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THE (IM)PARTIALITY OF JUSTICE: THE CHALLENGES OF INVESTIGATING THE CLASHES BETWEEN THE ISLAMIC MOVEMENT OF NIGERIA AND THE NIGERIAN ARMY IN ZARIA, NIGERIA

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1 Introduction

Over three days in December 2015, in and around the town of Zaria in Kaduna State, Nigeria, the Nigerian army violently clashed with members of a national Shi'ite sect, the Islamic Movement of Nigeria (IMN), with lethal consequences. The clashes were sparked by an altercation between the convoy of the Chief of Army Staff (COAS) and members of the IMN over a roadblock that had been set up along the main Zaria highway. After much local and international pressure, on 17 December the government of Kaduna State announced the establishment of the Judicial Commission of Inquiry into the 12-14 December Clashes in Zaria. The Commission was officially established on 16 January and inaugurated on 29 January 2016.

Much controversy surrounded the establishment of this Commission. The army's involvement in the incident in question would ideally have meant that the federal government should have set up the Commission of Inquiry within the federal capital territory. However, the federal government was quiet in this respect and deferred to the investigation underway by the National Human Rights Commission (NHRC), which was another point of contention with questions raised as to why the Kaduna State government did not subject itself to the NHRC investigation rather than setting up its own mechanism. Further, there had been previous clashes between the IMN and the Nigerian security forces, in Zaria, with

* This chapter is based upon research interviews conducted in Abuja and Kaduna in early October 2016. Along with Thomas Probert, the author interviewed a series of individuals and groups connected with the investigation, including commissioners, members of the National Human Rights Commission, local activists, representatives of the IMN, lawyers familiar with the Commission, and representatives of international non-governmental organisations.

the clashes in December 2015 recording the highest number of deaths. It was therefore important that the government of Kaduna responded to what was seen as an escalating abuse of state power.

There was also controversy surrounding the proceedings of the Commission, with one of the parties, the IMN, opting not to participate, citing partiality and a lack of independence in the proceedings. These allegations were made with respect to the constitution of the commissioners as the IMN argued that several of those appointed had expressed strong views against the movement and therefore would offer a partial view of the events of those fateful days in December 2015. Despite the withdrawal of the IMN, the Commission carried on with its proceedings and produced a report that found, among other things, that the army indeed had been excessive in its response to the unrest that occurred during that time. They also found that the immediate cause of the clashes during that period may be imputed to the IMN, as discussed in further detail below. In August 2016, as required, the government of Kaduna offered its official response to the report through the release of a White Paper. This document undercut the report in several ways, accepting only those parts that determined the responsibility of the IMN and rejecting those that focused on the role of the Nigerian army and the state government.

Alongside South Africa and Kenya, Nigeria has a high incidence of commissions of inquiry on the continent. Our initial research (described in chapter 3) found more than ten commissions of inquiry instituted at federal and state level in Nigeria over a 25-year period focusing on violations of the right to life.¹ However, a culture of silence around commissions and a failure to publish, or at least to publicise their final reports, make it difficult to access information on such bodies and the actual number of commissions constituted over time.² This chapter explores critically the role of the Zaria Commission in securing accountability for the apparent violations of the right to life that occurred in December 2015, considering

1 These include the Judicial Commission of Inquiry into the Conflict in Namu Town, Qua'an Pan Local Government Area, Plateau State (2005-2009); the Rivers State Truth and Reconciliation Commission (2007-2009); the Commission of Inquiry into the conflict in Jos, Plateau State (2009); the Commission of Inquiry (Witchcraft Accusations and Child Rights Abuses (2011)); the Sheikh Lamu Commission (2011); the Osun Truth and Reconciliation Commission (2011); the Judicial Commission of Inquiry to Investigate the Wukari and Ibi Crises (2013); and the Rivers State Commission of Inquiry (2015). This list is not exhaustive. For a full list of the commissions examined during the scoping, see Annex I.

2 Jeff Fischer 'National Commissions of Inquiry into Electoral Violence: A Study of Practices and Outcomes' Working Paper of the Explaining and Mitigating Electoral Violence Project (2017) available at: <http://www.electoralviolenceproject.com/cms/wp-content/uploads/2017/07/Jeff-Fischer-Commissions-of-Inquiry-Working-Paper-July-2017.pdf>.

both the effectiveness of its investigation into what occurred and the extent to which it was able either to remedy the harm or to recommend reforms.

2 The events in Zaria

Relations between the IMN and the Nigerian government have for several years been tense. The IMN alleges that the government wants to destroy the IMN and the authorities accuse the IMN of disregarding the law and operating as a state within a state. Processions, demonstrations and other activities organised by the IMN, normally conducted without the necessary permits, have resulted in several confrontations with the state or national security forces and have strained relations with neighbouring communities.³ The incident of 12 to 14 December 2015 was not the first reported between the Nigerian government and the IMN. In 2007 the military destroyed the IMN headquarters in Sokoto prompting their move to Zaria, the hometown of their leader, Sheikh El-Zakzaky. In July 2015 a confrontation between the Nigerian army and members of the IMN left approximately 30 people dead and several seriously wounded. Among those who died were the three sons of the IMN leader, Sheikh El-ZakZaky, and although the Nigerian army promised to investigate the incident, to date no person has been held accountable for the deaths that occurred during that incident.⁴ Another incident occurred in November 2014 when an IMN procession was the target of a suicide attack in Kano. Alongside the 15 IMN members that were killed in the suicide attack, it is reported that soldiers shot at individuals seeking shelter after the attack and killed a further six people.⁵ This chain of events contributed to a tension between the IMN and Nigerian army that finally erupted on 12 December 2015.⁶

There are varied accounts of the facts surrounding the cause of the clashes. The Commission reports that the clashes were triggered by an incident between IMN members and the convoy of the COAS along the highway approaching Hussainiya Baqiyyatillah. On 12 December the

3 Amnesty International *Unearthing the Truth: Unlawful Killings and Mass Cover-Up in Zaria* (London: Amnesty International, April 2016) p.38.

4 *Ibid.*, p.15.

5 'Nigeria: Deaths as Kano Police Clash with Shia Muslims' *Al Jazeera* (14 November 2014) available at: <http://www.aljazeera.com/news/2016/11/nigeria-deaths-kano-police-clash-shia-muslims-161114153510342.html>.

6 Confrontations have continued since then: for example in October 2018, where IMN youth threw stones at the Nigerian army during a protest against the continued detention of their leader, Sheikh El-Zakzaky. The Nigerian army responded with live fire claiming at least three lives and injuring others; see 'Nigeria Arrests 400 Shi'a Muslims After Deadly Clashes' BBC (31 October 2018) available at: <https://www.bbc.com/news/world-africa-46042243>.

IMN were celebrating a ‘hoisting of the flag ceremony’ and mounted roadblocks at strategic locations on the highway approaching the location of the ceremony.⁷ On the same day, it is reported that the COAS was on his way from an event along the same highway and was prevented from passing through the roadblocks that had been erected by the IMN members. The Commission reported that the COAS attempted to peacefully negotiate his way through the roadblock, but eventually had to force his way through. The Commission further reports that the events of that day escalated when the Nigerian army received intelligence suggesting that, in response to the initial incident, the IMN was amassing weapons and was threatening to cause chaos in Zaria. Supposedly acting on this information, the Nigerian army conducted a ‘cordon and search operation’ throughout the various IMN compounds to maintain law and order, to recover the supposed weapons and to arrest the IMN leader on 13 to 14 December 2015.⁸ During this operation, the Commission reports that the IMN resisted, resulting in clashes between IMN supporters and the Nigerian army with some reported deaths. The Nigerian army also alleged before the Commission that their troops had come under attack by IMN members who used crude weapons such as bows and arrows, Molotov cocktails and catapults, and that their reaction therefore was in self-defence to protect themselves from imminent danger.⁹ The absence of the IMN meant that there was no alternative version of events put on record about what transpired during that period.

Other accounts of the same clashes contest the Commission’s version of events as published in the final report. Amnesty International, for example, carried out an investigation in February 2016, and reported that the Nigerian army did not provide enough evidence to substantiate their claim that the IMN attacked the COAS at the road block on 12 December. Their report also indicates that the degree of force with which the Nigerian army responded to the events in Zaria was not justified based on the evidence collected.¹⁰ According to their investigations, the Nigerian army were already strategically placed along the road leading to the compound of the IMN leader, El-Zakzaky, ahead of the roadblock incident. This contradicts the version put before the Commission by the Nigerian army,

7 *Report of the Judicial Commission of Inquiry into the Clashes Between the Islamic Movement of Nigeria and the Nigerian Army in Zaria, Kaduna State between 12th & 14th December 2015* (15 July 2016) p.2.

8 *Ibid.*, pp.2-3.

9 *Ibid.*, p.30.

10 Amnesty International, *Unearthing the Truth*. See also Human Rights Watch ‘Nigeria: Army Attack on Shia Unjustified; Independent, Impartial Probes Essential’ (22 December 2015) available at: <https://www.hrw.org/news/2015/12/22/nigeria-army-attack-shia-unjustified>.

which states that all their actions were reactive, in response to the IMN's refusal to grant passage to the COAS.

The Amnesty report provides further that although the IMN members had refused passage to the COAS in protest of the heavy army presence around their function, the amount of force used by the army in response to the IMN's actions was excessive, as members were not armed with lethal weapons.¹¹ This narrative further challenges the version captured in the Commission's report, which places the blame squarely on the actions of the IMN, and reports that the Nigerian army merely acted in defence to a perceived threat from the IMN. There is also no evidence in the Commission's report of any attempt by the military to de-escalate the situation in an attempt to save lives, and there is no explanation as to why a decision was made to use force, let alone lethal force, to disperse the crowd and clear the road rather than attempting other solutions to the immediate crisis.¹² It was evident from Amnesty's investigation that the army responded to a law enforcement situation with military force. They expressed deep concern that the military resorted to firing live ammunition against mostly unarmed protesters without any attempt to use less lethal means of crowd control.¹³

The Commission's report is not entirely clear as to how the cordon and search operation escalated to the point of the use of lethal force against several IMN members. It also does not give an indication of how exactly events unfolded and violence erupted to the point where the army deemed it necessary to use force that resulted in over 380 reported deaths. The report merely offers that 'several lives were lost' and property was destroyed as a result of this operation.¹⁴

Where the Commission's report is vague about the events in Zaria, Amnesty International's report offers detailed information based on several witness statements and site visits. According to several witness accounts, the army was deployed as early as 10:00 on 12 December 2017 at several of the IMN compounds where various members had gathered in anticipation of the religious ceremony to be celebrated later that day.¹⁵ That same afternoon, IMN supporters blocked a section of the road in front of Hussainya. They refused to allow passage to the convoy of the COAS prompting soldiers to open fire, with live ammunition, resulting in

11 Amnesty International, *Unearthing the Truth* p.7.

12 *Ibid.*

13 *Ibid.*

14 *Report of the Judicial Commission of Inquiry* p.3.

15 Amnesty International, *Unearthing the Truth* p.10.

at least seven deaths and several injuries. On the evening of 12 December soldiers surrounded the IMN compound in Hussainya and were also deployed to the other locations where IMN supporters were gathered. Confrontations ensued with soldiers shooting intermittently at the various IMN compounds throughout the night. According to witness accounts and interviews conducted with family members, dozens of IMN members were shot and killed by soldiers. On 13 December soldiers broke into the IMN Hussainya compound wounding hundreds of members. On this day soldiers also set fire to a building in the IMN leader's residential compound, where several wounded protestors were seeking shelter, killing several more members. One witness recounts that '[t]hose who were badly injured and could not escape were burned alive ... I don't know how many of the wounded were burned to death. Tens and tens of them. There was also a room full of dead bodies and more dead bodies in the courtyard. They too were burned in the fire.'¹⁶

On 14 December the Nigerian army announced the arrest of Sheikh El-ZakZaky and his wife, who were both seriously injured during the confrontation the previous day. After this announcement, the army petitioned the NHRC to investigate what they alleged was an attempted assassination of the COAS by members of IMN at the Hussainya road block on 12 December. Soldiers sealed off the areas around El-Zakzaky's compound and around the Hussainiya area for several days after the incident and during that time most of the evidence at the scenes of the clashes was destroyed. The army alleged that the structures demolished in the days following the clashes were built on public land, without the necessary permits. However, the covert nature of these demolitions raises questions as to the legality thereof as they should have been conducted in accordance with the law and postponed until completion of the investigation in order to preserve the evidence.¹⁷ Residents who had witnessed the shooting and seen bodies in the streets told Amnesty researchers that when they were allowed to return to the area, several days later, they found that the site of the compound had been cleared of all evidence. One resident stated that '[t]he streets were cleaner than usual and in the place where El-Zakzaky's compound used to be was just an empty space'.¹⁸

On the evening of 14 December Amnesty reports that hundreds of bodies were secretly buried in a mass grave in the Mando area of Zaria. This was also reflected in the Commission's report, which acknowledges

16 *Ibid.*, p.8.

17 *Ibid.*, p.24. See also Human Rights Watch, 'Nigeria: Army Attack on Shia'.

18 *Ibid.*

that on 11 April 2016 a Kaduna state official admitted before the Commission that two days after the massacre they had buried the bodies of 347 people in a mass grave.¹⁹ The Amnesty International report goes further by offering the exact location of the mass grave. This number remains an estimate but it is believed that the actual number of deaths is higher than those admitted thus far. This is due to the large number of IMN protestors reported missing since the 12 to 14 December 2015 incident that still remain unaccounted for, and are feared dead.

3 Setting up a commission of inquiry

3.1 The use of commissions of inquiry in Nigeria

Nigeria is a federal state meaning that, administratively, functions are separated at a national or federal level and a state level. Governments at both levels have the power to institute commissions of inquiry. Although there is an overarching Tribunals of Inquiry Act in Nigeria, which empowers the President to constitute such bodies and which regulates their conduct, commissions of inquiry may also be instituted according to state law where the matter under investigation falls within such jurisdiction. The President is thus only empowered to institute a commission if the issue concerns an organ of the federal government or arises in the federal capital territory.²⁰

Commissions of inquiry at a state level have the same procedures, powers and functions as described by the Tribunals of Inquiry Act. Sections 1 to 3 of this Act provide the procedure for the institution of such commissions including membership, the publication of terms of reference, and the reporting of the findings of the Commission. Section 3 affirms the impartiality requirement of all members of the Commission and according to section 4, commissions are free to regulate their own proceedings. Section 5 sets out the powers of such tribunals, which include the power to procure evidence as required and examine witnesses. They also have the power to summon witnesses and to admit any evidence regardless of whether it would be admissible in a court of law.²¹ Section 5(g) also grants commissions the power to carry out inspections *in loco*.

Several commissions of inquiry have been constituted in Nigeria at both federal and state level. It was contended by one participant that,

19 *Ibid.*, p.18.

20 Tribunals of Inquiry Act [1966] (Ch.447 of the Laws of the Federation of Nigeria, 1990) sec.21.

21 *Ibid.*, secs.5(b), 5(c).

given the direct implication of the Nigerian army in the events under consideration, this specific Commission should have been instituted under federal capital territory law.²² Yet, the events that led to the clashes and ultimate deaths of several IMN members during that period occurred in Kaduna State. The Kaduna State government was further implicated in the cover-up of the deaths through the admission of the state official that testified before the Commission that they had received 349 bodies from the Nigerian army, which they buried in a mass grave on 14 December. Upon review of the various commissions of inquiry that have been constituted in Nigeria, it appears that the competency to institute a commission of inquiry into certain events is linked to the location of underlying events rather than the subject(s) thereof or parties thereto.

There seems to be a ready resort to the appointment of commissions of inquiry in Nigeria, yet the noted impact thereof has been limited. Few of the reports of commissions of inquiry have actually been released and made public and even fewer have been met with an official government response by way of a white paper. Indeed, there are several examples of commissions of inquiry in Nigeria that are considered to have been ineffective. One such example is the Human Rights Violations Investigations Commission that was constituted to investigate the causes, nature and extent of human rights violations between 15 January 1966 and 28 May 1999, commonly referred to as the Oputa Panel. This Commission was chaired by former Supreme Court Justice Chukwudifu Oputa and was loosely modelled on the South African Truth and Reconciliation Commission. It had as its objective reconciliation, based on an honest knowledge of the truth of Nigeria's past.²³ This Commission received over 10 000 petitions and heard approximately 340 cases. However, this Commission was considered unsuccessful in achieving its objectives because several of those who were subpoenaed to appear and give testimony, including several high-ranking military and government officials, either failed to appear at all or were unrepentant and uncooperative.²⁴

Another example of the historical failures of commissions of inquiry in Nigeria is the series of commissions constituted to investigate the clashes in Jos, Plateau State. Plateau State in Nigeria has been the site of recurring ethno-religious violence that first erupted in 1994. The causes of the violence have been linked to, among others, claims to ethnic superiority

22 Interview with the author, October 2016.

23 F. Oduro 'The Canadian Truth and Reconciliation Commission: Lessons from Comparable Experiences in Nigeria and Ghana' *Canadian Journal of Native Studies* 32(2) (2012) pp.103–120.

24 *Ibid.*

between the various dominant tribes of the area who are fighting for recognition of their political, economic, religious and social identity.²⁵

The earliest commission constituted to investigate the root causes of the clashes in Jos was the Fiberesima Panel led by Justice Aribiton Fiberesima.²⁶ After hearing more than 50 witnesses and reviewing a wealth of other material, this Commission made several recommendations including the imposition of sanctions against all those indicted by the inquiry. However, these recommendations were not implemented nor even officially reviewed by the government through a white paper. This failure by the state to act upon the recommendations resulted in sporadic clashes which eventually culminated in a week-long crisis in Jos in 2001, claiming at least 1 000 lives and the destruction of property valued at N328 278 659.80 (nearly \$2,75 million).²⁷ The Plateau State governor then instituted a commission of inquiry following the 2001 clashes headed by Justice Niki Tobi. This Commission was similar to the Fiberesima Commission in mandate, findings and recommendations.

The underlying issues characterising this conflict remain largely unaddressed, and between 1994 and 2010 there were at least seven commissions of inquiry on the crises in Plateau State, four of which were held at the state level and three at the federal level. Of these commissions, only the Fiberesima and Niki Tobi final reports were made public. The main criticism levelled against the Fiberesima and Niki Tobi Commissions of Inquiry was that they were discriminatory in composition, specifically that most commissioners were Christian, and thus biased in their processes and outcome.²⁸ Further, the chairmanship of both commissions was questioned as the justices that led them were also members of the judiciary in Plateau State at the time, thus raising questions of independence and the extent to which it was possible for them to remain impartial. Finally, the ethnicity of the commissioners was also raised as a point of contention: it was argued that as members of the same minority groups that were party

25 Nabila Isa-Odidi, 'Ethnic Conflict in Plateau State: The Need to Eliminate the Indigene/Settler Dichotomy in Nigeria' Washington College of Law, Human Rights Brief (2004).

26 White paper on the report of the Commission of Inquiry into the riots of 12 April 1994 in Jos Metropolis (September 2004) available at: <http://www.r2knigeria.org/index.php/access-to-the-reports-of-judicial-commissions-of-inquiry-on-jos-crises?download=29:fiberesima-whitepaper-report> p.6.

27 *Ibid.*, p.10.

28 For a comparative analysis of the findings of each Commission, see Right to Know Nigeria Review of the Judicial Commissions of Inquiry on the Conflicts in Jos, Plateau State and the Government White Papers on these Reports (Abuja: Right to Know (R2K) 2010).

to the events under consideration, it would be difficult for them to remain impartial.²⁹

These critiques have resulted in a general perception in Nigeria that commissions of inquiry are ineffectual despite the government's continued reliance on them. They are considered an attempt by government to cover up its own complicity in events under examination.³⁰

3.2 Why set up a Kaduna Commission?

As noted above, one of the controversies surrounding the creation of the Zaria Commission of Inquiry was the fact that one of the parties was the Nigerian army, a federal institution. There was pressure on the federal government to respond to the events that occurred in Zaria, based on its history of conflict with the IMN. This pressure was both national and international as there was a widespread acceptance that there needed to be some form of accountability for the deaths that had occurred.³¹ Internationally, there was pressure from various human rights organisations that called for an inquiry into the events.³² Iran is also said to have pressured Nigeria to respond, which is significant as it is a country perceived to be the leading voice for the Shi'a Muslim movement of which the IMN is a part.³³ Moreover, nationally, the long-standing tension between the IMN and other communities had escalated to such an extent that it was believed that an investigation was needed to find a solution.³⁴ Several observers also highlighted the fact that the Zaria Commission may have been instituted because of a natural comparison with the circumstances that had triggered the Boko Haram insurgency.

29 *Ibid.*

30 *Ibid.*

31 See, for example, Human Rights Watch 'Nigeria: End Repression of Shia Group' (14 December 2016) available at: <https://www.hrw.org/news/2016/12/14/nigeria-end-repression-shia-group>; see also European Parliament Resolution on Nigeria (2016/2649) available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2016-0478&language=EN>.

32 'Reps Meet Buratai Over Zaria Clash' *Daily Trust* (23 December 2015) available at: <https://www.dailytrust.com.ng/news/general/reps-meet-buratai-over-zaria-clash/125702.html>.

33 S. Schwartz 'Iran Meddles in Nigeria's Sectarian Strife' *Weekly Standard* (23 December 2015) available at: <http://www.weeklystandard.com/iran-meddles-in-nigerias-sectarian-strife/article/2000331>.

34 For background on these tensions based on interviews, see Amnesty International, *Unearthing the Truth* pp.15–17.

Finally, it may well be that the Commission was born out of the need by the federal government to distance themselves from the killings.³⁵ The Kaduna State government's hand was almost forced by the silence of the federal state government to step up amidst growing pressure and criticism of the manner in which the clashes were handled. However, it has also been conversely argued that the Kaduna State government instituted the Commission of Inquiry before the federal state had a chance to do so, in order to shape the narrative around what had occurred in its favour.³⁶ Regardless of which view one adopts, it is clear that there were national and international calls on both the national and regional governments to ensure that there was accountability for the deaths.

Whether constituting a commission of inquiry for these events was the most appropriate response remains a contested issue. There were several possible responses that may have been adopted to investigate the clashes that occurred in Zaria, including the possibility of criminal investigations into the deaths that occurred or a military tribunal. Moreover, other investigatory mechanisms were also constituted before the Zaria Commission. The Nigerian Senate established an *ad hoc* committee to investigate the killings in Zaria on 16 December 2015. The Nigerian NHRC also announced a five-man panel to investigate the clashes in Zaria on 21 December 2015.³⁷ This panel only began its work on 19 January 2016.³⁸ In terms of chronology, the Kaduna State Commission of Inquiry thus was the last to be constituted, on 29 January 2016, although it had been announced in mid-December 2015. The question in this respect is whether it was necessary for the Kaduna administration to set up this Commission of Inquiry when there already was an initiative by the NHRC and the Nigerian Senate underway.

While it is true that the Kaduna government could have presented evidence before the National Human Rights Commission panel, the existence of that body did not preclude it from also launching its own inquiry. Due to the location of the clashes, the Kaduna State government may have felt it important to launch its own investigation to establish the facts of what had occurred in its territory. In this way, the fact-

35 Interview with the author, October 2016.

36 *Ibid.*

37 I. Nnochiri 'NHRC Sets Up Probe Panel' *Vanguard Times* (16 December 2015) available at: <https://www.vanguardngr.com/2015/12/armyshiite-clash-nhrc-sets-up-probe-panel/>.

38 Nigeria National Human Rights Commission *Annual Report* (2016) available at: <http://www.nigeriarights.gov.ng/downloads/NHRC%202016%20ANNUAL%20REPORT.pdf> p.34.

finding function of the Commission appears to have been of paramount importance for the state government.

3.3 The scope of the Zaria Commission's mandate

The Zaria Commission was mandated to investigate the facts surrounding the history of the clashes in Zaria leading up to the events of 12 to 14 December and to offer a report and recommendations based on their findings. The terms of reference as published by the Kaduna State government were:

- a. to determine the immediate causes of the clashes;
- b. to examine the historical circumstances and contributory factors of the clashes and to ascertain the number of persons killed, wounded or missing during the clashes; and
- c. to identify the actions of persons, institutions, and federal and state actors, and determine whether such actions were necessary, appropriate and sufficient in the circumstances in which they occurred.

The Commission was officially established on 16 January (one month and two days after the events) and inaugurated on 29 January 2016 (one month and 15 days after the events). The final report was handed over to the governor of Kaduna State on 15 July 2016 (seven months and a day after the events).

The report indicated that alongside the above-published terms of reference, the Commission's mandate had also included the following objectives:

- a. to determine the evolution of the IMN, its legal status, organisation, 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;
- b. to review all other factors, issues or matters, including the alleged involvement of foreign and domestic actors or their influence or instigation, that may have contributed to the incident or may conduce to such incidences in the future and make recommendations thereto;
- c. to investigate any other matter incidental or relevant to these terms of inquiry which in the Commission's view should be investigated and make any other pertinent recommendations that it deems necessary for the purpose.³⁹

39 *Report of the Judicial Commission of Inquiry* pp.4–6.

The extended list of terms of reference also included that recommendations were to be made:

- a. to the Kaduna State government and the federal government as to direct and indirect responsibility for any acts of commission or omission;
- b. as to actions to be taken to ensure that administrative or criminal responsibility is further determined by the appropriate administrative or judicial authorities for any identified acts or omissions;
- c. as to actions to be taken, policies to be developed and implemented to ensure that acts and omissions that may have contributed or led to the clashes are pre-empted entirely or where they occur, their negative effects are mitigated in future; and
- d. [as to] [a]ny matter for prosecution, further investigation or the convening of a separate inquiry to the appropriate Law Enforcement Agency, Government Department of Prosecutor regarding the conduct of a certain person or persons.

The circumstances under which the original terms of reference were expanded to include those listed in the final report are not clear, as there is no discussion thereof in the literature or the Commission's report. It may only be assumed that this was done by the Commission itself in line with the powers granted to the convenor of a commission of inquiry who can by order, whenever deemed desirable, add to, alter or revoke the instrument or the terms of reference of a tribunal.⁴⁰ Amnesty International expressed concern about aspects of the terms of reference, especially the question of the organisational evolution of the IMN. The relevance of such a query was questioned as it seemed far broader than needed for the Commission to make findings in relation to the incident in Zaria.⁴¹

4 Effectiveness of the Commission

As with other studies in this collection, an important assessment of the Zaria Commission will be the extent to which it was able to provide an effective investigation into the violations of the right to life that were alleged. As has already been mentioned, this Commission was more successful than many others in Nigeria, in that it was able to reach the end of its mandate, to finalise and to publish its report; but there are a number of other indicators of effectiveness.⁴²

40 Tribunals of Inquiry Act, sec.2(b).

41 Amnesty International, *Unearthing the Truth* p.13.

42 The effectiveness of a commission was assessed on the basis of a combination of the following factors, depending on the nature of the inquiry: the independence and impartiality of the commission; its sources of funding; the type of investigatory powers

Indeed, there are certain other aspects of the Commission's proceedings that may have impeded its full effectiveness, for example the allegations of partiality levelled by the IMN, the selective exercise of certain of its powers and its interaction with other accountability mechanisms. These are discussed in detail in the parts that follow.

4.1 Independence and impartiality

Among those interviewed for this study, observers were of the opinion that the Commission operated independently, in that there was no indication of any interference by the state government or any of its representatives in the conduct of the Commission's business. The commissioners that were interviewed all affirmed that they had experienced no interference from government or any of the parties to the proceedings and they were able to conduct the hearings without issue.

Beyond direct interference, a contributing factor to the effective independence of a commission of inquiry includes the availability of sufficient financial and human resources. According to one commissioner to whom we spoke, the Commission was sufficiently resourced which ensured that they were able to effectively carry out their mandate.⁴³ The state government of Kaduna fully financed the Commission and while there is no indication of the actual amount of money that was made available, it appears to have been sufficient to carry out their various hearings and meetings, and whenever a request was made for funds to facilitate their work it was made available by the government of Kaduna.⁴⁴

However, the challenge for this Commission was one not so much of independence but of impartiality. Professor Etannbi Alemika has opined more broadly, with reference to the clashes in Plateau State, that a commission of inquiry's credibility not only is affected by the ethno-religious factors but also by the tier of government constituting the commission of inquiry:

The general perception is a commission of inquiry from the state government will be pro-indigene/Christian, but if it is by the federal government, then it

it enjoyed; aspects of security including witness protection; the extent to which the processes whereby the commission undertook its work were transparent and timely; the levels of participation it encouraged; whether it published its report; the extent to which its findings and recommendations were responsibly used; and its interplay or synergy with other accountability mechanisms.

43 Interview with the author, October 2016.

44 *Ibid.*

will be pro-Hausa Muslim. This has accounted to the Hausa people many times boycotting some of these things involving the state government.⁴⁵

Due to the unique religious/tribal social organisation of Nigeria it was important for the state government of Kaduna to strike the right balance in respect of the composition of the members on the Commission.

The Commission had 14 members and was chaired by Justice Mohammed Lawal Garba from the Court of Appeal in Port Harcourt, who was appointed by the governor of Kaduna State. The secretary of the Commission was Dr Bala Babaji, director of the Centre for Islamic Legal Studies. There were several academics on the panel, including Prof Salihu Shehu (Bayero University, Kano); Prof Umar Labdo (Northwest University, Kano); Prof Auwalu Yadudu; Prof Ibrahim Gambari; and Dr Jibrin Ibrahim. From intelligence and security were Mr Afakriya Gadzama (former Director-General of the Department of State Services (DSS)); Brigadier-General Dr Aminun-Kano Maude (rtd); Major-General Alexander Anjili Mshelbwala; and Captain Desiree Deseye Nssirim (rtd). Other commissioners included Malam Salihu Abubaker (Ahmadu Bello University, Zaria); Mrs Khadija Hawaja Gambo (gender rights activist and social entrepreneur) from civil society; and Mr Bilya Bala from the private sector. The entire Commission thus consisted of Nigerians, and of the 14 commissioners, only two were women. The Commission was well represented in terms of diversity of expertise, including five academics, two representatives from the army and one representative from the police force. It seemingly was representative in terms of expertise but, as argued above, the deeply-seated ethno-religious divisions manifest in Nigerian society means that such must be considered in an assessment of the impartiality of the Commission.

However, the IMN alleged that the Commission was partial and would never produce an objective and balanced report. In a press conference held on 29 March 2016 the IMN issued a statement addressing matters arising from the clashes in Zaria. It registered its dissatisfaction with the manner in which the federal and state government had conducted the investigations into what transpired during the clashes. Included in its statement was

45 Remarks of Prof Etannabi Alemika during a panel discussion on 'Reconstruction and Rehabilitation', part of a conference on 'Memory and Nation Building: Biafra 50 Years After ... A Sober Reflection' at the Yar'Adua Centre, Abuja (25 May 2017) available at: <http://yaraduafoundation.org/biafra50/prof-etannabi-alemika-reconstruction-and-rehabilitation.html>.

opposition to the composition of the Commission, citing the inclusion of certain individuals it viewed as problematic.⁴⁶

Some of the members whose inclusion in the Commission was questionable included, for example, Professor Umar Labdo who had made certain public utterances against the IMN. In a detailed press release, the IMN argued that he ‘hated [Shi’ite Muslims] with a passion’ citing the following phrase from his book, *Yan Shi’a Da Akidojinsu*:

Shi’ite schools should be closed because it is from there they spread their deviant beliefs. Shi’ites should not be allowed to teach in public and private schools including universities. Their properties should be confiscated, like their houses. There should be an investigation on their finances especially from foreign countries like Iran and Lebanon.⁴⁷

In his other book, *Bacin Tafarkin Yan Shia da Akidojinsu*, he had stated:

To the generality of Muslims, the duty over their [Muslims’] heads is to ensure that they all contribute, each according to his strengths, in fighting this group. Those in authority, scholars, masses, the wealthy, each must all contribute his quota to check this spread of Shi’a.⁴⁸

Prof Salihu Shehu’s appointment was also challenged on the basis that he was a vocal anti-Shi’a public figure. The IMN claimed that Prof Shehu in his lectures, presentations and other public interactions had verbally attacked the Shi’a movement and its leadership, including statements such as that

Shi’ites are getting more comfortable in many countries ... As we can clearly see in many countries like Nigeria, they have no respect for the rules and regulations of the country, they do whatever they feel like doing without thinking of the impact or the implications of their actions.⁴⁹

According to one of the commissioners interviewed, the proceedings were not influenced by any ethnic or religious biases, and according to another, the different strong opinions within the group were all considered and balanced during the process of writing the report.⁵⁰ However,

46 ‘Press Conference by the Islamic Movement’ (29 February 2016) available at: https://islamicmovement.org/index.php?option=com_content&view=article&id=2514.

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 Interviews with the author, October 2016.

the critique levelled by the IMN was further buttressed by certain civil society organisations that questioned whether this panel would ever call the perpetrators to account because of its composition. A former head of Nigeria's National Human Rights Commission was quoted in the international press as suggesting that the selection procedure for the members of the Commission was not fair as it was not consultative and failed to take into account the concerns raised by the IMN with respect to the presence of certain members that had evidenced bias towards the movement.⁵¹

The terms of reference of the Commission may also have been problematic because they seemed to presuppose some sort of culpability by the IMN. This is with specific reference to those aspects of the terms of reference that required the Commission to focus its energies on investigating various aspects of the IMN and the extent to which these contributed to the events under investigation.

It was on the basis of this critique, as well as the continued imprisonment of its leader, Sheikh El-Zakzaky, that the IMN opted to not participate in the proceedings of the Commission until the commissioners implicated as biased had recused themselves.⁵² According to the IMN, the continued presence of those individuals on the Commission was reflective of an already-established position that was neither impartial nor objective, making it impossible to conduct an effective investigation into the events in Zaria.⁵³

The government of Kaduna did not respond to these concerns, and the Commission proceeded with the same list of commissioners and the same terms of reference, ignoring a credible challenge to their impartiality. This is not to argue that the impartiality of a commission of inquiry will be negatively impacted in all instances where one party to the proceedings is absent. However, in this specific instance the failure by the state government meaningfully to engage with the concerns of the IMN prior to the actual institution of the Commission perhaps is indicative of a preconceived bias in the conceptualisation thereof.

To its credit, the Commission acknowledged the impact of the IMN's absence on the findings and recommendations, and highlighted the

51 Philipp Sandner 'Inquiry Hearing into Nigerian Military Over Shiite Killings Finish' *Deutsche Welle* (29 April 2016) available at: <http://www.dw.com/en/inquiry-hearings-into-nigerian-military-over-shiite-killings-finish/a-19224788>,

52 Interviews with the author, October 2016.

53 'Press Conference by the Islamic Movement' (29 February 2016).

measures taken to mitigate such absence, including the admission of several expert testimonies that expounded on their history and development. However, these submissions were silent on what had transpired on the day of the clashes: a large part of the factual narrative of the final report therefore is missing.

Although the perceived bias of the Zaria Commission was well known and vocally expressed by both the IMN and several other commentators, as shown above, a respondent closely involved with the Commission told us that they maintained the position that the perspectives of three out of the 11 members who held such views would not be of such impact to influence the rest of the members. However, impartiality concerns about the Commission extend beyond these three members, and also bring into question the appointment of other commissioners who were in the military, former DSS or police.⁵⁴

4.2 Investigatory powers

The investigative powers of this Commission are particularly important because of the absence of one of the parties to the proceedings. Although the IMN's choice to not participate in the proceedings to a certain extent was beyond the Commission's control, the Commission could potentially have taken steps to mitigate this absence and offer a more balanced version of events. The failure to do so may have ultimately undermined the credibility of the Commission.

The powers of the Commission were provided for by the Tribunal of Inquiry Act and included a wide range of powers such as the power to receive evidence, written or oral, and to require such evidence to be adduced under oath. The Commission also enjoyed the power of subpoena and could summon any person to appear before them to give evidence or to produce any document necessary for the proceedings of the Commission. It also had the power to admit into evidence any written or oral testimony, regardless of whether it would have been admissible in a civil or criminal matter. The Commission could conduct on-site visits, and access any property for purposes of obtaining evidence that would be useful to the investigations.⁵⁵ The Commission therefore had a vast range of powers available to it that would be useful in soliciting evidence for purposes of its proceedings.

54 Interview with the author, October 2016.

55 See Tribunals of Inquiry Act sec.5.

However, the Commission chose not to exercise the full extent of its powers, which may have been useful in bolstering the already flailing credibility of this mechanism. The most obvious example of this was its failure to subpoena the federal government to produce Sheikh El-ZakZaky, leader of the IMN, to give evidence before the Commission. It was well known that he was in the custody of the DSS. However, it is an open question whether El-ZakZaky would have given testimony if he had appeared before the Commission, as the IMN had refused to participate in the Commission because of its alleged partiality, or whether this would have escalated the conflict. However, the Commission still had an option to exercise this power and cause the DSS to present Sheikh El-Zakzaky to the proceedings. This would have gone some way in challenging the allegations of impartiality levelled against the Commission at its constitution.

The Commission also did not interpret its terms of reference to include reliance on forensic evidence. This would have enabled it to make more detailed findings as related to the killings that occurred during the clashes. This was particularly relevant in light of the competing figures given for the number of people that died during that time and the causes of death. The government of Kaduna said that it had buried 349 corpses in a mass grave on the outskirts of town. The Nigerian army, on the other hand, insisted that there were seven casualties. Further, under the Coroner's Law of Kaduna State, a death certificate cannot be issued until a cause of death has been ascertained and normally there can be no burial of the dead if the identity of the deceased has not been ascertained.⁵⁶ Anonymous burials are permissible in instances where relatives of the deceased cannot be found and the continued storage of the deceased would cause a public health concern. Yet, there was no indication from the Kaduna government that such a determination had been made; the decision was rather taken to bury the bodies received from the army in a mass grave.⁵⁷

When questioned about the lack of use of forensic evidence, one of the commissioners indicated that from the Commission's perspective, it was sufficient to have witnesses give testimony under oath; there was no need independently to investigate the veracity of the testimony received.⁵⁸ In the commissioner's view it was enough that if the testimony turned out to be false, that would trigger possible prosecution for perjury.⁵⁹ Time constraints were also cited as a reason that the Commission 'was not able

56 See Compulsory Registration of Births and Deaths Act secs.17–20 (Part III).

57 *Report of the Judicial Commission of Inquiry* p.57.

58 Interview with the author, October 2016.

59 *Ibid.*

to do everything'. The Commission was clear about its shortcomings and called on other bodies to take up the issues that it could not conclusively assess.⁶⁰

Yet the terms of reference of the Commission included ascertaining the number of persons killed, wounded or missing during the clashes. Arguably, for the effective realisation of its mandate according to this specific requirement, the Commission had a duty to invoke the full extent of its powers in order to confirm the number of deaths that had occurred during that period. The state was also mandated in terms of its human rights obligations concerning the arbitrary deprivation of life. According to these principles, the state has a duty to establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons where such disappearance may be as a result of a violation of the right to life.⁶¹

The Commission's choice of not carry out forensic investigations to ascertain the identities of those buried by the Kaduna State government was a failure to consider a fundamental element of accountability, namely, the identification of those who suffered the harm. This not only was a part of its mandate according to the terms of reference, but also a duty that vested as a result of the state's various human rights obligations to protect the right to life.

4.3 Public participation

The nature of the Commission's work was highly formal: it was to receive evidence through memoranda and incident reports from specifically-identified parties and from those who had made an application to submit evidence. Both the IMN and the Nigerian army were identified as special direct parties, and asked to submit memoranda.⁶² The formality of the procedures to submit information to the Commission may well have

60 *Ibid.*

61 See UN Human Rights Committee, General Comment 6: Article 6 (Right to Life) (1982) paras.3–4. Also see African Commission on Human and Peoples' Rights, General Comment 3: The Right to Life (Article 4) paras.7, 38.

62 Relevant stakeholders to submit incident reports or memos were the Inspector-General of Police; the Director, State Security Service (the official name of DSS); Director Military Intelligence; Commandant-General, Nigeria Security and Civil Defence Corps; National Emergency Management Agency; State Emergency Management Agency; Ahmadu Bello University Teaching Hospital; Gambo Sawaba General Hospital, Zaria; Ahmadu Bello University, Zaria; Federal College of Education, Zaria; Zaria Local Government Council; Sabon Gari Local Government Council; Zazzau Emirate Council; Jama'atu Nasril Islam; Nigeria Supreme Council for Islamic Affairs; and Gyallesu Community Association, Zaria. See *Report of the Judicial Commission of Inquiry* p.8.

contributed to the weak levels of participation in the hearings.⁶³ There in fact were two rounds of submissions of memoranda in an effort to boost the numbers of those who were to appear, but not with great success.⁶⁴ For a country with such a vibrant civil society, their absence from the proceedings was clearly notable. According to the commissioners, in retrospect, attempts were made to engage civil society, but they did not present the required memoranda for consideration and thus could not appear before the Commission to adduce any evidence.⁶⁵

The fact that the IMN, as one of the parties to the proceedings, was absent from the Commission had a major impact. The report highlights in detail its version of events that led to the breakdown of communication with the IMN, culminating in their refusal to participate in any Commission hearings.⁶⁶ The IMN was clear that it acted as a unit and therefore no member would speak to the Commission without clearance from the leadership. The Commission tried to balance this out by asking individuals to testify at random about surrounding events. It was the view of the Commission that all attempts had been made to ensure that the IMN would participate.⁶⁷ According to a participant closely involved with the Commission, the main challenge in securing the participation of the IMN in the proceedings of the Zaria Commission was the continued detention of their leader, Sheikh El-ZakZaky. The IMN was willing to appear before the Commission if its religious leader was brought before the Commission and its counsel granted access to him before his appearance. This again raises the question of whether the Commission indeed did exhaust its options to overcome this serious flaw in its investigative capabilities.

As noted above, the NHRC at the same time was running an inquiry into the same matter. It constituted a five-man panel in response to a complaint lodged by the COAS on 14 December alleging that the IMN had made an attempt on his life and attacked his convoy, leading to the clashes. The mandate of this special investigation panel extended beyond the legality or illegality of the events in Zaria and focused on the overall human rights violations that occurred during that period.⁶⁸ Aside from its

63 *Report of the Judicial Commission of Inquiry* p.9.

64 Interview with the author, October 2016.

65 *Ibid.*

66 *Report of the Judicial Commission of Inquiry* pp.10–19.

67 *Ibid.*, p.19.

68 Evelyn Okakwu 'Zaria Massacre: Human Rights Commission Inaugurates 5-Man Probe Panel' *Premium Times* (21 December 2015) available at: <https://www.premiumtimesng.com/news/top-news/195531-zaria-massacre-army-chief-petitions-human-rights-body-wants-attempt-on-his-life-probed.html>.

broad focus on human rights, the panel was to investigate the immediate and remote causes of the violations and to ascertain the number of deaths that occurred and the value of property destroyed. They were also to offer recommendations on appropriate remedies for the victims of the various violations and recommendations on how to prevent future violations.⁶⁹

This panel began its work on 19 January 2016, and therefore preceded the Kaduna State judicial inquiry into the clashes in Zaria by only a few days. It is not clear why the government of Kaduna did not submit itself to the investigations of the human rights panel but rather chose to conduct its own investigation. This may have been a tactical move to ensure that the Kaduna State government controlled the narrative produced around the clashes in a manner that favoured them.⁷⁰ It may also have been because they were not satisfied with the broad human rights focus of the NHRC investigation and wanted to conduct their own inquiry focusing specifically on, among others, the role of the IMN. No mention is made of the NHRC panel in the report of the Commission of Inquiry.⁷¹ The Panel found that the immediate cause of the incident that sparked the eventual clashes on 12 December 2015 was the blockade of the public highway by members of the IMN. The panel further found that the specific rights violated during the clashes of 12 to 14 December 2015 were the right to life and the right to freedom of movement.⁷² The liability for these violations, however, is not ascribed to any particular party. Nevertheless, the panel recommended that the families of those that had lost their lives unjustifiably during the clashes, including members of the armed forces, are entitled to compensation from the federal government.⁷³

4.4 Timing of the Commission

The Commission was initially granted six weeks within which to investigate and report after the first public sitting. However, this deadline was not met and the Commission ended up sitting for over six months. This delay was largely due to the mediation process with the IMN, to facilitate their participation in the proceedings. After the decision had been made

69 Nigeria National Human Rights Commission Annual Report (2016) p.35. The Special Investigation Panel obtained memos from many stakeholders, including the Nigerian army, members of the IMN, Council of Ulmars (Kaduna State Branch), the Nigerian police force, and the Department of State Security. The Panel also visited some other stakeholders, including the Military Depot Commandant, Zaria, the Ahmadu Bello University Teaching Hospital, Zaria, and the Nigeria Security and Civil Defence Corps.

70 Interview with the author, October 2016.

71 *Ibid.*

72 Nigeria National Human Rights Commission Annual Report (2016) p.36.

73 *Ibid.*

to proceed with the inquiry, the government allowed the Commission to submit when they felt they had completed the work. The Commission handed over its final report to the governor of Kaduna State in July 2016.

By comparison, this Commission of Inquiry was quite short-lived, as it was able to move through its work quickly and submit its final report within six months of its inception. This nonetheless represented a considerable delay when contrasted with its original mandate, which was supposed to be six weeks. The long lapse between the announcement of the Commission and the time it actually began work may have had an impact on certain aspects of its operation, including most notably on its investigations and participation. Perhaps there was some momentum lost during the Commission's negotiation period that caused interest in their work to wane. This was most clearly evidenced by the fact that the Commission had to extend the deadline for submission of memoranda because of the poor levels of response.⁷⁴ The amount of time that had lapsed may also have affected the Commission's ability to collect data, as the events no longer were fresh in the minds of possible witnesses. The sense of urgency with which commissions are constituted seemed to be missing from this inquiry juxtaposed against the Kenyan CIPEV which lends certain aspects of its effectiveness to the short timelines within which it had to carry out its mandate.

4.5 Finalisation of the report and its findings

The last day of the Commission proceedings was 27 April 2016.⁷⁵ The Commission submitted their final report to the governor of Kaduna State, Malam Nasir El-Rufai, on Friday 15 July 2016. On receipt of the Commission's report, on 22 July, the Kaduna State government appointed a White Paper Drafting Committee to draft the official response to the findings.⁷⁶ According to the report, the Commission contracted two experts to write a draft of the report for their consideration.⁷⁷ Our interviews, however, revealed that various members of the Commission substantively revised the initial draft, working on particular sections of the report at different times to ensure that it was completed on time.⁷⁸ Perhaps this accounts for the uneven tone of the report and further for the seemingly

74 *Report of the Judicial Commission of Inquiry* p.9.

75 *Ibid.*, p.20.

76 Zaria Judicial Commission of Inquiry White Paper p.vii, citing letter SSG/KDS/508/Vol. T4/100 (22 July 2016).

77 *Ibid.*, p.10. The experts were Professors Muhammed Tawfiq Ladan and James B. Kantiok of Amadu Bello University, Zaria.

78 Interview with the author, October 2016.

disjointed nature of the findings. Each report chapter seems to read as a separate section rather than one section of a much larger narrative on what transpired during the events under investigation.

The Kaduna State government subsequently published the report on its website. However, the Commission's report was labelled top secret despite its open access publication on the internet. None of the commissioners to whom we spoke was able to explain why such a reference was made as their accounts reiterate that it was not labelled as such when submitted to the governor of Kaduna.⁷⁹ Moreover, several annexes that were referenced in the report are not actually attached to the version that was made available.

In the report the Commission responds to each term of reference in a separate chapter, offering a summary of the evidence and relevant findings. Based on the evidence presented before them, the Commission concluded that the most immediate cause of the clashes of 12 to 14 December 2015 between the Nigerian army and the IMN was the act of the road barricade mounted by the IMN. This was a perceived act of aggression against the COAS prompting the army to respond in the manner that they did.⁸⁰ The Commission also found that the IMN had been steadfast and deliberate in refusing to recognise the legitimacy, authority and the Constitution of the Federal Republic of Nigeria. They also adduced that the IMN had a long tradition of confrontation with its immediate neighbours, the Sunni Muslim community, and were disrespectful to other surrounding Muslim groups by engaging in insulting and provocative preaching routines and making attempts to take over their mosques.⁸¹

Drawing from the testimonies brought before it, the Commission found that there was manifest disrespect for the beliefs and practices of Sunni Islam deeply held by the IMN, thus pointing at a core religious factor as a main contributor to the clashes in Zaria from 12 to 14 December.⁸² The Commission went further to identify an international dimension to the religious tension, reporting that anecdotal evidence pointed to a close association between the IMN and militant Shi'ite movements, particularly the Hezbollah group in Lebanon, from which it had received economic and political support. It was submitted before the Commission that the Iranian President had sought direct intervention with the Nigerian President, Muhammadu Buhari, demanding the release

79 *Ibid.*

80 *Report of the Judicial Commission of Inquiry* p.28.

81 *Ibid.*, p.46.

82 *Ibid.*, p.52.

of Sheikh El-Zakzaky.⁸³ This allegation was neither proved nor disproved but seemingly was accepted as true based on the fact that it was included as a contributing factor to the report's findings.

The Commission justified its inability to determine the causes of death of the deceased victims due to the mass burial that was conducted by the Kaduna State government in contravention of the state Coroners Law. It further found that this mass burial (of male and female victims together) was in contravention of Islamic law and Rule 115 of the Geneva Convention (though it offered no explanation of why it contended the Geneva Convention might be relevant to the situation). It failed to justify its refusal to invoke certain of its powers that would have allowed it to determine the causes of death and the identities of those buried in line with international human rights law obligations on accountability for violations of the right to life. The Commission, however, found members of the IMN culpable for the death of an army officer, Corporal Dan Yakubu, and made recommendations for further investigation and prosecution.

Another finding of the Commission was that the Nigerian army had deployed disproportionate force in Zaria, contrary to its own rules of engagement and to 'the international standard of proportionality'.⁸⁴ In the absence of detailed evidence of how the operation took place, the Commission based this conclusion in part on the number of casualties, although it also rebuked the army for its failure to keep a proper record of the number of casualties, even on its own side. The Commission also effectively criticised the army for a failure to exercise precaution, finding shortcomings in their intelligence, as they knew that the COAS would be passing through the region on that day.

However, the detail of exactly how or why there were failings was left vague. The report referred to other inquiries, noting that

[g]oing by the memo submitted by the Nigerian army, the Board of Inquiry instituted by the General Officer Commanding, 1 Division, Kaduna and another by the Chief of Army Staff; it did appear that the Nigerian army did not adhere strictly to the provisions of its Rules of Engagement and the Code of Ethics during the operation.⁸⁵

The Commission said that the army had not been able to convincingly prove that the killings 'were necessary, appropriate or justified, considering

83 *Ibid.*, p.53.

84 *Ibid.*, p.85.

85 *Ibid.*, p.87.

the calibre and number of weapons recovered from the group'. They underlined that according to the army's own evidence, only one firearm (a locally-made pistol) was recovered from the house of the leader of the IMN, Sheikh El-Zakzaky, while the other weapons recovered were catapults, knives, swords and bows and arrows.⁸⁶ The Commission commented that '[t]hese could hardly justify the force and intensity of the two days army show of superior fire power'.⁸⁷

Although the Commission went to great lengths to explain why it chose to proceed without the input of the IMN and the various ways it tried and counter its absence, because the IMN was not able to put forward its version of events on the record, the report is one-sided. This raises questions as to the ability of the report to serve as an accurate record of the events that had transpired in Zaria. This is further buttressed by the Commission's failure to exercise the full extent of its powers in an attempt to ascertain the veracity of the allegations put forward by the Nigerian army.

The reliability of this Commission's findings is further placed in question by Amnesty International's report that introduced a version of events not covered by the Commission. This is with particular reference to the reasons offered by the army for the destruction of the IMN sites after the clashes, particularly Ibrahim El-Zakzaky's compound, where most of the killings are believed to have taken place.⁸⁸

86 The Commission cited the Army's Enclosure 8, the Handover of Exhibits letter to the Kaduna State Commissioner of Police, with reference number DEPOT/PROV/G1/300/08 (22 December 2015).

87 *Report of the Judicial Commission of Inquiry* p.88.

88 Amnesty International, *Unearthing the Truth* p.24.

5 The impact of the Commission: The government's response

The Commission of Inquiry made several recommendations to the federal government, the Nigerian army, the police force and the Kaduna State government in response to each of the items highlighted in the terms of reference. Some of the recommendations included that

- a. the IMN members should bear most responsibility for the clash and its liabilities;
- b. cordon and search orders should always be accompanied by the issuance of the 'Rules of Engagement' to all officers and men involved;
- c. operational use of the armed forces in dealing with civil disturbances should be sparingly employed or ordered only in exceptional, extreme or specified circumstances to provide the necessary and required support to the police, and other civil security agencies and institutions as provided for in section 217(c) of the Constitution;
- d. the police and other security agencies should be well trained and equipped to deal with civil disturbances so that the armed forces are not regularly dragged into law enforcement activities.
- e. all future cordon and search operations should be filmed to ensure there is video evidence on how it was conducted.⁸⁹

The recommendations adopted by this Commission of Inquiry were largely operational in nature and were not geared towards any broader social reform. The terms of reference of the Commission clearly provided that the mandate included offering recommendations on how to prevent a recurrence of the events in Zaria. However, the recommendations do not offer any guidance on how to manage the underlying structural issues that led to the escalation of the levels of violence experienced during this time. Even where they touched on structural operational issues (such as the determination of the army's power to conduct law enforcement operations) the Commission steered away from the bigger picture and focused recommendations on particular details, especially related to the culpability of the IMN.

Aside from these operational issues (important though they were) the Commission failed to offer recommendations geared towards reconciling the Nigerian army, the IMN and the broader community around Zaria. If anything, some of the recommendations put forward by the Commission served to further galvanise these two parties and seemed to justify the

⁸⁹ *Report of the Judicial Commission of Inquiry* p.31.

treatment that the IMN had been receiving at the hands of the Nigerian army.⁹⁰

In response to the report, the Kaduna State government released its White Paper on the findings and recommendations of the Zaria Commission of Inquiry on 5 December 2016. The White Paper acknowledges and accepts all of the findings and recommendations that implicate or criticise the IMN, especially the recommendations for follow-up prosecution.⁹¹ With the release of the White Paper the Kaduna State government officially labelled the IMN an insurgent group and declared that it is to be treated as such.

The White Paper notes the findings and recommendations against the Nigerian army and the use of excessive force against the IMN but qualifies their actions against a narrative of historical insurrection from the IMN.⁹² It is silent on the sections of the report that implicate the Kaduna State government in the cover-up of the killings by burying the bodies they received from the army in a mass grave.⁹³ This could be read as a silent acceptance of responsibility. However, read together with their tone in front of the Commission, it perhaps is rather indicative of a quiet stubbornness based on a firm belief that any actions during that time were justifiable on account of the problematic nature of the relationship between the (state and federal) government and the IMN.⁹⁴

By contrast, the state government uncritically accepted the findings of the Commission against the leader of the IMN; Sheikh El-ZakZaky, finding that he should bear responsibility for all acts of lawlessness committed by the members of his organisation and should thus be fully investigated and prosecuted.⁹⁵ The Commission's report had stated:

The evidence before the Commission, from the testimonies and memoranda submitted to it by the various interest groups and stakeholders, clearly shows that IMN has become a law unto itself; disregarding the authority of

90 *Ibid.* See for example recommendations in sec.2.3 of the report that highlight that the IMN member should be held primarily responsible for the clash and its liabilities; likewise, the language of the recommendations under sec.8.5.2 of the report with respect to the nature of the IMN, effectively declaring it an illegal sect and calling for the compilation, investigation and prosecution of lawless acts committed by the IMN. Also see Zaria Judicial Commission of Inquiry White Paper pp.31,126.

91 Zaria Judicial Commission of Inquiry White Paper pp.1, 7, 21.

92 *Ibid.*, pp.21–27.

93 *Ibid.*, pp.65–70.

94 Interview with the author, October 2016.

95 *Report of the Judicial Commission of Inquiry* p.126.

the Nigerian state as vested in the police and other security agencies which many a times lead to several confrontations such as the one of 12th to 14th December, 2015 between it and the Nigerian army.⁹⁶

The White Paper provided:

All incidents of violence and aggression by the members of the IMN against individuals, groups or communities, which have resulted in grievous bodily harm, destruction of properties and deaths, should be fully investigated and culprits brought to book. Where appropriate, compensations should be paid.⁹⁷

With respect to the culpability borne by the Nigerian army for the excessive use of force, it was highlighted in the report and reiterated in the White Paper that the army had followed its rules of engagement. The White Paper instead observed that the Commission of Inquiry should have taken into account the activities of the IMN in Gyaileso that threatened peace and security. This suggested that based on a tense history aggravated by the actions of the IMN, the actions of the Nigerian army were fully justified and that the findings against them in the Commission's report were misplaced. The White Paper further states:

For all intent[s] and purpose[s], the IMN is an insurgent group and ought to be treated as such ... the sheer number of IMN members congregating in Zaria from across the country that night with many bearing arms was such that the Nigerian army was in no position to accurately determine how armed and organised they were and had to be concerned on what their intention for Zaria was.⁹⁸

With respect to the findings against the state government for complicity in covering up the killings by carrying out the mass burial after receiving the bodies from the army, the White Paper simply states that it does not condone the unlawful killing of any citizen and that this conduct will be further investigated and any culprits identified will first be subjected to court martial by the federal authorities, followed by civil prosecution by the state government.⁹⁹ They proceed to offer a detailed justification for the levels of force that the army used against the IMN and the high number of deaths that resulted from that confrontation, but do not respond directly to the indictment against them for their role in covering

96 *Ibid.*, p.125.

97 Zaria Judicial Commission of Inquiry White Paper, p.136.

98 *Ibid.*, p.22.

99 *Ibid.*, p.21.

up the deaths.¹⁰⁰ The state government, however, noted the findings of the Commission on the conduct of the Nigerian army with respect to the 347 bodies buried in the mass grave and noted the recommendation that the members that may have been involved should be brought to trial. The White Paper encourages the federal government to facilitate the training of security forces, including the army and police, that they may be able to better handle future conflict but does not expressly respond to the findings against them.¹⁰¹

The government has diligently followed up on the recommendations to investigate and prosecute members of the IMN that were found culpable and several members remain in detention, including the leader, Sheikh El-ZakZaky.¹⁰² A total of 265 members of the IMN were arrested during the clashes in Zaria; of that number, 50 have been charged with causing the death of one soldier and, according to media reports, the Kaduna State government has requested the death penalty.¹⁰³ Proceedings have also been instituted against the IMN leader, Sheikh El-ZakZaky, and on 15 May 2018 he was charged in the Kaduna High Court on allegations of unlawful gathering, criminal conspiracy and culpable homicide which are punishable by death.¹⁰⁴

6 Conclusion

One measure for the impact of a commission of inquiry is the extent to which its recommendations are effectively implemented by the government.¹⁰⁵ This is a relatively recent commission of inquiry, certainly relative to some of the other commissions discussed in this volume. The White Paper responding to the findings and recommendations was released on 5 December 2016 and, as previously mentioned, the government of Kaduna was very clear about which recommendations it readily accepted. In line with what was published in the White Paper, the Kaduna State government initiated proceedings against 50 members of the IMN on a

100 *Ibid.*, pp.21–26.

101 *Ibid.*, p.73.

102 ‘Kaduna Govt Seeks Death Sentence for 50 Shiite Members’ *Premium Times* (21 April 2016) available at: <http://www.premiumtimesng.com/news/headlines/202213-kaduna-govt-seeks-death-sentence-50-shiite-members.html>.

103 *Ibid.*

104 ‘Nigeria Shi’ite Leader Sheikh El-Zakzaky Arraigned in Kaduna, Trial Adjourned to June 21’ *AhluBayt News Agency* (16 May 2018) available at: http://en.abna24.com/news/africa/nigeria-shiite-leader-sheikh-el-zakzaky-arraigned-in-kaduna-trial-adjourned-to-june-21_893631.html.

105 J. Gomery ‘Pros and Cons of Commissions of Inquiry’ *McGill Law Journal* 51 (2006) p.783.

five-charge count of criminal conspiracy, unlawful assembly, culpable homicide, disturbance of public peace and wrongful restraint, which are punishable by the death sentence. These 50 suspects are among the 265 people currently in custody after arrest during the clashes in Zaria.¹⁰⁶

It is possible, therefore, to draw a very clear link between the state government's decision to establish a commission of inquiry and a wider set of legal proceedings relating to the events at Zaria. However, it is equally possible to highlight how the decision to establish the Commission, the decision of how to mandate that Commission, and the decisions about which of the Commission's findings and recommendations to follow up, represent a series of actions to follow a very one-sided approach toward investigation with a subsequent impact on justice.

The Commission was plagued by credibility and impartiality issues, given the apparent bias of some of its members and its mandate, and after one party to the proceedings refused to participate. Nonetheless, despite the apparent one-sided nature of the process, some useful information was revealed in its report regarding the use of force by state security forces. Although no action has yet been taken with respect to these findings, they could prove a valuable precedent for future legal challenge or advocacy around the role the Nigerian army plays in law enforcement. This Commission was also useful in highlighting the importance of ensuring the perception of impartiality and independence for the effectiveness of a commission. There is no guarantee that the findings and recommendations of the Commission would have been different had the IMN participated, given the historical clashes already experienced with several local communities and state security forces. In fact, according to one participant, the IMN generally did not have much sympathy, which may have contributed to the lack of participation. However, the government still had a duty to act with due diligence in the exercise of its obligations under international and national laws that secure the right to life. There thus was still a duty to ensure that the processes followed in the realisation of this objective were fair, but with respect to this specific commission, the onus still rested to ensure that it was effective.

This case highlights the challenges arising from the initiation of several investigative mechanisms into the same event(s) at the same time, without a well thought-out plan for coordination. At least three mechanisms were set up to address the events in Zaria. While this may have been a laudable attempt at a comprehensive approach, in this instance it had the opposite

106 'Kaduna Govt Seeks Death Sentence for 50 Shiite Members' *Premium Times* (21 April 2016).

effect. Due to the lack of coordination between the different mechanisms, some issues fell between the cracks resulting in an investigative process that was incomplete. Most notable was the information surrounding the mass grave and the number of bodies buried therein, which only came to light through an Amnesty International report.

The example of this Commission also highlights the discretion that commissions need to exercise with respect to which of their investigatory powers to use. This Commission was vested with various powers, including the power to subpoena witnesses and to collect forensic evidence, which it ultimately elected not to use, despite fundamental investigative gaps. The decision not to exercise its power to subpoena Sheikh El-ZakZaky to appear before the Commission was unfortunate, as that may have gone some way towards ensuring the IMN's wider participation. The lack of participation evident in this Commission of Inquiry meant that it was not able to create one of the distinct potential values of commissions, namely, the provision of a public space for dialogue. The IMN, a central actor, was absent and refused to participate in the Commission, citing issues of partiality. Dialogue thus was not possible, and an opportunity was missed to effectively tackle the root cause of this and other conflicts that have flared up between the IMN and the Nigerian (state and federal) government.

The Commission's failure to exercise its power to conduct forensic tests had an impact on its ability to secure accountability for the rights violations that occurred during the Zaria clashes. An important element for accountability of violations of the right to life includes prompt, impartial, thorough and transparent investigations of alleged violations, and the provision of an effective remedy for victims. Aside from the failure to establish the exact causes of death, the Commission also failed to identify the victims who had been harmed, clearly a fundamental impediment to the provision of a remedy.

Ultimately this Commission laid bare the fact that the impact of these mechanisms does not lie only in their ability to conclude their investigation and to publish a report, nor solely in the implementation of their recommendations. There are several factors that contribute to the overall impact of a commission of inquiry from inception to conclusion. This particular Commission highlighted the importance of independence and impartiality. Ultimately illustrating that a commission that investigates based on skewed terms of reference and only in a partial way seems unlikely to contribute towards accountability. Although some members of the Commission appear to have tried hard to ensure that it included references to serious violations and made plausible recommendations to

avoid their recurrence, the follow-up actions of the state government make it clear that the Commission was not meant to succeed in entrenching accountability. It rather seemed to have been used as a tool by the state government to justify actions that it has been thinking about taking for some time as they relate to the IMN. This is evidenced most clearly by the state government's White Paper, which simply ignored those findings and recommendations (some of which extended beyond its jurisdiction) that highlighted their and the Nigerian army's culpability and made political use of what was left to prosecute and persecute the IMN.

The extent to which this Commission can be said to have contributed to some sort of accountability for the violations of the right to life that occurred in Zaria in December 2015 is limited. The Commission was able to investigate and report but the findings and recommendations have not made much traction because of a fundamental flaw in the creation of the Commission relating to its terms of reference and constitution, which affected its independence and partiality. This excluded a major party to the proceedings, which is not problematic in and of itself, but the Commission's failure to exercise the full extent of its powers to balance out the absence of such party in order to ascertain key facts related to the events that occurred in Zaria during that time rendered the process flawed. This impacted the report and findings which are clearly one-sided which came to bear on the nature of the government response to the Commission through its White Paper (which is also one-sided) and the actions taken up after the recommendation such as the decision to prosecute several IMN members. There also have been no concurrent measures to address the culpability of the Nigerian army and the state government.

That said, drawing from arguments put forward by Bishop, commissions of inquiry provide a unique space for the debate and deliberation of the meaning and value of certain democratic principles, including accountability.¹⁰⁷ To this end, despite the apparent failings in method, form and substance they will invariably enrich the democratic process through the discourse and contestation that surrounded the Commission. Although it remains a highly-contested and contentious issue, the fact that it formed the subject of both national and international debate on accountability for excessive use of state power is notable.

107 M Bishop 'An Accidental Good: The Role of Commissions of Inquiry in South African Democracy' available at: <http://www.nyslawreview.com/wp-content/uploads/sites/16/2014/11/Bishop.pdf>.