

224/98 : Media Rights Agenda / Nigeria

Summary of Facts

1. The communication, which was sent through e-mail, is dated 25th May 1998, and was received at the Secretariat on 26th May 1998
2. The complaint is filed by Media Rights Agenda, a Nigerian Human Rights NGO based in Lagos, on behalf of Niran Malaolu, Editor of an independent Nigerian daily newspaper, "The Diet".
3. The author complains that Mr Niran Malaolu was arrested together with three other staff of the newspaper by armed soldiers at the editorial offices of the "Diet" Newspaper in Lagos on 28th December 1997.
4. Neither Niran Malaolu nor his three colleagues were informed of the reasons for their arrest or shown a warrant of arrest.
5. The three other colleagues who were arrested along with Malaolu were later released.
6. Niran Malaolu continued to be held without charges until 14th February 1998 when he was arraigned before a Special Military Tribunal for his alleged involvement in a coup.
7. Throughout the period of his incarceration, Niran Malaolu was not allowed access to his lawyer, doctor or family members.
8. On 28th April 1998, after a secret trial, Niran Malaolu was found guilty by the tribunal of the charge of concealment of treason and sentenced to life imprisonment.
9. The Complainant further alleges that Niran Malaolu's alleged involvement in the coup is connected with the news stories published by his newspaper on the coup plot involving the then Chief of General Staff, Lt. General Oladipo Diya, as well as other military officers and civilians who have also been convicted by the tribunal and given sentences ranging from prison terms to death by firing squad.
10. One of such stories was an article entitled "The Military Rumbles Again", which was published in the "Sunday Diet" of 28th December 1997, based upon the announcement by the military government of the alleged coup plot it claims to have uncovered.
11. Further, the Complainant alleges that Niran Malaolu was denied the right to be defended by lawyers of his choice, and, instead, assigned a military lawyer by the tribunal in contravention of the right to fair hearing.
12. The Special Military Tribunal that tried Niran Malaolu was neither competent, independent nor impartial in that members of the tribunal were hand-picked by the Head of State, General Sani Abacha, and the Provisional Ruling Council (PRC) against whom the alleged offence was committed. Besides, the President of the tribunal, Major-General Victor Malu is also a member of the PRC, which is empowered by the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986, to confirm the death sentences passed by the tribunal. These are alleged to be in violation of the rules of natural justice and, in particular, [Article 7.1.b](#) of the Charter.
13. The arraignment and trial of Niran Malaolu, a civilian before the Special Military Tribunal using special procedures is a breach of [Principle 5](#) of the [United Nations Principles on the Independence of the Judiciary](#) and [Article 7](#) of the Charter.
14. The Complainant alleges further that under the provisions of the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986, which established the tribunal that tried and convicted the accused, the right of appeal to a higher judicial authority is completely extinguished and those convicted may only appeal to the PRC, the composition and interests of which are indicated in paragraph 12 above.
15. The Author also contends that the trial of Niran Malaolu in camera was a violation of recognised international human rights standards, to wit: the right to a fair and public hearing.
16. Finally, that the arrest, detention, arraignment, trial, conviction and sentence of Malaolu was in breach of the norms of fair trial guaranteed in the Charter.

Complaint

17. The Author alleges that the following articles of the African Charter on Human and Peoples' Rights have been violated: [Articles 6, 7, 9](#) and [26](#).

Procedure

18. At its 25th Ordinary Session held in Bujumbura, Burundi, the Commission decided to be seized of the communication, and requested the Secretariat to notify the Nigerian government. It also requested the Secretariat to submit an opinion on the admissibility of the communication, particularly in accordance with [Article 56.7](#) of the Charter, in relation to Nigeria's current political situation.

19. On 19th August 1999, the Secretariat of the Commission notified the parties of this decision.

20. At its 26th Ordinary Session held in Kigali, Rwanda, the Commission declared the communication admissible and requested parties to submit written arguments on the merits of the case.

21. On 17th January 2000, the Secretariat notified parties of the above decision.

22. On 17 February 2000, the Secretariat received a Note Verbale from the High Commission of the Federal Republic of Nigeria in Banjul, referring to the above Note Verbale and requesting the Commission to forward the following documents to the country's competent authorities to enable them prepare for appropriate responses to the alleged violations:

- a) The Draft Agenda for the 27th Ordinary Session and the letter of invitation to the session from the Secretariat;
- b) A copy of the complaint that was attached to the Secretariat's Note;
- c) A copy of the Report of the 26th Ordinary Session

23. Further to the above request, the Secretariat of the Commission on 8th March 2000, forwarded all the documents as requested (except the Report of the 26th Ordinary Session), together with a copy of the summary and status of all pending communications against Nigeria, a copy each of [communications 218/98](#), [224/98](#) and [225/98](#) as submitted by their authors, and a copy of the written response of the Complainant on the merits of this communication.

24. At its 27th Ordinary Session held in Algeria, the Commission reviewed the case and postponed its further consideration to the next session to enable the Government of Nigeria respond to its request for arguments on the merits of the case.

25. On 31st May 2000, the Secretariat received a letter from the Complainant inquiring about the decision of the Commission at the 27th Ordinary Session.

26. The above decision was communicated to parties on 6th July 2000. The Secretariat also acknowledged receipt of the complainant's letter of 31st May 2000.

27. On 27th September 2000, the Secretariat received a response from the High Commission of the respondent state in the Gambia intended to be arguments on the merits of communications [224/98](#) and [225/98](#). The facts therein however focused on the former communication.

28. On 3rd October 2000, the Secretariat of the Commission acknowledged receipt of Note Verbale and indicated the discrepancy. Also, a copy of the submission was forwarded to the Complainant for its observations.

29. During the session of the Commission in Benin, the Respondent State submitted additional arguments on the matter.

The State Party's Response

30. The Government of Nigeria contends that the trial was conducted under a law that was validly enacted by the competent authority at that time. The Treason and Other Offences (Special Military Tribunal) Act, Cap 444 of the Laws of the Federation of Nigeria, 1990 under which Malaolu was tried arose from the ashes of the Treason and Other Offences (Special Military Tribunal) Decree No.1 of 1986 enacted by the military government headed by General Ibrahim Babangida (Rtd.). Malaolu was therefore charged, tried, convicted and sentenced to life imprisonment in accordance with the provisions of a known law.

31. The government argues that Malaolu was tried along with a number of people accused of involvement in an alleged plot to overthrow the late Gen. Sani Abacha. It asserts that without going into the merits or demerits of the trial, it was not an ostensible case of victimisation against Malaolu or his profession. Indeed, one or two other journalists were also sentenced to imprisonment at the same trial.

32. It claims that the whole episode took place during a prolonged military regime. It is well known all over the world that military regimes are abnormal regimes and a painful aberration. There was no way of controlling any wanton acts of abuse of fundamental rights by a military junta determined to stay in power at all costs, no matter whose ox was gored.

33. In respect of the allegation that the trial was not fair, it argued that the right to fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order, etc.

34. The Government of Nigeria affirms and reiterates its capacity and determination to defend and promote the rights of its citizens and intends to provide effective and adequate representation at the hearing of the case.

Additional Response by the State Party

35. Mr Malaolu was arrested, detained, tried and convicted under an existing legislation made by a “legitimate” military administration, which was imposed on the people of Nigeria. Be that as it may, the military regime of General Abdulsalami Abubakar caused Mr Malaolu to be granted pardon, and he can institute an action in the ordinary courts for violation of his rights and also petition the Judicial Commission of Inquiry of human rights violations. Meanwhile, the obnoxious enactment has been repealed.

Law

Admissibility

36. At its 25th Ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give its opinion on the effect of [Article 56.7](#) of the Charter in view of the prevailing political situation in Nigeria. Relying on the case law of the Commission, the Secretariat submitted that based on the well established principle of international law, a new government inherits the previous government’s international obligations, including responsibility for the previous government’s misdeeds (see [Krishna Achutan and Amnesty International/Malawi, communications 62/92 \[sic\], 68/92, 78/92](#)).

37. The Commission has always dealt with communications by deciding upon the facts alleged at the time of submission of the communication (see [communications 27/89, 46/91 \[sic\] and 99/93](#)). Therefore, even if the situation has improved, such as leading to the release of the detainees, repealing of the offensive laws and tackling of impunity, the position still remains that the responsibility of the present Government of Nigeria would still be engaged for acts of human rights violations, which were perpetrated by its predecessors.

38. Furthermore, the Commission noted that although Nigeria is under a democratically elected government, the new constitution provides in its Section 6(6)(d) that no legal action can be brought to challenge ‘any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law’.

39. For the above reasons, and also for the fact that, as alleged, there were no avenues for exhausting local remedies, the Commission declared the communication admissible.

Merits

40. The Complainant alleges that the arrest and subsequent detention of Malaolu was arbitrary as he was neither shown any warrant of arrest nor informed of the offences for which he was arrested. Further, that Malaolu was arrested by armed soldiers from the Directorate of Military Intelligence at his

office, on 28th December 1997, and detained incommunicado at a military facility in Lagos until he was moved to Jos, where his trial took place.

41. This, it is contended, is in contravention of [Article 6](#) of the African Charter on Human and Peoples' Rights. The said article provides *inter alia*:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for the reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested and detained.

42. Further to this, the Complainant alleges that until 14th February 1998 (that is, about two months after his arrest) when he was arraigned before a Special Military Tribunal for his alleged involvement in a coup, Mr Malaolu was neither informed of the reasons for his arrest nor of any charges against him.

43. In its *Resolution on the Right to Recourse Procedure and Fair Trial*, the Commission had, in expounding on the guarantees of the right to fair trial under the Charter observed thus:

... the right to fair trial includes, among other things, the following:

(b) Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them;

44. The failure and/or negligence of the security agents who arrested the convicted person to comply with these requirements is therefore a violation of the right to fair trial as guaranteed under [Article 7](#) of the Charter.

45. The Complainant alleges a violation of [Article 7\(1\)\(a\)](#) of the African Charter on Human and Peoples' Rights which states:

Every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;

46. The Complainant contends that the decision of the tribunal that tried and convicted Malaolu is not subject to appeal, but to confirmation by the Provisional Ruling Council, the composition of which is clearly partisan. Non-compliance of the competent authorities of Nigeria to this requirement is in breach of the provision of [Article 7\(1\) \(a\)](#) of the Charter.

47. The Complainant alleges a violation of [Article 7\(1\)\(b\)](#) of the Charter which provides that: Every individual shall have ...the right to be presumed innocent until proven guilty by a competent court or tribunal.

The Complainant alleges in this respect that prior to the setting up of the tribunal, the military Government of Nigeria organised intense pre-trial publicity to persuade members of the public that a coup plot had occurred and that those arrested in connection with it were guilty of treason. In this regard, it alleges further, any possible claim to national security in excluding members of the public and the press from the actual trial by the tribunal cannot be justified, and therefore in breach of the right to fair trial, particularly, the right to presumption of innocence.

48. The government has not contested the veracity of the complainant's submissions. In this circumstance, the Commission is obliged to accept this as the facts of the case and therefore finds the Government of Nigeria in violation of [Article 7\(1\)\(b\)](#) of the Charter.

49. The Complainant alleges that the exclusion of members of the public and the press from the actual trial by the tribunal was not justified, and therefore in breach of the right to fair trial.

50. The government argues that the right to fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order, etc.

51. Neither the African Charter nor the Commission's *Resolution on the Right to Recourse and Fair Trial* contain any express provision for the right to public trial. That notwithstanding, the Commission is empowered by [Articles 60](#) and [61](#) of the Charter to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine. Invoking these provisions, the Commission calls in aid General Comment 13 of the UN Human Rights Committee on the right to fair trial. Paragraph 6 of the said Comment states:

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time [Article 14, paragraph 1](#) acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons...

52. The exceptional circumstances under the [International Covenant on Civil and Political Rights](#) (which the above Committee monitors), are for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The Commission notes that these circumstances are exhaustive, as indicated by the use of the phrase "apart from such exceptional circumstances".

53. The government has only presented an omnibus statement in its defence to the effect that the right to fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order, etc. It has not specifically indicated which of these circumstances prompted it to exclude the public from such trial. The Commission therefore considers the argument not sufficient enough to avail the Government of Nigeria such defence.

54. Considering the fact that as alleged by the Complainant, prior to the setting up of the tribunal, the government had organised intense pre-trial publicity to persuade members of the public of the occurrence of a coup and the involvement of those arrested in connection with it, the Commission is constrained to find the exclusion of the same public in the actual trial unjustified and in violation of the victim's right to fair trial guaranteed under [Article 7](#) of the Charter.

55. It is alleged that prior to his arraignment, precisely, for the 49 days he was detained, Mr Malaolu was not allowed access to his lawyer, neither was he given the opportunity to be represented and defended by a lawyer of his own choice at the trial. Rather, he was assigned a military lawyer by the tribunal. The Complainant submits that by refusing Mr Malaolu access to his lawyer, the Government of Nigeria was in contravention of [Article 7\(1\) \(c\)](#) of the Charter which provides: Every individual shall have the right to defence, including the right to be defended by counsel of his choice.

56. In its *Resolution on the Right to Recourse and Fair Trial*, the Commission in re-enforcing this guarantee observed in paragraph 2 (e) (i) thus:

In the determination of charges against individuals, the individual shall be entitled in particular to:

(i) ... communicate in confidence with counsel of their choice

The denial of this right therefore is a violation of these basic guarantees.

57. The Complainant alleged that the Special Military Tribunal which tried the convicted person was neither competent, independent nor impartial because members of the tribunal were selected by the Head of State, General Sani Abacha, and the Provisional Ruling Council (PRC), against whom the alleged offence was committed. Some members of the Tribunal are also serving army officers. For instance, the President of the Tribunal, Major-General Victor Malu is also a member of the Provisional Ruling Council, which is empowered by the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986, to confirm the sentences passed by the Tribunal. This is a breach of the right to a fair trial as stipulated in [Article 7\(1\) \(d\)](#) of the Charter, which states:

Every individual shall have... the right to be tried... by an impartial court or tribunal.

58. The government has not refuted this specific claim. It only states that the Treason and Other Offences (Special Military Tribunal) Act, Cap 444 of the Laws of the Federation of Nigeria, 1990 under which Malaolu was tried arose from the ashes of the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986 enacted by the then military government headed by General Ibrahim Babangida (Rtd.). Further, it asserts that its submission would not address the merits or demerits of the trial.

59. The Commission is not taking an issue with the history and origin of the laws nor the intention why they were promulgated. What is of concern here to the Commission is whether the said trial conforms to the fair hearing standards under the Charter. The Commission is of the opinion that to

answer this question, it must necessarily consider the merits or demerits of the trial, an issue the government does not want to be involved in.

60. Consequently, the Commission finds the selection of serving military officers, with little or no knowledge of law as members of the tribunal in contravention of [Principle 10](#) . The said Principle states:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.

61. In the same vein, the Commission considers the arraignment, trial and conviction of Malaolu, a civilian, by a Special Military Tribunal, presided over by serving military officers, who are still subject to military commands, without more, prejudicial to the basic principles of fair hearing guaranteed by [Article 7](#) of the Charter.

62. It is fitting, in this regard, to cite the Commission's general position on the issue of trials of civilians by military tribunals. In its *Resolution on the Right to Fair Trial and Legal Assistance in Africa*, the Commission had, while adopting the Dakar Declaration and Recommendations noted thus: In many African countries military courts and special tribunals exist alongside regular judicial institutions. The purpose of military courts is to determine offences of a pure military nature committed by military personnel. While exercising this function, military courts are required to respect fair trial standards.

They should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, special tribunals should not try offences that fall within the jurisdiction of regular courts.

63. The Commission considers the said trial, which has not been refuted by the Respondent State, save to the extent that it was done under a law validly enacted by the competent authority at the time, in contravention of the right to fair trial guaranteed under [Article 7](#) of the Charter. The Commission also finds the setting up of the said tribunal for the trial of treason and other related offences as impinging on the independence of the judiciary, in as much as such offences are being recognised in Nigeria as falling within the jurisdiction of the regular courts.

64. The Commission also finds the trial in contravention of the basic principle of fair hearing contained in [Principle 5](#) of the *United Nations Basic Principles on the Independence of the Judiciary* (The UN Basic Principles) and [Article 7\(1\) \(d\)](#) of the African Charter. Principle 5 of the UN Basic Principles stipulates:

Everyone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

65. Furthermore, in its General Comment on a similar provision of [Article 14](#) of the *International Covenant on Civil and Political Rights* , the Human Rights Committee observed:

The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialised. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned...While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14. (See also its Comment on the Report of Egypt - UN Doc. CCPR/79/Add. [2]3, paragraph a of August 1993)

66. It could not be said that the trial and conviction of Malaolu by a special military tribunal presided over by a serving military officer, who is also a member of the PRC, a body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in [Article 7](#) of the Charter. This is also in contravention of [Article 26](#) of the Charter which states:

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

67. It is also contended by the Complainant that Malaolu is being punished by Nigeria's military government over news stories published by his newspaper relating to an alleged coup plot involving

Nigeria's Chief of Staff and Second-in-Command, Lt. General Oladipo Diya and other military officers and civilians. This is alleged to be in contravention of his right to freedom of expression enshrined in [Article 9](#) of the Charter.

68. The government argues that Malaolu was tried along with a number of people accused of involvement in an alleged plot to overthrow the late Gen. Sani Abacha. It contends that the trial was not an ostensible case of victimisation against Malaolu or his profession, but rather that one or two other journalists were also sentenced to imprisonment at the same trial.

69. Considering the facts at the disposal of the Commission and the response of the government, the Commission takes the view that it was only Mr Malaolu's publication which led to his arrest, trial and conviction and therefore finds that in violation of [Article 9](#) of the Charter as alleged.

70. The Complainant avers that while Mr Malaolu was in detention, he was subjected to such cruel, inhuman or degrading treatment, as having his legs and hands chained to the floor day and night. From the day he was arrested and detained, until the day he was sentenced by the tribunal, a total period of 147 days, he was not allowed to take his bath. He was given food twice a day, and while in detention, both in Lagos and Jos, before he faced the Special Investigation Panel that preceded the trial at the Special Military Tribunal, he was kept in solitary confinement in a cell meant for criminals. The complainant submits further that the treatment meted out to Mr Malaolu contravened [Article 5](#) of the Charter. [Article 5](#) provides:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Principle 1 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides:

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Further, Principle 6 states:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

71. It is worth noting that the term 'cruel, inhuman or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental.

72. The government has not denied these allegations. Indeed, it has made it clear that it is not contesting the merits or demerits of the case. In the absence of any information to the contrary from the government, the Commission finds the various forms of treatments meted to Mr Malaolu while in detention, a violation of the right to respect and dignity and right to freedom from inhuman or degrading treatment guaranteed under [Article 5](#) of the Charter and reinforced by the above Basic Principles. (See [communications 64/92, 68/92 and 78/92 \(Krishna Achuthan on behalf of Aleke Banda, Amnesty International on behalf Orton and Vera Chirwa\) / Malawi](#)), [communications 27/89, 46/91, 49/91 and 99/93 \(Organisation mondiale contre la torture and AIJD, C.I.J and Union interafricaine des droits de l'Homme / Rwanda\)](#), respectively.

73. Although not an issue, the Commission notes that the alleged violations took place during a prolonged military rule and that such regimes, as rightly pointed out by the Government are abnormal (see the Commission's Resolution on the Military, adopted at the 16th Ordinary Session in Banjul, The Gambia). The Commission sympathises with the Government of Nigeria over this awkward situation but however asserts that this does not in any way diminish its obligations under the Charter, nor the violations committed prior to its coming into office.

74. Finally, the Commission finds it necessary to clarify the position regarding the claim of the Government of Nigeria to the effect that the trial was conducted under a law validly enacted by the competent authority at the time. Also that the victim was charged, tried, convicted and sentenced in accordance with the provisions of such a law.

75. In this regard, the Commission recalls its decision in communication [147/95 and 149/96, Sir Dawda Jawara / The Gambia](#), wherein it stated thus: "For a State to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter". It is therefore not enough for a State to plead the existence of a law, it has to go further to show that such a law falls within the permissible restrictions under the Charter and therefore in conformity with its Charter obligation. No such reasons have been adduced in the instant case. The Commission therefore rejects this argument.

Holding

For these reasons, the Commission

Holds a violation of [Articles 3\(2\), 5, 6, 7 \(1\) \(a\), \(b\), \(c\), \(d\), 9 and 26](#) of the African Charter and [Principle 5](#) of the *United Nations Principles on the Independence of the Judiciary* .
Urges the Republic of Nigeria to bring its laws in conformity with the provisions of the Charter.

Cotonou, Benin, 23rd October to 6th November 2000.