. This article provides for the prompt appearance of one who has been detained or arrested on a charge which is criminal to appear before a judge or officer which the law authorises to exercise judicial power. According to the prescriptions of article 9 (3) of the ICCPR, which Kanu was denied, a person who has been detained must be brought within 48 hours of his arrest before a judicial authority. It also provides that an assessment must be made as to the appropriateness of that person's pretrial detention. Kanu was entitled to a trial within a reasonable time or he should have been released.⁶³ His pre-trial detention was therefore unjustified and constituted a deprivation of his liberty which was arbitrary.

⁶¹ Art 2 International Convention for the Protection of All Persons from Enforced Disappearance

⁶² See arts 3, 8 and 9 UDHR, arts 2(3), 9(1) and 9(4) ICCPR and arts 11, 32 and 37 Body of Principles

⁶³ Art 9(3) ICCPR

The facts before the WGAD, showed that Kanu had been denied judicial proceedings before a court in Kenya.⁶⁴ He was allegedly forcibly taken against his will to Nigeria, with both governments arranging with INTERPOL and the Nigerian Intelligence Officials for his return⁶⁵ This collusion by both governments according to the WGAD had been affirmed by the Attorney General of Nigeria,⁶⁶ and also established by it from its opinion. Under international law, certain procedures regarding the extradition of an extraditee must be observed, as this ensures that their right to a fair trial has been protected. There must, for example, be a judicial hearing, giving that person, an opportunity to give state why he should not be expelled, a reviewal of his case⁶⁷ and also allowing him access to counsel. Unfortunately, these procedures were not followed when Kanu was arrested, detained and removed from Kenya, when he was renditioned to be tried in Nigeria. This led the WGAD to conclude that Kanu's removal from Kenya to Nigeria amounted to an extraordinary rendition. As a result, both articles 9 of the UDHR and article 9 of the ICCPR were violated as there was no legal basis for Kanu's rendition. Also, there was a failure to comply with the due process of law.⁶⁸ The WGAD also concluded that both governments were jointly responsible for Kanu's arrest and detention. They were also responsible for his extraordinary rendition to Nigeria and for violating his rights in Kenya and Nigeria.⁶⁹

For the above reasons, the WGAD concluded that the Kenyan Government failed to establish a legal basis for detaining Kanu. Kanu's detention in

⁶⁴ The Constitution of Kenya also has provisions incorporating article 9 (4) of the ICCPR, which relates to an individual's right to challenge the legality of his detention before a court. See arts 20(2), 22(1), 22(2), 22(3), 23(3), 25(d), 165(3) of the Constitution of Kenya, 2010

⁶⁵ Human Rights Council Working Group (n 4) para 45

⁶⁶ Ibid. As mentioned earlier, the Kenyan Government denied any involvement in Kanu's extraordinary extradition. See reference in footnote 4.

⁶⁷ Art 13 ICCPR

⁶⁸ Human Rights Council Working Group (n 4) paras 46 and 47

⁶⁹ Human Rights Council Working Group (n 4) para 66

Kenya and his extraordinary rendition to Nigeria were therefore arbitrary under this category.

3.1.2 Category II – The deprivation of liberty results from the exercise of the rights or freedoms guaranteed by UDHR and the ICCPR

A category II deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13-14 and 18-21 of the UDHR, and insofar as State parties are concerned, by articles 12, 18-19, 21-22 and 25-27 of the ICCPR.⁷⁰ Category II cases are those when ‘detention is used in response to the legitimate exercise of human rights.’⁷¹

The WGAD considered Kanu’s arrest and detention by the government of Kenya as a well thought out plan with the government of Nigeria to prevent him from campaigning for an independent Republic of Biafra. Kanu’s right to criticise the Nigerian government’s position on his quest for an independent Republic of Biafra is protected as a right to freedom of opinion and expression, which must be respected and protected by both governments. As pointed out by the WGAD, detention which is due to the peaceful exercise of rights, which the ICCPR protects could in certain circumstances be arbitrary. Consequently, depriving Kanu of his liberty violated his human rights, particularly his right to freedom of opinion and expression which articles 19 of the UDHR and 19(2) of the ICCPR provide for.

⁷⁰ These rights are freedom of movement (art 13 UDHR and art 12 ICCPR), asylum (art 14 UDHR), freedom of thought, conscience, and religion (art 18 UDHR and art 18 ICCPR), freedom of opinion and expression (art 19 UDHR and art 19 ICCPR), freedom of peaceful assembly (art 20 UDHR and art 21 ICCPR), freedom of association (art 20 UDHR and art 22 ICCPR), take part in public affairs (art 21 UDHR and art 25 ICCPR), equal protection of the law without discrimination (art 7 UDHR and art 26 ICCPR), and the free exercise of culture, religion, and language by minority groups (art 27 ICCPR).

⁷¹ The Legal Methods and Jurisprudence of the United Nations Working Group (n 21) 40

Article 19 of the UDHR provides for one's right to freedom of opinion and expression. Included in this right is the freedom to hold opinions without interference. The article also provides for the right to seek, receive and impart information and ideas through any media, regardless of one's frontiers. While article 19(1) of the ICCPR requires protection for one's right to hold opinions without interference, state parties are requested under article 19(2) to guarantee a person's right of freedom of expression. This right may for example, include the right of freedom to seek and receive information and also various kinds of ideas, without restricting one's frontiers. Some methods by which this may be done are orally, in print or in writing.⁷²

The exercise of the rights of freedom of expression provided for in article 19(2) of the ICCPR, is not absolute as it could be restricted. The restrictions which must be according to the law 'must conform to the strict tests of necessity and proportionality.'⁷³ The grounds on which these restrictions may be imposed as listed in article 19(3)(a) and (b) relate to respect of others' rights or reputation, national security protection, public order (*ordre public*), including public health or morals. Article 20 of the ICCPR also prohibits propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

The WGAD's concluded that Kanu's detention was arbitrary under this category as the government of Kenya had not offered any exceptions, which article 19 (3) of the ICCPR permits. There was also no evidence to show that the exercise of freedom of opinion and expression by Kanu was not peaceful.⁷⁴

⁷² Under article 19(1) this is a right to which the ICCPR permits no exception or restriction.

⁷³ Art 19(3) ICCPR. See also General comment No 34, Article 19 (Freedom of opinion and expression) CCPR/C/GC/39 (21 July 2011) paras 22, 33 and 34.

⁷⁴ Human Rights Council Working Group (n 4) para 56

3.1.3 Category III – When an individual’s deprivation of liberty results from violation of right to a fair trial.

A category III situation is ‘when the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the states concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.’⁷⁵ Though an individual’s detention may be lawful according to international law, that detention may still be considered arbitrary where that individual has been denied the right to a fair trial. Under this category, the WGAD considers the general principles set out in the UDHR, provisions under the Body of Principles relating to fair trial and due process criteria, and, for states which are parties to the ICCPR, the criteria laid down in particular, in articles 9 and 14. If there are violations of such due process rights, the WGAD ‘then considers whether these violations, taken together, are of such gravity as to give the deprivation of liberty an arbitrary character.’⁷⁶

Denying Kanu access to legal counsel when he was detained in Kenya and also renditioned to Nigeria was a violation of his right to have sufficient time and facilities to prepare his defence, and also to communicate with a lawyer chosen by him. This right is provided by article 14(3)(b) of the ICCPR. Principle 18(3) of the Body of Principles and rule 61(1) of the Nelson Mandela Rules also provide that defendants must be legally represented promptly. Legal representation is an essential requirement for a person's right to a fair trial, as it is ‘procedurally inherent in the right of liberty and security of persons and the right to prohibition of arbitrary detention.’⁷⁷ Therefore, it must be provided every stage of the criminal

⁷⁵ Methods of Work of the Working Group on Arbitrary Detention (n 21) para 8

⁷⁶ The Working Group on Arbitrary Detention, Revised Fact Sheet No 26 (8 February 2019) p 6

⁷⁷ A/HRC/48/55, 6 August 2021 at para 56. See as examples arts 3 and 9 UDHR, art 9(1) ICCPR, and principles 15,17 and 18 of the Body of Principles

proceedings since it is a guarantee against arbitrary detention, and enables one to defend himself.

With regards to consular assistance, the WGAD found that the Kenyan Government had not informed Kanu, a British citizen of his right to have such assistance, and to inform the British consular if he so wished. Neither were the British authorities informed of Kanu's detention in Kenya.⁷⁸ This right of communication is recognised by the 1963 Vienna Convention on Consular Relations,⁷⁹ the Body of Principles⁸⁰ and the Nelson Mandela Rules.⁸¹ The WGAD concluded that Kanu's rights in this regard were violated under article 9 of the UDHR, article 9 of the ICCPR and principle 16 (2) of the Body of Principles. Consequently, his arrest and detention in Kenya violated his right to a fair trial, and was arbitrary under this category.

3.2 The Working Group's findings on the allegations made against the Nigerian Government

The WGAD considered whether the allegations relating to Kanu's deprivation of liberty by the Nigerian Government were arbitrary under categories I, II, III and V, as recognised in its working methods. It was mindful of the Nigerian Government's reply which stated that the case against Kanu was ongoing and therefore any reaction by it would be unconscionable. The WGAD however, pointed out that its method of work does not prevent it from considering allegations of arbitrary detention even where domestic proceedings are still ongoing.⁸²

⁷⁸ Human Rights Council Working Group (n 4) paras 61 and 62

⁷⁹ Art 36 Vienna Convention on Consular Relations 1963. The Convention was adopted on 22 April 1963 by the United Nations Conference on Consular Relations and entered into force on 19 March 1967 in accordance with art 77. Kenya became a party to the Convention by accession on 1 July 1965.

⁸⁰ Principle 16(2) Body of Principles

⁸¹ Rule 62 Nelson Mandela Rules

⁸² Human Rights Council Working Group (n 4) para 68

3.2.1 Category I - A clear impossibility to invoke any legal basis justifying the deprivation of liberty

Just as in the Kenyan Government's case, the WGAD found the Nigerian authority's failure to produce an arrest warrant when it took custody of Kanu, his rendition to Nigeria from Kenya, the Nigerian authority failing to let Kanu know why he was being arrested and the charges against him, violated articles 3 and 9 of the UDHR, article 9 of the ICCPR and principles 2, 4 and 10 of the Body of Principles. It concluded that such violations amounted to arbitrary detention by the Nigerian authorities under this category.

The WGAD also considered the allegation of Kanu's pre-trial detention by the Nigerian authorities which was not contested. Pre-trial detention under international law should not be the rule but rather an exception to the rule and ordered within the shortest time possible.⁸³ It found that no determination was made as to whether Kanu's release was subject to bail at any stage of the court hearing, and when the court pronounces its judgment.⁸⁴ As a result, the WGAD concluded that Kanu's rights were violated under the provisions of article 9(3) of the ICCPR.⁸⁵ The Nigerian authorities also failed to bring Kanu before a court within 48 hours of his arrest, according to the prescriptions of article 9 (3) of the ICCPR. The WGAD therefore, found a further violation of Kanu's rights as provided by articles 3 and 9 of the UDHR, article 9(3) of the ICCPR and principles 11, 37 and 38 of the Body of Principles.

The right to challenge the legality of Kanu's detention before a court, was also considered by the Working Group. Article 9 (4) of the ICCPR, provides for such a right. This right, which is a human right that self-standing is

⁸³ Human Rights Council Working Group (n 4) para 78. The second part of art 9(3) provides that '[i]t shall not be the general rule that persons awaiting trial shall be detained in custody'

⁸⁴ See art 9(3)

⁸⁵ Human Rights Council Working Group (n 4) para 78

essential as it preserves legality in a society which is democratic.⁸⁶ The WGAD concluded that Kanu's liberty had been deprived as he was denied this right, which had been violated under article 9(4) of the ICCPR.

In concluding that the government of Nigeria had not established a legal basis in detaining Kanu, the WGAD stated that Kanu's detention was arbitrary, and that such detention fell under category I. It also reiterated its displeasure in both governments colluding in Kanu's rendition and emphasized that they were joint responsibility for any violations of Kanu's rights whilst in their country.⁸⁷

3.2.2 Category II – The deprivation of liberty results from the exercise of the rights or freedoms guaranteed by UDHR and the ICCPR

Under this category the WGAD concluded that the Nigerian Government persecuted Kanu for the peaceful exercise of his rights, in particular his right to freedom of opinion and expression, in advocating for the establishment of a Biafran sovereignty. This was based on the fact that though Kanu had been accused of conspiracy to commit a treasonable felony, the Nigerian Government had failed to prove the crime against him.

The WGAD reiterated what it said in the Kenya Government's case regarding an individual's detention which occurs from him peaceful exercising his rights. It stated that in such a situation, these rights which the ICCPR protect may in certain circumstances be considered as arbitrary. It recalled that freedom of opinion and freedom of expression are essential to human development and in any society, constituting the basis for every society which is free and democratic.⁸⁸ In recalling the right to freedom of expression includes 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers,' the WGAD stated that this 'includes the expression and receipt of communications of every form of

⁸⁶ Human Rights Council Working Group (n 4) para 80

⁸⁷ Human Rights Council Working Group (n 4) para 82

⁸⁸ Human Rights Council Working Group (n 4) para 86

idea and opinion capable of transmission to others, including political opinions.’⁸⁹

As with the Kenyan Government, the WGAD concluded that Kanu’s detention by the Nigerian Government was arbitrary under this category, as the government had not offered any of the permitted exceptions stated in article 19 (3) of the ICCPR, neither was there any proof of an unrest when Kanu’s exercised his right to freedom of opinion and expression.

3.2.3 Category III - When an individual’s deprivation of liberty results from violation of right to a fair trial

The Nigerian Government denied Kanu the right to choose his lawyers to represent him, which included an international lawyer. This right, which was denied to him at all times during his detention, is inseparable from one’s right to liberty and security, and also to the right to a fair and public hearing by a competent court which must also be independent and impartial.⁹⁰ Kanu’s lawyers were also maltreated.⁹¹ Such treatment towards his lawyers is in violation of article 14 (3) (b) of the ICCPR and articles 10 and 11 of the UDHR, which state for example, the need for lawyers to be independent and effect in carrying out their duties and free from being harassed or intimidated.⁹²

As a result of the above violations, the WGAD found that Kanu’s right to a fair trial and procedural guarantees as provided by the UDHR, the ICCPR and other human rights standards, were not adhered to. Kanu’s detention was therefore arbitrary under this category.

⁸⁹ Ibid.

⁹⁰ See Arts 3, 9, 10 and 11 (1) UDHR, art 14 ICCPR, principles 15, 17 and 18 of the Body of Principles and paras 1, 5, 7, 8, 21 and 22 of the Basic Principles on the Role of Lawyers.

⁹¹ Human Rights Council Working Group (n 4) para 94

⁹² Human Rights Council Working Group (n 4) para 94 and principle 9 of the Basic Principles and Guidelines

3.2.4 Category IV - When the deprivation of liberty constitutes a violation of international anti-discrimination standard

Under this category 'the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings.'⁹³

The WGAD concluded that Kanu had been the target of the Nigerian Government as a defender of human rights, because of his freedom of opinion and expression, and his standing towards Biafra's sovereignty. In this regard, the WGAD considered Kanu's detention was arbitrary under this category, as his detention violated articles 2 and 7 of the UDHR and articles 2 (1) and 26 of the ICCPR.

4. Allegedly Stripping Kanu of his rights – A foul play in his extradition

Since his rendition to Nigeria in July 2021, Kanu has been detained in Abuja, the Department of State Services (DSS) headquarters. The WGAD expressed its concern of Kanu remaining in solitary confinement, and the denial of medical treatment. He was also denied medication which he needed for his heart condition. The Working Group requested the Nigerian Government to release Kanu. The WGAD's request to the Government of Nigeria to release Kanu has not been heeded, neither was its request to both the governments to award him compensation and other reparations, in accordance with international law. Instead, the Nigerian Government was determined to pursue the criminal charges against Kanu, and tried him before the Federal High Court, Abuja, (trial court) on a fifteen-count charge which was amended.

⁹³ Methods of Work of the Working Group on Arbitrary Detention (n 21) para 8

Kanu filed a Notice of Preliminary Objection on the 19th January, 2022. An issue raised by him before the trial court, was the courts lack of jurisdiction to try him on the fifteen-count charge which had been amended. This was based on the fact that he had been forcibly abducted from Kenya and extraordinarily renditioned to Nigeria. He sought an order to strike out or quash, and dismiss the fifteen-count amended charge preferred against him, and also an order of the court to discharge and acquit him of all the counts preferred against him, upon them being struck out or quashed and or dismissed.⁹⁴ The trial court in delivering its ruling to the Preliminary Objection on 8th April, retained seven of the fifteen-counts which were amended as they showed ‘some semblance of allegations of offence’ on which it could proceed to trial.⁹⁵ Kanu’s appeal to the Nigerian Court of Appeal, was successful as the court discharged and acquitted him of all charges which the Nigerian Government had brought against him. Although the Appeal Court also ordered his release from custody, the Nigerian Government continued to detain him in the DSS facility. Not satisfied with the Appeal Court’s ruling the Nigerian Government appealed to the Supreme Court against the Court of Appeals judgment, with Kanu filing a cross-appeal. On 15 December, 2023, the Court of Appeal’s decision discharging and acquitting Kanu of the charges brought against him was unanimously reversed by the Supreme Court, which held that the trial should continue at the Federal High Court.

It was held by the Supreme Court that the Appeal Court was wrong to rule that Kanu could not be retried. This is because evidence which was obtained by violating an accused person’s right to privacy and through an illegal

⁹⁴ *Nnamdi Kanu v Federal Republic of Nigeria*, Appeal No: CA/ABJ/CR/383/2015, Judgment of Justice Adefope-Okojie pp. 1- 13. (Lead judgment), Judgment of Justice Sankey pp. 1 – 2 (Concurring judgment).

⁹⁵ *Nnamdi Kanu v Federal Republic of Nigeria*, Appeal (n 94) Judgment of Justice Adefope-Okojie p.10

search, can be produced before a court under Nigerian law.⁹⁶ The Court stated that the under development in Nigerian law with regards to the violation of an accused person's right does not allow a court in Nigeria from divesting of its jurisdiction to hear a case before it. That no law in Nigeria supports the Appeal Courts position, that a trial court is divested of its jurisdiction when illegally obtained evidence from the prosecution is used against an accused person who is standing trial.⁹⁷

The Supreme Court held that Kanu could file a civil action against the government for a violation of his rights. It allowed the appeal, whilst the cross-appeal was dismissed.

5.0 The Assumption that International Law automatically protects one's rights

Though the WGAD has a mandate to receive and investigate cases of arbitrary deprivation of liberty imposed arbitrarily or inconsistently with the international standards set forth in the UDHR, as well as the relevant international legal instruments accepted by the states concerned, its opinions are quasi-judicial, and are therefore not legally binding on states. Kanu's case is thus a good example of how a state, knowing that it does not have to comply with the WGAD's opinion will ignore certain international human rights due to an individual, in order to accomplish its goal of getting that person into its custody. This is not the first attempt by the Nigerian Government in orchestrating extraordinary renditions. Kanu's case is reminiscent of the Umar Dikko case, where the Nigerian Government attempted to extraordinarily rendition Dikko from London, England, to

⁹⁶ The Nation Newspaper 'Why Supreme Court reversed Nnamdi Kanu's acquittal' (15 December, 2023) <<https://thenationonlineng.net/why-supreme-court-reversed-nnamdi-kanus-acquittal/>> accessed 21 January, 2024. Premium Times Nigeria 'Supreme Court orders continuation of IPOB leader Nnamdi Kanu's trial' (15 December, 2023) <<https://www.premiumtimesng.com/regional/ssouth-east/651780-supreme-court-orders-continuation-of-ipob-leader-nnamdi-kanus-trial.html>> accessed 21 January, 2024.

⁹⁷The Nation Newspaper (n 96)

Nigeria. Though the Nigerian Government was successful in Kanu's case, their attempt to extraordinarily rendition him was foiled when he was discovered in a crate which did not have a diplomatic tag, by a custom officer at Stansted Airport.⁹⁸

Kanu's case can however, be distinguished from cases such as the Julian Assange case, where the United Kingdom and Sweden ignored the opinion of the WGAD, even though they are both State Parties to the ICCPR.⁹⁹ Sweden and the United Kingdom had taken proper legal steps in trying to get Julian Assange extradited to Sweden, and believed that it still had an obligation to extradite him. Julian Assange had been detained in London's Wandsworth prison, and had also been under house arrest, before claiming political asylum in the Republic of Ecuador's Embassy in London in 2012, which he was granted. Sweden refused to recognise the political asylum granted to Assange. The Swedish Government had issued a European Arrest Warrant relating to rape and sexual assault claims in 2010, which Assange denied. It wanted him extradited to Sweden to answer to these claims. Assange was also wanted by the United States which accused him of conspiring to break into its military databases to acquire sensitive information. He claimed that extraditing him to Sweden, would result in him being sent to the United States to be persecuted, face inhumane treatment, and physical harm.¹⁰⁰ The WGAD in concluding that Assange had been subjected to different forms of deprivation of liberty stated that:

⁹⁸ BBC News 'The Foiled Nigerian Kidnap Plot' (12 November, 2012) < <https://www.bbc.com/news/magazine-20211380>> accessed 16 October, 2023.

⁹⁹ See Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland), A/HRC/WGAD/2015, 22 January 2016.

¹⁰⁰ Opinion No. 54/2015 concerning Julian Assange (n 99) paras 5 -10. See also BBC News 'Julian Assange back in Australia after leaving US court a free man' *BBC News* (24 June 2024)< <https://www.bbc.com/news/live/world-69145409>> accessed 21 July, 2024.

The deprivation of liberty of Mr. Assange is arbitrary and in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 7, 9(1), 9(3), 9(4), 10 and 14 of the International Covenant on Civil and Political Rights. It falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group¹⁰¹

The WGAD requested the United Kingdom and Sweden to assess Assange's situation, ensure his safety and physical integrity, facilitate in an expedient manner his right to freedom of movement and ensure that he fully enjoys those rights which international norms on detention guarantee¹⁰² It also considered that in the 'circumstances of the case, the adequate remedy would be to ensure the right of free movement of Mr. Assange and accord him an enforceable right to compensation, in accordance with article 9(5) of the International Covenant on Civil and Political Rights.'¹⁰³

However, as pointed out in the dissenting opinion of one of the WGAD members, when Assange jumped bail sometime in 2012, he had stayed at the Embassy's premises, to avoid being arrested. Often, fugitives are self-confined within those places where they avoid being arrested and detained, and as such are not considered as places of detention under the Working Group's mandate.¹⁰⁴ He also pointed out that as the WGAD's mandate considers situations which involve deprivation of liberty, issues such as

¹⁰¹ Opinion No. 54/2015 concerning Julian Assange (n 99) para 99. One of WGAD's members Vladimir Tochilovsky, gave a dissenting opinion.

¹⁰² Opinion No. 54/2015 concerning Julian Assange (n 99) para 100.

¹⁰³ Opinion No. 54/2015 concerning Julian Assange (n 99) para 101.

¹⁰⁴ Opinion No. 54/2015 concerning Julian Assange, Dissenting Opinion of Vladimir Tochilovsky para 3.

asylum and extradition matters, which relate to fugitives' self-confinement, fall outside its mandate.¹⁰⁵

In April 2019, after Ecuador revoked the political asylum given to Assange, he was carried out of the Embassy, and sentenced in May to 50 weeks imprisonment by a court in Britain for jumping bail. In June 2019, the United States Justice Department formally applied to have him extradited, whilst Sweden dropped the rape allegations against him in November 2019. In June 2024 a deal was finally reached with the United States Justice Department where Assange walked free after he pleaded guilty to a charge under the Espionage Act for unlawfully conspiring to obtain and disseminate national defence information which was classified.¹⁰⁶ The case between the United States and Assange, shows how states are willing to intervene on that citizen's behalf when they are concerned in the welfare of that citizen. Assange's release was not just due to the due process of law being applied to his case, but diplomacy and politics between the Australian Government of which he is a citizen, and the United States Government who wanted him extradited to the United States.¹⁰⁷

The judgment of the Supreme Court regarding Kanu's case, on the other hand, highlights the problem faced by a state where there is a separation of powers and the injustice faced by an individual seeking justice. The Federal Government in Nigeria has the power to exclusively make laws and procedures regarding extradition, whilst the judiciary considers decisions in extradition cases where an individual's human rights have been violated

¹⁰⁵ Opinion No. 54/2015 concerning Julian Assange, Dissenting Opinion of Vladimir Tochilovsky para 5. See also E/CN.4/1999/63, para. 67

¹⁰⁶ Al Jazeera Explainer, 'Julian Assange timeline: A criminal or a hero?' *Al Jazeera News* (25 June 2024) <<https://www.aljazeera.com/news/2024/6/25/julian-assange-timeline-a-criminal-or-a-hero>> accessed 21 July, 2024.

¹⁰⁷ Daniel Hurst, 'Relentless lobbying and a garden party ambush: how Australia pushed for Julian Assange's freedom' *The Guardian* (26 June 2024) <<https://www.theguardian.com/australia-news/article/2024/jun/26/julian-assange-return-australia-prison-release-albanese-government-lobbying-ntwnfb>> accessed 21 July, 2024

under international law and at the same time violations of domestic laws.¹⁰⁸ The Supreme Court in Kanu's case, deemed itself 'jurisdictionally unimpaired by violations of international law and ... proceed with the case as if the violation of international law did not exist.'¹⁰⁹ Domestic courts normally consider that violations of international law are within the prerogatives of the executive, and not the judiciary. Also, domestic courts asset that it is the executive which have 'enforceable sanctioning powers over such situations.'¹¹⁰

6.0 Conclusion and Recommendations

Though the WGAD's opinions are quasi-judicial, they are however, argued like a legal decision, and are taken into account by the Human Rights Committee and other United Nations Special bodies.¹¹¹ The Kenyan and Nigerian Governments have previously been elected as members of the Human Rights Council,¹¹² which recognises the value attached to the WGAD's work and requested states to regard the WGAD's views, and 'where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the WGDA of the steps they have taken.'¹¹³ The Human Rights Council has also urged states to give due consideration to the WGDA's opinions, and encouraged them

¹⁰⁸ See Second Schedule, Exclusive Legislative List; Item 27 Constitution of Nigeria 1999 (as amended).

¹⁰⁹ M. Cherif Bassiouni 'Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition' (2021) 7 *Vanderbilt Law Review* 25 at 51.

¹¹⁰ Ibid

¹¹¹ A Conscientious Objector's Guide to the International Human Rights System, 'Working Group on Arbitrary Detention' (2023) <<https://co-guide.info/mechanism/working-group-arbitrary-detention#:~:text=Opinions%20of%20the%20Working%20Group,as%20the%20Human%20Rights%20Committee>> accessed 16 August 2023

¹¹² Kenya in 2013 – 2015 and 2016 – 2018, Nigeria in 2006 -2009, 2010 -2012 and 2015 – 2017. See United Nations Human Rights Council, 'Membership of the Human Rights Council' (2023) <<https://www.ohchr.org/en/hr-bodies/hrc/membership>> accessed on 16 August 2023

¹¹³ Resolution 51/8 adopted by the Human Rights Council, paras 4 and 6.

‘[t]o take appropriate measures to ensure that their legislation, regulations and practices remain in conformity with relevant international standards and the applicable international legal instruments.’¹¹⁴

As previous members of the Human Rights Council, Kenya and Nigeria have made decisions on human right issues and know the importance of getting states to adhere to them. The General Assembly, which the Governments of Kenya and Nigeria are members, has emphasized

the responsibility of all states, in conformity with the Charter to respect Human Rights and fundamental freedoms for all, without distinction of any kind as to political or other opinion.....

In the same resolution, it has acknowledged ‘that peace and security, development and human rights are the pillars of the United Nations system.’¹¹⁵ It has also stated that, for states elected as members of the Human Rights Council:

.... the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights;

.... that members elected to the Council shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership;¹¹⁶

Thus, if both Kenya and Nigeria continue to have a poor human rights track record, they could lose the opportunity of being considered to be elected again as members of the Human Rights Committee. Also, with regards to

¹¹⁴ Ibid para 8(a) and (b)

¹¹⁵ Resolution 60/251 adopted by the General Assembly on 15 March 2006, preamble

¹¹⁶ Ibid, paras 8 and 9

Nigeria which would like a permanent seat on the Security Council, such acts could be detrimental to being chosen for the seat.

Recommendations are therefore made as to what actions the Kenyan and Nigerian Governments should take: -

1. Both Governments must observe international procedures when extraditing individuals, so that they full comply with their human rights obligations. As signatories to various international human rights instruments, such as, the ICCPR, they have an obligation to refrain from acts which would defeat the object and purpose of that treaty.¹¹⁷ As a permanent member of the Security Council such acts could be detrimental to being chosen for the seat.
2. As far as possible, both governments should comply with requests received from WGAD's and also provide it with the required information when asked.
3. Both Governments must fully respect the safeguards of individuals whose liberty has been deprived.
4. The Kenyan Government must ensure a full and independent investigation of how Kanu left its shores, as it denies knowledge of being involved in his extradition. This will prevent such happenings occurring again. It must have a reliable and independent system of inspection at its airport and borders, so that individuals are not extradited through its country without adherence to proper legal formalities.

¹¹⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331, art 18