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Human Rights Council
Working Group on Arbitrary Detention

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Opinion No. 81/2018 concerning Ibraheem El-Zakzaky and Zeenah Ibraheem (Nigeria)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 15 August 2018 the Working Group transmitted to the Government of Nigeria a communication concerning Ibraheem El-Zakzaky and his spouse, Zeenah Ibraheem. The Government has not replied to the communication. The State has been a party to the International Covenant on Civil and Political Rights since 29 July 1993.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(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, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (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).

Submissions

Communication from the source

4. Ibraheem El-Zakzaky is the leader of the Islamic Movement in Nigeria.

5. Zeenah Ibraheem is the wife of Mr. Zakzaky.

6. According to the source, Mr. Zakzaky has been a passionate advocate for justice and equality in Nigeria and has used his influence to foster peace in the country for over 30 years. During the last two years, even while in detention, Mr. Zakzaky has been a moderating voice, calling for peace and persuading others that violence is not a solution.

Background

7. The source alleges that between July 2014 and December 2015 the Nigerian army committed crimes against the Islamic Movement in Nigeria in the northern region of Kaduna State, Nigeria. The Islamic Movement in Nigeria is a mass organization based in Zaria, a major city in Kaduna State. It was founded in the late 1970s as a student movement. Since its establishment, it has grown into a social and religious movement with supporters and members of all ages and from all religious affiliations. It is estimated that in 2016 it was supported by between 10 and 15 million people across Nigeria, from both the Sunni and Shia Islamic schools of thought, as well as by some Christians.

8. According to the source, the Islamic Movement in Nigeria has been targeted several times by indiscriminate attacks by both Boko Haram and the Nigerian army, especially on specific occasions, such as al-Quds Day processions. The Nigerian security authorities have regularly perpetrated bloody attacks on the Movement, in particular a clampdown on its members and the destruction of its headquarters in Sokoto, Nigeria, in July 2007 and in Zaria, Kaduna State, in 2009, 2014 and 2015.

9. The source reports that the Nigerian army carried out attacks from 12 to 14 December 2015 in the following locations: the Hussainiyyah, an Islamic Movement in Nigeria religious centre located at No. 1A, Sokoto Road, Zaria; the home of Mr. Zakzaky; the group's cemetery of Darur-Rahma in Dembo village on the outskirts of Zaria; and the home and burial place of Mr. Zakzaky's late mother in the Jushi neighbourhood of Zaria.

Attack, arrest and detention

10. According to the source, attacks against the Islamic Movement in Nigeria occurred between 12 and 14 December 2015. On 13 December 2015, at around 9 p.m., nine Nigerian army trucks carrying heavy weapons and ammunition drove to the private residence of Mr. Zakzaky. They started bombing a tea shop and setting surrounding shops on fire. Once they had taken up position outside the walls of the Ahmadu Bello University, close to the house of Mr. Zakzaky, soldiers opened fire indiscriminately on the people who had formed a human shield around the house.[1] As the shooting began, people around the house started throwing stones at the soldiers. The attack reportedly lasted until 5.30 a.m., when another 20 trucks carrying reinforcements arrived in support of the army and joined in the attack. The attack lasted for another two hours, after which soldiers successfully reached the fence of the house. It took them another two hours of shooting at the besieged civilians before they reached the entrance to Mr. Zakzaky's house.

11. The source reports that Mr. Zakzaky, his wife and their six children remained confined in the house. At least 700 supporters of the Islamic Movement of Nigeria were reportedly killed while many others, who were injured and left outside the residence in urgent need of medical assistance, were denied medical treatment until the following day. The source claims that eyewitness reports and photographs show piles of bodies lying on the floor outside Mr. Zakzaky's house. Later the army threw explosives at sections of the house, setting it on fire.

[1] According to the source, hundreds of members of the Islamic Movement of Nigeria who came for a flag-hoisting ceremony but could not get to the Hussainiyyah, went to Gyellesu neighbourhood, seeking refuge from the killing spree unfolding at the Hussainiyyah and to create a human shield around the leader of their organization.

Allegedly, some of those who were too badly injured to move, as well as some of the corpses, were burnt in the fire. Eyewitnesses reported that soldiers were seen killing anyone who had been injured during the attack and allowing groups of criminals to steal and loot the victims' belongings from their corpses. Those inhuman acts of violence were carried out in the presence and with the complicity of the soldiers. The eyewitnesses also reported that the soldiers were celebrating and chanting slogans against the Islamic Movement in Nigeria, such as "we have finished with the Shia and El-Zakzaky" and "no more Shia in Nigeria".

12. According to the source, the attack on Mr. Zakzaky's residence ended on 14 December 2015 with the arrest of Mr. Zakzaky and his family. Three of his sons and his elder sister were shot dead while Mr. Zakzaky and his wife were both shot and injured immediately before their arrest. Hundreds of other people were also reportedly arrested that day. Afterwards, evidence started circulating showing Mr. Zakzaky severely injured and bleeding while in military custody, with six gunshot wounds to his face, right leg, hand, arm and chest. Other photographic evidence showed him injured and being mistreated by Nigerian soldiers, forced to sit on the ground, brutalized and possibly tortured. He was subsequently ferried in a wheelbarrow to a waiting truck and taken to an unknown destination.

13. The source specifies that on the same day, the Nigerian army confirmed the arrest of Mr. Zakzaky and his detention at an army barracks.

14. The source reports that also on 14 December 2015, Mr. Zakzaky was moved to a military hospital in Kaduna. His wife was also moved to a military hospital.

15. The source reports that on 15 December 2015, the house of Mr. Zakzaky was razed to the ground by the army. On 23 December 2015, the grave of Mr. Zakzaky's mother was also destroyed by the army.

16. The source states that it is not clear whether Mr. Zakzaky and his wife are in the custody of the army or the police. No formal charges have been filed and initially the army refused to allow anyone, including his family, doctors or lawyers, to see Mr. Zakzaky and his wife. At that time, it was feared that he might have died in custody.

17. The source reports that the army eventually allowed a delegation of the Muslim Council to visit him on 14 January 2016, one month after his arrest. A member of the delegation confirmed that he was alive but injured by multiple shots. No family member, independent personal physician or lawyer has been allowed to see him so far.

18. Furthermore, according to the source, on 2 December 2016, the High Court ordered the Department of State Services to release Mr. Zakzaky and his wife within 45 days, therefore at the latest by 15 January 2017, considering their incarceration illegal and unconstitutional. They were, however, not released.

19. The source reports that, on 26 April 2017, protesters in Nigeria marked the 500 days of detention of Mr. Zakzaky and his wife with a peaceful demonstration in Abuja. Thousands of demonstrators asked the Government to respect human rights, personal liberty and a fair trial for every individual protected by the Nigerian Constitution. The source also reports other demonstrators calling for the release of Mr. Zakzaky and his wife. They were allegedly violently and fatally repressed. The source specifies that the demonstrations organized by the supporters of the Movement have always been peaceful, not a single one having involved violence. That has been the case because of Mr. Zakzaky's long-standing commitment to peace and non-violence and his ability to influence his supporters to follow those principles.

20. The source also reports a rapid deterioration in Mr. Zakzaky's health at the beginning of 2018, his doctor suspecting a stroke. He has difficulty moving and can now only speak while lying down. His condition is growing worse owing to the lack of treatment following his suspected stroke.

21. The source indicates that owing to the severity of his previous, untreated injuries, as well as the complications created by a possible stroke, it is essential that Mr. Zakzaky receives immediate medical treatment. As his condition is severe and complex, he may need to seek specific medical treatment abroad.

22. In addition, the source claims that on 22 January 2018, the Attorney General of Nigeria filed an appeal to overthrow the order of the Federal High Court of 2 December 2016

instructing that Mr. Zakzaky and his wife be released within 45 days. The court found that the Government was in contempt of the court order and that Mr. Zakzaky and his wife should have been released immediately after the decision of 2 December 2016 and should have been free during the appeals process.

23. According to the source, the failure to successfully prosecute Mr. Zakzaky for over two years, as well as the pressure from the court order demanding his release immediately as of December 2016, led the Nigerian authorities to charge him, his wife and two of their associates with numerous fabricated charges (namely blocking roads, being responsible for the death of a soldier and inciting violence). The source claims that the authorities have decided to press various charges against the detainees, hoping to succeed. The fact that countless eyewitnesses refute the Government's account of events seems irrelevant to the Office of the Prosecutor.

Response from the Government

24. On 15 August 2018, the Working Group transmitted the allegations by the source to the Government of Nigeria under its regular communication procedure. The Working Group requested that the Government provide detailed information before 15 October 2018 about the current situation of Mr. Zakzaky and Mrs. Ibraheem, as well as any comments that it might have on the source's allegations.

25. On 2 October 2018, the Government requested an extension of deadline to respond. The extension was granted with a new deadline of 15 November 2018. The Government did not submit any information in response to the present communication.

Discussion

26. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

27. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

28. At the outset, the Working Group wishes to state that the events in question have been widely reported and substantiated by a written submission made to the Prosecutor of the International Criminal Court alleging that the incident amounts to a crime against humanity.[2] In addition, a number of special procedures mandate holders have written to the Government about the same set of facts but in vain.[3] Given the wealth of information available to it, the Working Group is comfortable considering the information provided by the source and will now set out the legal implications.

29. According to the source, Mr. Zakzaky and his spouse were arrested on 14 December 2015. The officers who executed the arrest neither provided an arrest warrant, nor any reasons or legal basis for the deprivation of liberty of Mr. Zakzaky and his spouse. Neither of them was informed of the reasons for their arrest and subsequent detention and no formal charges were filed at that stage. Only recently, according to the source, have the Nigerian authorities decided to prosecute Mr. Zakzaky, Mrs. Ibraheem and their associates on charges of blocking roads, being responsible for the death of a soldier and inciting violence.

30. The State has an obligation to present an arrest warrant whenever a person is arrested and that obligation is enforced through the action of its agents who, in addition, must inform a person under arrest of the reasons for the arrest and subsequent detention. That obligation

[2] See International Criminal Court, Office of the Prosecutor, "Report on preliminary examination activities 2017" (4 December 2017), para. 213.

[3] See https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=22978 and https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23063. See A/HRC/WGEID/112/1, para. 75.

is established in article 9 of the Universal Declaration and in articles 9 (1) and (2) and 14 (3) (a) of the International Covenant on Civil and Political Rights. The same is provided in article 6 of the African Charter on Human and Peoples' Rights. It is clear that this obligation has been violated in the present case.

31. In addition, it is reported that Mr. Zakzaky and Mrs. Ibraheem were detained incommunicado. A delegation of the Muslim Council was allowed to visit Mr. Zakzaky on 14 January 2016, one month after his arrest but no family member, independent personal physician or lawyer has been allowed to see him so far. Furthermore, according to the source Mr. Zakzaky was ferried in a wheelbarrow to a waiting truck and taken to an unknown destination. Incommunicado detention prevents the detainee from challenging his detention, in violation of article 9 (4) of the Covenant.

32. The Working Group concludes that all the violations mentioned above render the arrest and the detention arbitrary within category I.

33. According to the source, on 2 December 2016 the Federal High Court considered the incarceration of Mr. Zakzaky and his wife illegal and unconstitutional and subsequently ordered the State to release them within 45 days, that is by 15 January 2017 at the latest. They have, however, still not been released. Indeed, more than a year after the High Court order, on 22 January 2018 the Attorney General of Nigeria filed an appeal to overrule the order. The Working Group considers that when a State does not respect judicial orders from its own courts, especially when the court has ordered the release of individuals, in this case Mr. Zakzaky and Mrs. Ibraheem, continuous detention becomes without legal basis, falling again within category I. The Working Group is particularly concerned by such abuse of the rule of law, which profoundly jeopardizes human rights in the country. In addition, in view of the context of armed conflict in part of Nigeria, the Working Group notes that the source has emphasized that the Islamic Movement in Nigeria is a non-violent movement and cannot therefore be associated with any armed group in Nigeria. The Working Group therefore considers that Mr. Zakzaky and Mrs. Ibraheem, as civilians, cannot be considered as members of armed groups and cannot, therefore, be detained on that basis. Furthermore, the Working Group recalls that, in its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, the Human Rights Committee noted that "the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable".

34. The Working Group also recalls the statement by the source that the Islamic Movement in Nigeria is a Shia group with close ties to Iran and based in Zaria, Kaduna State. The Movement is led by Mr. Zakzaky and has an estimated 3 million followers spread across Nigeria. There is nothing to suggest that the Movement is a terrorist organization such as Boko Haram, the radical Islamic group also operating in northern Nigeria that the international community has identified as a terrorist group of major concern.[4] However, according to the source, the Islamic Movement in Nigeria has been regularly targeted over recent years in indiscriminate attacks by the Nigerian army. Eyewitnesses have even reported that the soldiers were celebrating and chanting slogans against the Movement during the Zaria massacre. On the day of the arrests, over 300 people were peacefully protesting against the presence of the army in a circle around Mr. Zakzaky's house. That, however, did not stop the army from targeting those civilians in a mass shooting, including an 18-month-old baby and members of Mr. Zakzaky's family, in order to gain access to the latter. According to the source, such acts of violence are recurrent and part of a process intended to take down Mr. Zakzaky.

35. Mr. Zakzaky and Mrs. Ibraheem were arrested and detained for exercising their freedom of opinion and expression and their right to peaceful assembly and freedom of

[4] See, among others, S/PRST/2014/8. Following that statement by the President of the Security Council, on 22 May 2014 the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities approved the addition of Boko Haram to its list of individuals and entities subject to the targeted financial sanctions and the arms embargo set out in paragraph 1 of Security Council resolution 2083 (2012). See also Security Council resolution 2349 (2017).

association. Those rights and freedoms are protected under articles 19 (2), 21 and 22 (1) of the Covenant, articles 19 and 20 (1) of the Universal Declaration of Human Rights and articles 9, 10 and 11 of the African Charter on Human and Peoples' Rights, and can only be restricted, when necessary, to respect the rights or reputations of others or to protect national security, public order or public health or morals. The Working Group therefore concludes that the detention of Mr. Zakzaky and Mrs. Ibraheem falls within category II.

36. The Working Group also bears in mind that on 17 December 2015, the Governor of Kaduna State announced the establishment of a state judicial commission of inquiry into the incident at Zaria. In his news conference, the Governor listed a range of grievances against the Shia group, including how road traffic had been disrupted during Shiite processions and the group's disregard for Government of Nigeria authorities. His statement shows a certain bias of the Government against Mr. Zakzaky and his movement. However, according to the source, Mr. Zakzaky has never advocated for armed struggle as a means of achieving the establishment of Islamic rule in Nigeria, contrary to what Boko Haram advocates. In addition, Mr. Zakzaky is known to be a voice for peace in the country.

37. Given its finding that the deprivation of liberty of Mr. Zakzaky and Mrs. Ibraheem is arbitrary within category II, the Working Group wishes to emphasize that no trial should take place in the future. However, it appears likely from the information presented by the source that proceedings against Mr. Zakzaky and Mrs. Ibraheem will continue to trial. The Working Group will therefore assess the arguments in that regard.

38. The Working Group notes that the legal counsel of Mr. Zakzaky and Mrs. Ibraheem was not able to contact them between the time of their arrest and 1 April 2016, three and a half months later, contravening article 14 (3) (d) of the Covenant, which guarantees legal assistance in criminal proceedings, and principle 17.1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. As a result, the Working Group is convinced that the right of Mr. Zakzaky and Mrs. Ibraheem to have effective legal representation and adequate time and facilities for the preparation of a proper defence has not been respected by the State.

39. Moreover, as reported by the source earlier this year, Mr. Zakzaky's health has deteriorated and his condition is getting worse owing to his lack of treatment. The army has refused to allow anyone, including his family or doctors, to see him. That set of facts supports a violation of article 9 (3) and (4) of the Covenant, article 8 of the Universal Declaration of Human Rights and principles 11, 15, 18 (1) and (2), 19, 32, 37 and 39 of the Body of Principles. Moreover, in view of the context of the armed conflict in that part of Nigeria, the Working Group recalls that common article 3 of the Geneva Conventions of 1949 provides that: "Persons taking no active part in the hostilities … shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."

40. The Working Group concludes that all the violations referred to are of such gravity as to give the deprivation of liberty of the couple an arbitrary character, falling within category III.

41. The Working Group notes that a large number of individuals were arrested alongside Mr. Zakzaky and his spouse and are still missing or detained. The Working Group wishes to emphasize that it is concerned by the situation and urges the State to take action. In addition, the Working Group calls on the Nigerian authorities to conduct an internal investigation and for an international inquiry regarding the events of the attack on the Islamic Movement in Nigeria in December 2015.

42. Finally, the Working Group is concerned by the allegations of violation of articles 7, 10 (1) and 14 (3) (g) of the Covenant, articles 1 and 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the Universal Declaration of Human Rights, article 5 of the African Charter on Human and Peoples' Rights and principles 6 and 21 (2) of the Body of Principles. More specifically, it is alleged that the persons concerned have been tortured and ill-treated, deprived of the necessary medical care and detained in harsh conditions. The Working Group also recalls the denial of medical care which could amount to a violation of article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In accordance with paragraph 33 (a)

of its methods of work, the Working Group refers the case to the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Disposition

43. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Ibraheem El-Zakzaky and Zeenah Ibraheem, being in contravention of article 8, 9, 19, and 20 (1) of the Universal Declaration of Human Rights and articles 9, 14, 19, 21 and 22 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

44. The Working Group requests the Government of Nigeria to take the steps necessary to remedy the situation of Mr. Zakzaky and Mrs. Ibraheem without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

45. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to immediately release Mr. Zakzaky and Mrs. Ibraheem and accord each of them an enforceable right to compensation and other reparations, in accordance with international law.

46. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Zakzaky and Mrs. Ibraheem and to take appropriate measures against those responsible for the violation of their fundamental rights.

47. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for appropriate action.

48. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

49. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Zakzaky and Mrs. Ibraheem have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Zakzaky and Mrs. Ibraheem;

(c) Whether an investigation has been conducted into the violation of the rights of Mr. Zakzaky and Mrs. Ibraheem and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Nigeria with its international obligations in line with the present opinion, especially vis-à-vis the Islamic Movement of Nigeria;

(e) Whether any other action has been taken to implement the present opinion.

50. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

51. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

52. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[5]

[*Adopted on 21 November 2018*]

[5] See Human Rights Council resolution 33/30, paras. 3 and 7.