

Mandate of the Special Rapporteur on the independence of judges and lawyers

REFERENCE:
AL NGA 1/2019

8 February 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 35/11.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the suspension and replacement of the Chief Justice of Nigeria, Honourable Justice Walter Nkanu Samuel Onnoghen, which appear to be in contravention of international human rights standards relating to the independence of the judiciary.

According to the information received:

On 25 January 2019, the President of Nigeria, His Excellency Mr. Muhammadu Buhari suspended the Chief Justice of Nigeria, Honourable Justice Walter Onnoghen, and replaced him with Justice Ibrahim Tanko Mohammad, who subsequently sworn in as Acting Chief Justice. The President claimed to have acted in compliance with an order issued on 23 January 2019 by the Code of Conduct Tribunal. This order allegedly directed the President of the Republic to suspend the Chief Justice from office pending the final determination of a case against him before the Code of Conduct Tribunal.

Constitutional provisions

The Constitution of the Federal Republic of Nigeria regulates the appointment, as well as the removal, of the Chief Justice.

Article 231 (4) provides that if the Chief Justice cannot perform his/her functions for any reason, the President of Nigeria shall appoint the most senior Justice of the Supreme Court as acting Chief Justice until a new Chief Justice is appointed or the previous Chief Justice is able to resume his or her duties.

Article 292 of the Constitution, as amended, provides that the Chief Justice can only be removed from office by the President of the Republic upon request of at least two-thirds of the members of the Senate, or, alternatively, upon recommendation of the National Judicial Council.

In the present case, it appears that the removal from office of the Chief Justice has not been debated at the Senate, and that the Senate has never given its support to the President for the removal of the Chief Justice. It also appears that the National

Judicial Council has not issued any recommendation to the President concerning the possible removal of the Chief Justice.

Procedure before the Code of Conduct Tribunal

On 9 January 2019, the Attorney-General filed a motion against the Chief Justice before the Code of Conduct Tribunal for his alleged failure to declare some of his assets upon assumption of office.

Under the Constitution of Nigeria, the Code of Conduct Tribunal is established as a special tribunal to decide on alleged breaches of the Code of Conduct for Public Officials established in the Fifth Schedule of the Constitution. The public officers subject to the jurisdiction of the Code of Conduct Tribunal include the Chief Justice and Justices of the Supreme Court.¹ Decisions of the Tribunal may be appealed before the Court of Appeal.

The Code of Conduct Tribunal held two hearings, on 14 and 22 January.

At the second hearing, it is alleged that the Code of Conduct Tribunal unanimously rejected the request made by the prosecution for an interim injunction to order the Chief Justice to vacate his seat and to request the President to appoint an acting Chief Justice. The Code of Conduct Tribunal then adjourned proceedings until 28 January 2019, in order to determine, among other things, whether it had jurisdiction on Chief Justice Onnoghen's matter.

Reportedly, other Nigerian courts, including two Federal High Courts and the National Industrial Court, issued similar orders requesting that the Chief Justice remain in office pending the adjudication of the cases against him. In accordance with the principles of judicial independence and separation of powers, these decisions are binding on the President.

On 23 January 2019, the Code of Conduct Tribunal reportedly issued an *ex-parte* interim order directing the Chief Justice to 'step aside' pending the determination of the case against him before the Code of Conduct Tribunal, and requesting the President of Nigeria to swear-in the most senior Justice of the Supreme Court as Acting Chief Justice of Nigeria. It is alleged that the chairperson of the Tribunal reversed the decision adopted by the Tribunal on the previous day following unlawful pressure from outside the judiciary.

On 24 January 2019, the Court of Appeal Abuja Division ordered a stay of proceedings before the Code of Conduct Tribunal, including the pending motion

¹ In *Ngajiwa v. FRN* (2017), the Court of Appeal held that no criminal investigation for misconduct could be initiated or instituted against a judicial officer in any court or tribunal without having brought such allegations before the National Judicial Council. In the past, the Code of Conduct Tribunal complied with this principle, for example in *FRN v Ngwuta* (2018), when it referred to the need to prior consult the National Judicial Council before dismissing the case against Justice Ngwuta.

for removal of Chief Justice Onnoghen, pending the determination of the appeal before it. The appeal related to the decision of the Code of Conduct Tribunal to continue proceedings despite the stay of proceedings already ordered by the National Industrial Court and two Federal High Courts. The Code of Conduct Tribunal and the President of the Republic are allegedly bound by the order issued on 24 January by the Court of Appeal, which is hierarchically superior to the Code of Conduct Tribunal.

On 25 January 2019, the President of Nigeria suspended Chief Justice Onnoghen, and replaced him with Justice Ibrahim Tanko Mohammad, who was subsequently sworn in as Acting Chief Justice. The President claimed that the suspension of the Chief Justice was based on the *ex-parte* interim order of the Code of Conduct Tribunal of 23 January.

The suspension of the Chief Justice and the appointment of an acting Chief Justice have reportedly been criticised by several actors, including the President of the Senate, the opposition parties, the Nigerian Bar Association, and a number of civil society organisations.

Without prejudging the accuracy of the information received, concern is expressed at the allegedly unlawful suspension and replacement of the Chief Justice of Nigeria. If confirmed, the facts of the case would disclose a serious breach of the principles of judicial independence and separation of powers.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and comments which you may have on the above mentioned allegations.
2. Please provide detailed information on the constitutional procedure for the removal or suspension of the Chief Justice. In particular, please provide information on whether the decision adopted by the President of the Republic on 25 January 2019 was supported by a qualified majority of the Senate or, alternatively, adopted upon recommendation of the National Judicial Council.
3. Please provide detailed information on the order issued by the Code of Conduct Tribunal on 23 January 2019, and explain its relation with the opposite decision taken by the Tribunal on the previous day, when the

Tribunal allegedly rejected the request made by the prosecution for an interim injunction to order the Chief Justice to vacate his seat.

4. Please provide detailed information on the decisions adopted by the two Federal High Courts, the Court of Appeal and the National Industrial Court on the case concerning Chief Justice Onnoghen, and explain whether the Code of Conduct Tribunal is bound, in accordance to the Nigerian legislation, to comply with these decisions.
5. Please provide detailed information on the guarantees put in place by Nigeria at the federal and state levels to protect and promote judicial independence.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

I am considering to publicly express my concerns in the near future as, in my view, the information available to me is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to their human rights implications. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

The independence of the judiciary is prescribed, *inter alia*, in the International Covenant on Civil and Political Rights (ICCPR), acceded by Nigeria on 29 July 1993, and the United Nations Basic Principles on the Independence of the Judiciary.

Article 14 of the ICCPR establishes the right to fair proceedings before a competent, independent and impartial tribunal established by law.

In its General Comment No. 32 (2007), the Human Rights Committee observed that article 14 requires States to adopt appropriate measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them (para. 19).

The Human Rights Committee also stated that judges may be dismissed only on serious grounds of misconduct or incompetence, and in accordance with fair procedures ensuring objectivity and impartiality. The dismissal of judges without following the procedures provided for by the law and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary (para. 20).

The principle of the independence of the judiciary has also been enshrined in a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary. The Principles provide, *inter alia*, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

With regard to the accountability of judges, the Basic Principles provide that judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions (principle 18). Any decision to suspend or remove a judge from office should be taken in accordance with a fair procedure (principle 17), and be taken in accordance with established standards of judicial conduct (principle 19).