

Mandates of the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on minority issues; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

REFERENCE:
OL NGA 3/2017

27 April 2017

Dear Mr. Eze,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on minority issues; Special Rapporteur on freedom of religion or belief; and Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, pursuant to Human Rights Council resolutions 33/30, 27/1, 34/27, 32/32, 34/6, 31/16, and 27/3.

In this connection, we would like to bring to the attention of your Government information we have received concerning **the White Paper on the report of the Judicial Commission of Inquiry into the clashes between the Islamic Movement of Nigeria (IMN) and the Nigerian Army (NA) in Zaria, Kaduna State, between Saturday 12 and Monday 14 December 2015, issued on 5 December 2016 (hereafter “The White Paper”)**, and in particular some findings and recommendations by the Commission.

According to the information received:

In January 2016, a Commission of Inquiry (hereinafter, the Commission) was established by the Kaduna State Governor to investigate the killing of hundreds of followers of the Islamic Movement of Nigeria (IMN), a Shi'a minority religious and political group, allegedly by members of the Nigerian Army, in Zaria, Kaduna state, that took place between 12 and 14 December 2015. It is alleged that those killed were secretly buried in a mass grave in the following days. It is further alleged that several members of the IMN were also arrested in the course of these events.

The leader of the IMN, Mr. Ibrahim Al-Zakzaky and Ms. Zeinat Al-Zakzaky, husband and wife, were among those detained during the course of the incidents. It is alleged that Mr. and Ms. Al-Zakzaky were detained without charges on 14 December 2015 and reportedly were granted access to their lawyers only by the end of March 2016.

In January 2016, a Judicial Commission of Inquiry was established to investigate the events surrounding the clashes between the Islamic Movement of Nigeria and the Nigerian Army in Zaria, Kaduna State. It is reported that the IMN decided to withdraw its cooperation with the Commission's proceedings from the outset, in protest of the continued detention without charges of Mr. and Ms Al-Zakzaky, since December 2015. It is reported that the Commission decided initially to delay the beginning of its hearings until Mr. and Ms. Al-Zakzaky were granted access to their lawyers.

To date, Mr. and Ms. Al-Zakzaky remain in detention, despite the fact that a judicial ruling dated 2 December 2016 ordered their unconditional release within a period of 45 days from the date of the ruling. The alleged arbitrary detention of Mr. and Ms. Al-Zakzaky was the object of a previous communication to your Excellency's Government dated 8 February 2017 (UA NGA 1/2017). We regret that to date, we have not received any response to this communication.

1) Independence of the Judicial Commission of Inquiry

It is further alleged that the members of the Commission do not all comply with minimum requirements of independence and impartiality. In particular, it is alleged that several of its members reportedly made public statements which were discriminatory against Shi'a Muslims. This alleged lack of independence of the Commission, or at least the perception of it, was one of the reasons put forward by the IMN to withdraw from the Commission's proceedings.

Furthermore, while the Commission was established by the Kaduna state authorities to investigate the killings that took place in Zaria in December 2015, it is alleged that some of its terms of reference of the Commission's mandate were actually much broader and drafted in a way that seem to reveal pre-conceived opinions on the nature of the IMN movement.

Letter g) of the terms of reference (page vi), mandate the Commission "*to determine the evolution of the Islamic Movement in Nigeria, its legal status, organization, structure, membership, growth, assets, resources, culture and practices, and how any or all of these contributed to any engagement with the community, constituted authorities and the security agencies*". Under that item, the White Paper contains a number of observations on the inception and development of the IMN, devoting an entire chapter (chapter 8, pages 82-129) on issues that do not seem to have relation with the killings of IMN followers that took place between 12 and 14 December 2015, but on the contrary seem to reverse responsibilities on the IMN movement. For instance, a large number of the observations made with regard to the IMN include references to alleged confrontations between IMN and other groups, as well as alleged breaches of the

law and crimes committed by some IMN members in the past. These observations raise concerns in relation to the impartiality of the Commission.

2) *Findings and recommendations of the Judicial Commission of Inquiry*

On 5 December 2016, the Judicial Commission of Inquiry issued its report, “The White Paper”, which contains the outcome of its proceedings and investigations. It is reported that the White Paper arises several concerns contradicting international standards, including in relation to a) the determination of legal responsibility of the Nigerian Army for the killings of IMN members; b) the legal responsibility attributed to Mr Al-Zakzaky; and c) the recommendation to ban the IMN as an “unlawful organization”.

a) *On the legal responsibility of the Nigerian Army for the killings of IMN members*

We take note with grave concerns of the Commission’s findings regarding the role of the Nigerian Army (as described in pages 45 ff. of the White Paper) in the commission of serious human rights violations against IMN members during the December 2015 events. These include: 1) Disproportionate use of force by the Army; 2) Unjustifiable number of casualties; 3) Lack of written orders to conduct the operation; 4) Lack of compliance with the Army’s own Rules of Engagement; 5) Failure by the Army to keep record of recovered casualties from IMN; 6) Failure to assess the threat posed by the IMN to National Security.

We note with grave concern that, despite the above determination of responsibility of the Nigerian Army in the commission of serious human rights violations, the Commission did not hold accountable any of the identified perpetrators within the Army in relation to these serious violations, in clear contradiction with international human rights norms and standards.

We take this opportunity to draw the attention of your Excellency’s Government to Principle 4 of the United Nations Basic Principles on the Use of Force and Firearms by Law Officials, which provides that, “Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”

Furthermore, Principle 5 provides that, “Whenever the use of force and firearms is unavoidable law enforcement officials shall, (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate object to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected

persons at the earliest possible moment and (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment”.

Moreover, Principle 7 establishes that “Governments shall ensure that arbitrary or abuse use of force and firearms by law enforcement officials is punished as a criminal offence under their law”.

b) *On Mr. Al-Zakzaky’s legal responsibility*

By contrast, we note with concern that the Commission concludes in the criminal responsibility of IMN members, allegedly accusing its members for the clashes with the Nigerian Army that took place between 12 and 14 December 2015. In particular, we note with grave concern the recommendation of the Commission with respect to Mr. Al-Zakzaky's legal responsibility, which reads as follows: “*Members of the IMN owe absolute loyalty to Sheikh Ibraheem El -Zakzaky. He therefore bears responsibility for all the acts of lawlessness committed by the organisation and should therefore be held responsible, fully investigated and prosecuted*” (page 103). A similar statement is made on page 135: “*(i) Considering the nature and organizational structure of the IMN, where the leader has the total control over the members, Sheikh Ibraheem El-Zakzaky should be personally held responsible for all the acts of commission and omission of the entire membership of the Islamic Movement in Nigeria in its clashes with the Nigerian Army for refusing to call his members to order when required to do so*”.

We express grave concern at these conclusions of the Commission. Such broad statements pointing out to the criminal responsibility of an individual for all acts committed by the members of an organization raises concerns over the principle of presumption of innocence and the principle of legality, which are protected by article 14 (2) and article 15 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Nigeria on 29 July 1993. We note with concern that Mr. Al-Zakzaky did not appear before the Commission and was not compelled to do so.

A judicial process with all constitutional guarantees of equal protection before the law and respect of all guarantees of due process of law should be conducted to determine any criminal and/ or civil responsibility of individuals.

We recall that international law recognises the right not to be deprived arbitrarily of liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of the ICCPR.

c) *On the recommendation to ban the IMN as an “unlawful organization”*

We would also like to note the recommendation by the Commission to ban the IMN (page 152 of the White Paper): *“(ii) Without any hesitance, government must demonstrate the necessary political will to proscribe the existing IMN as an unregistered and unlawful association. As the example of other Shia organizations, such as disclosed in the testimonies of At-Thaqalayn and Rasul A'azam, Shism, as a religious confession and practice, can be observed and ought to be protected within the boundaries set and permitted by Nigerian Constitution and other laws. To avoid taking such a step would send the wrong signal to other law-abiding organizations and embolden the IMN to continue to defy all constituted authorities”*.

However, the Commission seems to contradict itself with respect to its recommendation to outlaw the IMN, as in other sections of the White Paper it makes recommendations that are favorable to the functioning of the IMN as an organization. For instance, on page 154 of the White Paper, the Commission's recommendation reads as follows: *“The law enforcement agencies are obliged to issue the IMN necessary permits, if and when requested, to carry out its activities in an orderly manner. As a complement, the State is obliged to collaborate with the association to provide security cover for such activities”*.

It is reported that the Government of Kaduna issued a legal notice in October 2016 declaring the IMN “an unlawful society”, prior to the official publication of the White Paper in December 2016. It has been alleged that follows the leaking of an executive summary of the report of the Commission, dated July 2016, which was circulated on the Internet.

As the ban of the IMN may negatively impact the right to freedom of religion or belief of its members, in conjunction with their rights to freedom of expression and association, any recommendation in relation to ban of a religious organisation should comply with international human rights standards, in particular articles 18, 19, 20 and 22 of the ICCPR. Limitations to the right to freedom of religion or belief, the right to freedom of expression need to meet the high threshold established under article 18(3), 19(3) and 22. Article 18(3) ICCPR establishes that *“freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”*. Article 19(3) ICCPR establishes that restrictions to freedom of expression shall be provided by law and be necessary *“(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.”* Finally, article 22 regarding the right to freedom of association, provides that *“No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are*

necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”.

The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence¹ can provide practical guidance through its recommendations to States in order to implement the international prohibition of incitement to hatred while respecting international standards on freedom of opinion and expression and freedom of religion and promoting inclusion and respect for diversity.

The Special Rapporteur on the rights to peaceful assembly and association stressed, in his first report to the Human Rights Council that “any association, including unregistered associations, should be allowed to function freely, and their members operate in an enabling and safe environment” (A/HRC/20/27, recommendations).

The Rapporteur also highlighted that “the right to freedom of association applies for the entire life of the association. The suspension and the involuntarily dissolution of an association are the severest types of restrictions on freedom of association. As a result, it should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient” (A/HRC/20/27, para 75).

3) *Response by the Government of Kaduna and the Federal Government on the recommendations of the Commission*

We express grave concern that the Government of Kaduna only noted, but did not accept the recommendations, related to the serious human rights violations attributed to Nigerian Army, to investigate and to prosecute the officers suspected to be criminally responsible (pages 135 and 155). We also note with concern that the Government only accepted those recommendations directed against the IMN, including its ban and the consideration of the IMN leader as legally responsible for all the actions of the IMN members during the 2015 incidents.

Similarly, we express concern that the Federal Government only noted, and did not accept, relevant recommendations related to the establishment of an independent body with a mandate to “*conduct a thorough investigation into the circumstances surrounding the June 2014 and December 2015 Nigerian Army clashes with the IMN; (b) re-assess the necessity and circumstances for the*

¹ A/HRC/22/17/Add.4

deployment of the Nigerian Army to quell civil disturbances, riots and civil disorders; (c) review the adequacy of the existing rules of engagement pertaining to internal security operations and bring them into conformity with constitutional stipulations and in accord with democratic norms and humanitarian best practices; and (d) review the reports of the boards of inquiry referred to above and determine matters associated with foregoing observations and findings with a view to assigning individual responsibility and to make any other recommendations deemed appropriate and necessary” (page 161).

We also note that the Federal Government noted, but did not accept, the creation of “(a) *An inter-agency body be commissioned to audit existing protocols which guide the cooperative and collaborative work of all law enforcement and security agencies with a view to making them more efficient, responsive and up to date. b. A review of existing laws and regulations which have imposed constraints on officers when it comes to information sharing. Without prejudice to safeguarding State Secret, a balance must be found to facilitate confidential exchanges of information on a need to know basis and subject to any restrictions deemed desirable. c. There is need for a review of existing protocols for the procurement, processing and sharing of intelligence among these agencies to make it more efficient and timely” (page 162-163).*

Furthermore, a crucial recommendation regarding prosecutions of all Nigerian Army officers and the IMN members, suspected to be criminally responsible in the 2015 incidents, is also noted, but not accepted (pages 163-164).

4) *Burial of 347 persons in a mass grave in an unspecified location*

We note that the White Paper contains some findings by the Commission that do not have a correlated recommendation. We consider that such recommendations would be necessary to address relevant issues in relation to the December 2015 incidents.

In particular, the Commission acknowledges that the burial of 347 persons in a mass grave in an unspecified location in the Mando area, near Kaduna city, on 14 December 2015, was conducted by the Kaduna Government without a prior identification of the bodies or autopsies. The Commission does not raise concerns regarding compliance to customary international law applicable to the disposal of the dead (Rule 115 Geneva Convention). In addition, the Commission does not make any recommendation with regard to determining the fate, the identity and the bodies of those who were killed and forcibly disappeared, including individuals killed as a consequence of their support of the IMN.

In this regard, the Principles on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, in particular principle 9, recall the duty

to conduct thorough, prompt and impartial investigations of all suspected cases of extra-legal, arbitrary and summary executions. Moreover, the Minnesota Protocol (UN Minnesota Manual on the Effective Prevention of Extra-legal, Arbitrary and Summary Executions) includes guidelines for the investigation potentially unlawful deaths. In addition, the Declaration on the Protection of All Persons from Enforced Disappearances establishes that no State shall practice, permit or tolerate enforced disappearances (article 2) and that no circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances (article 7). In its article 13, the Declaration also proclaims that whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint and that no measure shall be taken to curtail or impede the investigation (article 13.1). Also that each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits (article 13.2) and that such investigations should be able to be conducted for as long as the fate of the victims of enforced disappearance remains unclarified (article 13.6).

5) *Compensations and redress measures for the victims and their relatives*

Regarding compensation of victims and their relatives, the Commission makes recommendations with respect to the victims of “*all incidents of violence and aggression by the members of the IMN against individuals, groups and which have resulted in grievous bodily harm, destruction of properties and deaths...*” (pages 126 and 139), as well as to “*all those who complained before the Commission that their properties were either destroyed or damaged as a result of the clash*” (page 138). There is also a recommendation in page 38 to the Kaduna State Government to “*appoint professional valuers to re-evaluate properties reported to have been destroyed or damaged and take appropriate steps to provide necessary compensation to the claimants*”. We express grave concern that there is no reference to the need for compensation for all victims or relatives of the victims of the incidents, including IMN members, or reference to the victims of the Nigerian Army.

It is our responsibility under the mandates provided to us by the Human Rights Council to seek to clarify all cases brought to our attention. We would therefore welcome any additional information or clarification from your Government with respect to the serious human rights violations committed in December 2015, and to the findings and recommendations of the Judicial Commission of Inquiry as set in its White Paper, and on measures taken by the Nigerian Government to comply with its obligations under international human rights law, particularly with regard to the rights to life, the right to

justice, non-discrimination, the right to freedom of religion or belief, freedom of opinion and expression, freedom of association, the prohibition of enforced disappearances.

We would also like to request your Excellency's Government to provide any information on the measures taken to ensure the right to truth, access to justice and reparations for all victims and comply with the State's obligation to take all necessary measures to ensure the non-recurrence of such serious human rights violations. In particular, we urge prompt, impartial and effective investigations into the Zaria massacre, by a fully independent judicial body, and all perpetrators to be held accountable and brought to a court of justice.

Furthermore, we would like to emphasize the importance of preserving mass grave sites and ensuring that an effective criminal and forensic investigation can take place thereon, in compliance with international norms and standards.

In this regard, we would like to request your Excellency's Government to provide information on the steps taken to secure and/or protect the site of the mass grave area and on steps taken to ensure that all human remains and other findings are kept in a secure and appropriate place and that an independent forensic, medical, legal and archaeological investigation is carried out; as well as on steps taken to ensure that potential victims' families and public are informed of the process.

Moreover, we would appreciate receiving additional information with respect to the detention and prosecution of Mr. and Ms. Al-Zakzaky, and in particular the reasons why the judicial ruling dated 2 December 2016, ordering the immediate release Mr. and Ms. Al-Zakzaky, has reportedly not yet been implemented.

We would also welcome the opportunity to discuss the content of the White Paper in more detail with your Government at your convenience.

Your Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Mr. Eze, the assurances of our highest consideration.

José Guevara
Vice Chair of the Working Group on Arbitrary Detention

Houria Es-Slami
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Maina Kiai
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Rita Izsák-Ndiaye
Special Rapporteur on minority issues

Ahmed Shaheed
Special Rapporteur on freedom of religion or belief

Pablo de Greiff
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-
recurrence