

**THE BAGA INCIDENT AND THE SITUATION IN
NORTH-EAST NIGERIA
AN INTERIM ASSESSMENT AND REPORT**

BY

THE NATIONAL HUMAN RIGHTS COMMISSION

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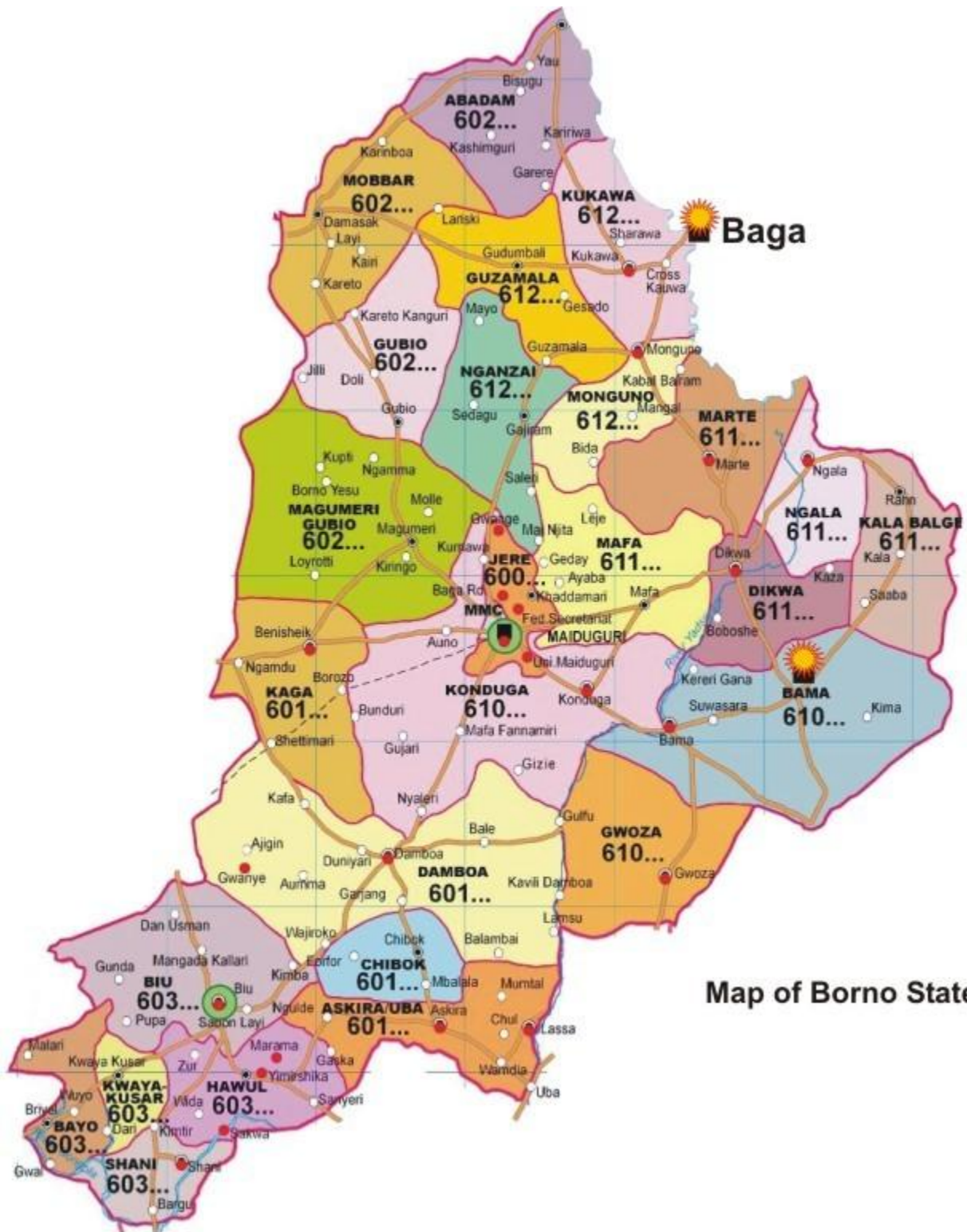
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Map of Borno State

GLOSSARY

AU	African Union
BOSEPA	Borno State Environmental Protection Agency
DIA	Defence Intelligence Agency
DSS	Department of State Security
ICC-OTP	International Criminal Court-Office of the Prosecutor
HRW	Human Rights Watch
IED	Improvised Explosive Device
JALISWAJ	<i>Jama'atu ahlus sunnah lid da'awati wal jihad</i>
JTF	Joint Task Force
LGA	Local Government Area
MDAs	Ministries, Departments, and Agencies
MNJTF	Multi-National Joint Task Force
NASRDA	National Space Research and Development Agency
NEMA	National Emergency Management Agency
NHRC	National Human Rights Commission
NIA	National Intelligence Agency
NIS	Nigeria Immigration Service
NPF	Nigeria Police Force
PTSD	Post-Traumatic Stress Dis-order
SoE	State of Emergency
SOFs	Special Operations Forces
UNHCR	United Nations High Commissioner for Refugees

EXECUTIVE SUMMARY WITH INTERIM RECOMMENDATIONS

The encounter involving personnel of the Nigerian Armed Forces on internal security duties and the Baga community on or around 16 April 2013 illustrates serious concerns about proportionality of the use of force as well as with humanitarian and human rights compliance in internal security operations that must be addressed by the Federal Government, security forces and institutions of accountability in the search for durable solutions to the on-going problems in the north-east of Nigeria.

This interim report identifies a cluster of areas of concern arising from the Baga incident and extending to the other States of north-east Nigeria currently under a State of Emergency. The major constraint in the preparation of this report has been the limitation in access to and communication with the affected areas of north-east Nigeria, especially, since the declaration of the State of Emergency. This is thus an interim report. As such, it narrates trends in evidence at the disposal of the Commission but stops short of making dispositive findings with respect to allocation of individual or other responsibility.

This report is prepared and issued in exercise of the functions of the National Human Rights Commission (NHRC) of Nigeria under the amended NHRC Act of 2010. In preparing this report, the Commission takes as its point of departure the overriding objectives in Nigeria's 1999 Constitution that "the security and welfare of the people shall be the primary purpose of government"¹; and that "governmental actions shall be humane."² The narrative of this report indicates that strategy or action designed to address the security situation in north-east Nigeria should aim for durable solutions by respecting the principles of legality, proportionality, and humanitarian access.

The details of the Baga incident have been drowned out by competing claims about the casualty count with a focus on the numbers reported killed rather than on whether the nature of force that resulted in their killing was proportionate or disproportionate taking account of all the circumstances of the case, and, therefore, whether the force was ultimately lawful or unlawful. Through this controversy, the impression has been created that certain thresholds or numbers of killing may be permissible as long as they are made to appear low enough. Government has not done enough to discourage this impression. The Commission considers this tragic. While casualty count is important to our investigation, it is necessary to underline the fact that the focus of the Commission is on the lawfulness of the force applied and responsibility for it, taking account of all the circumstances of the case. This determination will be governed by the applicable rules of law and by evidence.

¹ Constitution of the Federal Republic of Nigeria, 1999, Section 14(2)(b)

² *Ibid.*, Section 17(2)(c)

With reference to the wider situation in north-east Nigeria, there has been a notable deterioration in the security situation in the States of north-east Nigeria, especially in Borno State, since 2012. This deterioration, which has deepened since 2013, has been characterized by various abuses committed by or attributed to the *Jama'atu ahlus sunnah lid da'awati wal jihad* (JALISWAJ) as well as by personnel of the Joint Task Force (JTF).

Credibly attested allegations against the JALISWAJ include attacks on numerous communities resulting in killings, rape, forced abduction and forced marriage of women, targeted attacks on teachers, schools, churches and places of worship; preventing farming communities from going to the farms, and attacks on public health officials administering primary health activities, including maternal health and child immunization programmes as well as many fatal attacks on security personnel and institutions. By the beginning of May 2013, JALISWAJ was reportedly present or dominant in most of the Local Government Areas in Borno State.

The case against the JTF include allegations of extra-judicial executions, torture, indeterminate incommunicado detention, indicating a pattern of internment without clear rules; practice that could violate the absolute prohibition in international law against enforced disappearance and against torture respectively; rape, various outrages against members of host communities and a pattern of disproportionate use of force. The Commission also received persistent and credibly attested allegations of indiscriminate disposal of dead human remains by personnel of both the JTF and the Borno State Environmental Protection Agency, BOSEPA. The rules of engagement are at best unclear and information on the management of troop renewal and rotation is unavailable.

As a result, thousands have been forcibly displaced both within Nigeria and beyond; a farming season has been lost, threatening the region with a food security and nutritional crisis; maternal mortality has increased, the cost of living has risen sharply and communication with the rest of Nigeria and their international neighbours has been all but cut off. Together, these consequences threaten a foreseeable humanitarian crisis on the region which could endanger the short term gains of the on-going security operations in north-east Nigeria.

To address and prevent this, the report addresses the following interim recommendations to the Federal Government and the armed and security agencies:

INTERIM RECOMMENDATIONS

These recommendations primarily addressed to Nigeria's Federal Government who have primary responsibility under Nigeria's constitution for the management of all security institutions:

- (a) LEGALITY AND RULES OF ENGAGEMENT (RoEs):** Government should as a policy commit itself to the principle of legality in the conduct of the operations in the north-east. In keeping with this policy, RoEs should be adopted, published and regularly reviewed. RoEs should be calibrated to the conditions confronted by the internal security deployment. These conditions should be regularly reviewed in response to evolving conditions as the operations make progress towards their defined objectives. There should also be a preparedness to acknowledge and offer redress for violations of these Rules and other relevant standards of legality with respect to these operations. Information should periodically be made available on any disciplinary measures invoked by the units under internal security deployment.
- (b) DETENTION, INTERNMENT AND ENFORCED DISAPPEARANCES:** The prolonged detention of persons in un-gazetted places of detention and without access to the legal process or other safeguards under judicial supervision is not allowed under Nigeria's constitution. Government should urgently address detention practice to bring it in compliance with the Constitution and other applicable standards binding on Nigeria, including, in particular, the International Convention for the Protection of All Persons from Enforced Disappearance. Detainees should be properly documented and enumerated and government should regularly publish information on the numbers of persons detained in connection with the situation in north-east Nigeria. The rules or regulations applicable to detention should be published and counsel and medical professionals afforded access to detainees.
- (c) TRAINING:** Government should guarantee and provide regular training to all personnel of the Armed Forces in the relevant standards as part of a curriculum on internal security operations in the doctrine of the Armed Forces and security agencies generally.
- (d) HUMANITARIAN ACCESS:** Government and the security forces should encourage and guarantee access for humanitarian deliveries and workers to the States and communities in north-east Nigeria and a safe corridor for humanitarian deliveries. The protection and security of humanitarian workers should equally be safeguarded and guaranteed. Particular attention should be paid to access to maternal care and health and to the healthcare needs of children.
- (e) FORCED DISPLACEMENT:** Government should ensure adequate records of forced displacement and guarantee protection and assistance to affected persons not implicated in the insurgency. With respect to those persons forcibly displaced into refugee systems outside the country, the Government of Nigeria, together with the host

countries and the UNHCR, have responsibilities to co-operate in status determination in a manner that ensures that refugee status is not extended to persons who would otherwise be liable to be excluded under applicable standards binding on Nigeria.

- (f) **PERSONNEL ROTATION:** The leadership of the Armed Forces should regularly undertake rotation and renewal of the troops deployed in the north-east. Troop rotation facilitates rest and recuperation on the part of active service personnel, helping them to minimise risks of PTSD, among other consequences, which may predispose them to violations of host communities.
- (g) **AVERTING A HUMANITARIAN AND NUTRITIONAL EMERGENCY:** The Federal Government, in collaboration with the relevant States and other MDAs, multi-laterals and interested philanthropies should urgently design and deploy mitigation mechanisms to prevent a foreseeable humanitarian emergency, including food security, nutritional and public health crises in the States of north-east Nigeria.
- (h) **DEVELOPING A COMPREHENSIVE RECORD OF VICTIMISATION:** As its own contribution to the search for durable solutions, the NHRC desires to develop a comprehensive record of victimisation connected with the current security situation in Nigeria and invites information from all persons and institutions capable of contributing to this. Proper records of victimisation signify the fundamental value placed on human life and sustainable communities. In particular, the Commission believes it is essential to ensure accurate records of service personnel killed or injured in line of duty and requests the security agencies to ensure that such information is kept and accessible to families of the affected persons, humanitarian agencies and the NHRC.

1 INTRODUCTION

This interim report and assessment is issued in exercise of the powers of the National Human Rights Commission of Nigeria (hereafter called “NHRC”) under the National Human Rights Commission Act (as amended). It provides a broad narrative and status report on the situation in north-east Nigeria, generally and also of the incident in Baga, Borno State, on or about 16-17 April 2013, in which an encounter between uniformed personnel of the Armed Forces and the local community resulted in reports of multiple fatalities and apparent arson in which property and human habitation valued in billions of Naira were destroyed. In the context of the narrative that follows, the Baga incident illustrates concerns about the proportionality of the use of force in internal security operations that must be addressed by the Government of the Federal Republic of Nigeria, its security forces and institutions.

Against this background, the report also identifies preliminarily, human rights concerns for the attention of the government of the Federal Republic of Nigeria and invites urgent measures of co-operation by the Federal Government and its institutions to bring the operations currently being undertaken by its security forces in these parts of Nigeria into compliance with applicable norms, prevent civilian casualties, especially affecting women, children and aged people, and ensure effective access to the affected regions for humanitarian agencies and human rights monitors.

In preparing this report, the Commission is fully cognizant of the fact that the oaths of office of all the senior officials of the Executive arm – President, Vice-President, and Governors – under the 7th Schedule of the 1999 Constitution obliges them to always act “in the interest of the sovereignty, integrity, solidarity, well-being and prosperity of the Federal Republic of Nigeria” and to always “strive to preserve the Fundamental Objectives and Directive Principles of State Policy contained in the Constitution of the Federal Republic of Nigeria.” Section 14(2)(b) of these Fundamental Objectives and Directive Principles of State Policy requires that “the security and welfare of the people shall be the primary purpose of government.” In addition, Sections 17(2)(b) and (c) provides that “the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced”; and “governmental actions shall be humane.”

Guided by this controlling constitutional responsibility, the Commission recognizes the profound difficulties confronted by all persons in positions of leadership in political governance or in the security services in the current context of enhanced security difficulties in Nigeria and is supportive of lawful measures under the constitution designed to safeguard the lives and security of all persons and institutions, address serious crime in all its manifestations and safeguard the future of elected government in the country. The Commission is also cognizant of the sacrifices that security agencies continue to make in pursuit of these goals as well as the

toll that this situation levies on victims, affected communities and the political economy of Nigeria.

The Commission recalls, however, the caution of the Presidential Committee on Security Challenges in the North-East of Nigeria (hereafter also referred to as “the Galtimari Committee”), in its 2011 report about the need to “cultivate” and “sustain public support for continued military presence in” the north-east,³ as well as its recommendation, despite acknowledged difficulties, of the need to “endeavour to win the hearts and minds of the people” in order to de-couple the perpetrators of the violence from any bases or hosting in the affected communities.⁴

This report is thus designed to contribute to the search for durable solutions to this situation based on the principles of legality, proportionality, and humanitarian access; as well as a manifest commitment to minimising civilian casualties, prevent the alienation of affected communities and secure the safety and integrity of the Federal Republic of Nigeria and all who live in it.

2 LEGAL BASES, SCOPE AND APPLICABLE LAW

This interim report is issued in exercise of the functions, responsibilities and powers of the Commission to monitor and investigate allegations of human rights violations in Nigeria and advise the Federal Government as appropriate under the amended National Human Rights Commission Act (hereafter called the “amended NHRC Act”).

Section 5(a) of the Act empowers the Commission to “deal with all matters relating to the promotion and protection of human rights guaranteed by the Constitution of the Federal Republic of Nigeria, the United Nations Charter and the Universal Declaration on Human Rights, the International Convention on Civil and Political Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the International Convention on Economic, Social and Cultural Rights, the convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Rights of the Child, the African Charter on Human and Peoples’ Rights and other international and regional instruments on human rights to which Nigeria is a party.”

³ *Report of the Presidential Committee on Security Challenges in the North-East of Nigeria*, page 8, paragraph 16 (2011), hereafter called “*Galtimari Committee Report*”

⁴ Federal Republic of Nigeria, *White Paper on the Report of the Presidential Committee on Security Challenges in the North-East of Nigeria*, page 9, paragraph 27(b), Lagos, Federal Government Printer, (May 2012), hereafter called “*Galtimari Committee White Paper*”.

In undertaking this report, the Commission has been guided by these provisions. The Constitution of the Federal Republic of Nigeria, 1999 and the NHRC Act remain the principal legal instruments on which this report is based. We have, additionally also, taken account of international human rights standards “to which Nigeria is party”, such as the International Convention for the Protection of All Persons from Enforced Disappearance,⁵ as well as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1984.⁶ The Commission considers that through the provisions of the amended NHRC Act, these Conventions have applicability to the current investigation and assessment.

The Act also empowers the Commission to “monitor and investigate all alleged cases of human rights violation in Nigeria and make appropriate recommendations to the Federal Government for the prosecution and such other actions as it may deem expedient in each circumstance”;⁷ and to “undertake studies on all matters pertaining to human rights and assist the Federal, State and Local Governments where it considers it appropriate to do so in the formulation of appropriate policies on the guarantee of human rights”⁸

Additionally, the Commission may “examine any existing legislation, administrative provisions and proposed bills or bye-laws for the purpose of ascertaining whether such enactments or proposed bills or bye-laws are consistent with human rights norms”;⁹ and may also “prepare and publish, in such manner as the Commission considers appropriate, guidelines for the avoidance of acts or practices with respect to the functions and powers of the Commission under this act”¹⁰; and should “promote an understanding of public discussions of human rights issues in Nigeria.”¹¹ In appropriate cases, the Commission may also “refer any matter of human rights violation requiring prosecution to the Attorney-General of the Federation or of a State, as the case may be.”¹²

Under Section 6(1) of the Act, the Commission may “conduct its investigations and inquiries in such manner as it considers appropriate.”

⁵⁵ Nigeria acceded to this Convention on 27 July 2009. Ratification status available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en

⁶ Nigeria ratified this Convention on 28 June 2001. Ratification status available at http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants

⁷ National Human Rights Commission Act 1995, as amended by the National Human Rights Commission (Amendment) Act, 2011, Section 5(b).

⁸ *Ibid.*, Section 5(d)

⁹ *Ibid.*, Section 5(k)

¹⁰ *Ibid.*, Section 5(l)

¹¹ *Ibid.*, Section 5(m)

¹² *Ibid.*, Section 5(p)

The decision of the Commission to undertake the investigation and assessment on which this interim report is based is founded on these provisions of the Act. It is the view of the Commission that the on-going situation in north-east Nigeria engages Nigeria's human rights obligations under both the constitution and international instruments. This interim report is issued in order to contribute to on-going formulation of policy, execution of powers under law and implementation of both laws and policies with respect to this situation.

Guided by these provisions, this interim report provides a progress report of the on-going investigation into the Baga incident, identifies issues of concern with respect to human rights compliance by Nigeria in the security operations in north-east Nigeria, and provides an initial analysis of the norms that should govern internal security operations in this context. In so doing, this report also seeks to provide bases for framing or characterizing the nature of on-going security operations in Nigeria in order to govern them and ensure they are legally accountable to both law and civil authorities.

3 BACKGROUND, METHODOLOGY AND CONSTRAINTS

Sometime between 15 and 21 April 2013, an encounter reportedly took place between uniformed personnel and alleged insurgents in Baga, Borno State, near Nigeria's north-eastern border with Lake Chad. At the end of this encounter, many people were reportedly killed, houses were burnt, and many more people were reportedly displaced.

Initial disclosures about the Baga incident were accompanied by competing and contradictory claims, mostly in the media, about what happened, when it did, the parties involved, scope of casualty and responsibility for what happened.

In exercise of its responsibilities and powers under Sections 5 and 6 of the Act Governing Council of the National Human Rights Commission on 3 May 2013 authorised an independent investigation into the Baga incident and with a mandate also to assess the wider humanitarian situation in parts of north-eastern Nigeria, especially in Borno and Yobe States and, for that purpose. The terms of reference (ToRs) of the investigation mandated the investigation to secure and review other relevant pronouncements, reports, documents, or releases; identify and interview witnesses, visit the location and prepare a report for not later than the end of June 2013. The ToRs are attached as Appendix 1 to this report.

In seeking to undertake this work, the Commission has reviewed reports by the Defence Headquarters, the Nigeria Police Force, and non-governmental organizations. We have also met and interviewed the leadership of defence and security agencies in Nigeria. We sought and received independent review and analysis of geospatial information available on both the Baga incident and north-east of Nigeria. In addition, the Commission has reviewed and analysed the provisions of applicable laws.

As part of this investigation, the Commission had planned an on-site visit to Baga and to some of the states of north-east Nigeria. This visit was to take place from 20 to 23 May 2013. However, on 14 May 2013, the Federal Government announced the declaration of a State of Emergency affecting three States – Adamawa, Borno and Yobe – all in north-east Nigeria. Following operations launched in response to the emergency, telecommunications services with the affected States of north-east Nigeria were disabled or have become severely disrupted to the point of being inaccessible.

As a result, the Commission was compelled to defer the visit because of the inability of the security agencies to guarantee the safety of its personnel for these purposes. In the course of preparing this report, the Commission has met with members of communities affected or displaced by the on-going situation in north-eastern Nigeria into Kano, in north-west Nigeria.

In the circumstances, this report remains work in progress. The Commission will schedule a visit to the region at an appropriate time and proposes through this report an on-going plan of involvement in monitoring violence in Nigeria in its different forms or manifestations.

4 CONTEXT

The context of the situation in north-east Nigeria can be broken up to the periods before and after announcement of the State of Emergency. It is thus framed by developments in the region before the SoE, responses by the Nigerian government to manage them as well as the activities of international institutions with regard to the region.

4.1 PRE-EMERGENCY PERIOD

Since 2009, Nigeria has confronted a deepening crisis of public safety and security in parts of northern Nigeria, especially in the states of north-eastern Nigeria. This crisis is connected with the activities claimed by, on behalf of or ascribed to the *Jama'atu ahlus sunnah lid da'awati wal jihad* (in this report, referred to as “JALISWAJ”, but more popularly called “Boko Haram”). The background to and origins of this movement have been covered by both academic research and official reports commissioned by and available publicly within and outside Nigeria, some of which are referred to in this interim report and are not the subject of this report.

While all institutions of government at the federal, state and local government levels share in this obligation, direction in guaranteeing public safety and security in Nigeria is provided by the Federal Government under the leadership of the President who is also the Commander-in-Chief of the Armed Forces.

The response of government to deepening security situation in the north-east of Nigeria has been multi-faceted. Security deployments in the north-east of Nigeria were enhanced in 2009. In 2011, the Presidential Committee on Security Challenges in the North-East Zone of Nigeria chaired by Ambassador Usman Gaji Galtimari reported to the Federal Government (hereafter referred to as the Galtimari Committee Report). In its White Paper on the Galtimari Committee Report issued in May 2012, the Federal Government accepted the recommendation of the Committee to “engage and dialogue with the leadership of the sect (JALISWAJ)....from a position of strength by allowing the security forces to dominate the environment”, with the caution that “dialogue with the sect should be contingent upon their renunciation of violence and surrender of arms.”¹³

On 12 June 2011, a military-led Joint Task Force (JTF), code-named Operation Restore Order and comprising personnel from the Nigerian Armed Forces, Nigeria Police Force (NPF), the Department of State Security (DSS), Nigerian Customs Service (NCS), Nigeria Immigration Service (NIS), and the Defence Intelligence Agency (DIA), was deployed for operations in Borno and Yobe States.¹⁴ By the beginning of 2013, the JTF was sectored up to 180km from Maiduguri. Prior to this deployment, and in response to “the problem of cross-border crimes orchestrated by illegal aliens and arms in-flow, and exacerbated by our porous borders”,¹⁵ Nigeria’s Federal Government, had established a Multi-National Joint Task Force (MNJTF), “which is made up of armed forces personnel from Chad, Niger, and Nigeria.”¹⁶ In 2012, the three countries extended the mandate of the MNJTF to cover counter-terrorism operations. The MNJTF coexists with the JTF in parts of Borno State.

While it has clearly deepened over this period, the characterization of the security crisis in the north-east of Nigeria has been unclear. The *Nigerian Defence Magazine* reports that: “Since the crackdown on them began in 2009, the group (JALISWAJ) has engaged in low level insurgency, targeting security agents and innocent civilians mainly in Maiduguri and environs (*sic*). However, from low level insurgency, the group has advanced in its activities getting more sophisticated and expanding its area of operations and establishing close ties with international terrorist groups.”¹⁷

By the beginning of 2011, the Galtimari Committee Report clearly indicates, the security agencies were of the view that “the case in Maiduguri was an insurgency where members of

¹³ Galtimari Committee *White Paper*, page 7, paragraph 12.

¹⁴ Prior to this, “Operation Flush Out was in charge of security in Borno State and was administered by the State Government. Operation Flush Out ceased to operate and was integrated into the JTF Operation. See, Lt. Col. H.I. Mohammed “X-Raying the Activities of Operation Restore Order in Borno State”, 1 *Nigerian Defence Magazine*, page 28(2012)

¹⁵ Chidi Omeje, “Focus on the Joint Task Forces”, *Ibid.*, page 23

¹⁶ *Ibid.*

¹⁷ *Ibid.*

the Sect/criminals used sophisticated arms and Improvised Explosive Devices (IEDs).”¹⁸ In its April 2013 report, the Committee on Reconciliation, Healing and Security, of the Northern Governors’ Forum refers to a “Boko Haram insurgency” and accompanying “counter-insurgency operations”. It requests the “security agencies to unmask and bring to justice, the individuals and groups using” this “as a franchise for political violence, economic rivalry and criminal activities in the States in the North”, and appeals to the Federal Government to “assume its responsibility to ameliorate the condition of victims of collateral damage arising from the counter-insurgency operations.”¹⁹

Also in its 2011 report, the Galtimari Committee called acknowledged that it has been “inundated with unbelievable details of the “atrocities” allegedly committed by some members of the (Joint) Task Force”, describing the alleged acts as a “catalogue of unprofessional behavior”.²⁰ The Committee made several recommendations to minimize and reduce these, which the Federal Government merely “noted” in the White Paper.²¹

4.2 EXTERNAL RESPONSE TO THE PRE-EMERGENCY PERIOD

External characterization of the situation in north-east Nigeria has also been uncertain. In its 2011 Conflict Barometer, the Heidelberg Institute indicated that the situation in the north-east “escalated from a non-violent level into war” in 2011.²²

By contrast, in the report of its preliminary assessment of the situation in Nigeria in November 2012, the Office of the Prosecutor of the International Criminal Court (ICC-OTP), indicated that “allegations against Nigerian security forces in the context of their operations against Boko Haram may reflect serious human rights violations.”²³ The ICC-OTP concluded that it had “currently no reasonable basis to believe that the confrontations between the security forces and Boko Haram amount to an armed conflict” but cautioned that “these initial assessments may be revisited in the light of new facts or evidence.”²⁴ The ICC-OTP, however, determined that “there is a reasonable basis to believe that crimes against humanity have been committed in Nigeria, namely acts of murder and persecution attributed to Boko Haram.”²⁵

¹⁸ Galtimari Committee Report, para 16

¹⁹ Report of the Northern Governors’ Forum Committee on Reconciliation, Healing and Security, page 13 (April 2013).

²⁰ Galtimari Committee Report, page 8, paragraph 16

²¹ Galtimari Committee White Paper, page 10, paragraph 28

²² Heidelberg Institute for International Conflict Research, *Conflict Barometer 2011*, p. 2

²³ International criminal Court, Office of the Prosecutor, “Report on Preliminary Examination Activities, 2012”, paragraph 90 (November 2012)

²⁴ *Ibid.*,

²⁵ *Ibid.*, paragraph 96

4.3 THE EMERGENCY

However, announcing the declaration of a State of Emergency on three States of north-east Nigeria on 14 May 2013, President Goodluck Jonathan identified “terrorists and insurgents” who have, in many places and among other things “destroyed the Nigerian flag and other symbols of state authority and in their place, hoisted strange flags suggesting the exercise of alternative sovereignty; ...attacked government buildings and facilities;... murdered innocent citizens and state officials;...set houses ablaze, and taken women and children as hostages”, declaring that “these actions amount to a declaration of war and a deliberate attempt to undermine the authority of the Nigerian state and threaten her territorial integrity.”²⁶

On 20 May 2013, the Federal Government issued the formal Proclamation of the State of Emergency with the concurrence of the National Assembly.²⁷ The preamble to this Proclamation acknowledges that “Nigeria has been experiencing serious crises, internal tension and civil disturbances which presently constitute grave threats to peace, order, good governance, security and safety of life and property”, and that “these crises and disturbances transcend religious, political, and ethnic divide with the perpetrators of the crises utilizing terrorist tactics, thereby occasioning serious breakdown of law and order.”²⁸ On 4 June 2013, President Goodluck Jonathan assented to the legal instrument under the Nigeria’s Terrorism Prevention Act formally proscribing JALISWAJ as a terrorist organization.²⁹

5 THE BAGA INCIDENT

Baga is a commercial and border settlement in Kukawa Local Government Area (LGA) in north-east Borno State, a gateway to Lake Chad and the Nigeria’s border with Chad and Cameroon. Located on the coast of Lake Chad, Baga is a centre for commercial and livelihood activities, including fishing, farming and water transport. Its markets traditionally attracted traders and buyers of various races, ethnic and national origins from within and outside Borno and Nigeria. It is also a base of the MNJTF, under the command of a Brigadier-General of the Nigerian Army. According to the 2006 Census, Baga had a population of about 32,828 persons. Burials by the Baga community usually take place in three cemeteries within and around Baga.

Kukawa Local Government Area has its headquarters in Kukawa Town. Located as it is on a multinational border and major water source on the southern rim of the Sahel, Kukawa LGA is also reputed to be host to several un-documented points of entry into and outside Nigeria. The MNJTF base in Baga was designed to provide a nipping point and patrol post

²⁶ President Goodluck Ebele Jonathan, Full Text of National Broadcast, 14 May 2013.

²⁷ Federal Republic of Nigeria, State of Emergency (Certain States of the Federation) Proclamation, Government Notice No. 84 of 2013, Official Gazette, No. 27, Vol 100, page B.43-B.49

²⁸ *Ibid.*, preamble, paragraphs 1 and 3.

²⁹ Terrorism (Prevention) (Proscription Order) Notice 2013

against trans border crime, including trafficking in light weapons, cross-border livestock rustling. Neighbouring LGAs include Monguno, Marte and Malamfotori, all in Borno State. It appears that the period immediately preceding the Baga incident witnessed a spike in the presence of and activities attributed to or claimed by elements of JALISWAJ in Kukawa and surrounding LGAs, including alleged unlawful killing of members of the community and robbery incidents. An Army supply base in the Local Government Area was allegedly also attacked, losing considerable hardware and ordnance from its armory. The upsurge in reported incidents of violent attacks on installations and personnel of the security services, including Immigration, Police, and Customs services, during this period, appears consistent with allegations of rise in the caliber and quantity of ammunition available to the perpetrators of this violence and supports the suggestion that those responsible had become both more organised and emboldened by their apparent successes (despite enhanced security presence).

These activities forced many residents to flee or stay away from the main settlement in Kukawa, especially Baga. It is possible that those who remained, it appears, were left in fear for their lives and safety. The extent to which such an underlying context of fear and insecurity may have played a part, if any, in the events that occurred is part of what the Commission seeks to understand and determine in this investigation.

There is consistency between the security agencies and members of the community on the date on which the incident began – Tuesday, 16 April. It is alleged that in the early hours of the evening of 16 April, 2013, a soldier, personnel of the MNJTF while ingesting some beverages in a local convenience in the Bulabulin Ward in Baga, was shot dead by a projectile suspected to be a bullet, discharged by unknown assailants, presumed to be or associated with the JALISWAJ. The fallen soldier was identified as one Lance Corporal Olomoja. Some other soldiers may have been allegedly injured. There are also allegations that this was one of many acts of provocation with fatal consequences attributed to the JALISWAJ which may have inspired or invited a firm response by the military deployment in the town. It is reported that a reinforcement of soldiers from the MNJTF returned to the town later in the day and, according to the incident report by the Police, “started shooting indiscriminately at anybody in sight including domestic animals. This reaction resulted to loss of lives and massive destruction of properties.”³⁰ According to some witnesses from the community interviewed by the Commission, this operation may have lasted into part of the following day, 17 April. The burial of those who lost their lives took place on Wednesday, 17 April.

The number of persons killed or injured became the subject of intense dispute. A review team deployed by the Chief of Defence Staff and led by a Major-General of the Nigerian Army concluded, upon a visit to Baga and interviews with various parties, that about 36 persons

³⁰ Police Incident Report, paragraph 7 (April 2013).

identified mostly as members of JALISWAJ had been killed in this incident. It also reported that the military hospital in the town treated and discharged some injured persons. On their own, the Police reported that about 37 persons may have been killed. For his part, the Senator representing the Zone in the Upper House of Nigeria's National Assembly, Senator Maina Maaji, alleged that up to 228 persons may have been killed in the encounter.³¹

There were also competing claims about the extent of destruction of property. According to Senator Maina Maaji Lawan, up to 4,000 houses were destroyed mostly by fire. Human Rights Watch (HRW), an international human rights advocacy organization, claimed, based on its analysis of geospatial images of the community after the encounter that the destruction covered an area of about 80,000 square metres, with at least 2,275 houses destroyed and another 125 houses severely damaged.³² In its own analysis, Nigeria's National Space Research and Development Agency (NASRDA), using the same image sets generated by Human Rights Watch as well as images from Nigeria's own NigeriaSat-2 Satellite concluded that the affected area measured not more than 54,000 square metres, with an active zone of destruction measured at about 11,000 square metres. NASRDA disputed HRW's analysis, concluding from the image overlay analysis that the affected area "can't logically house 2,400 damaged buildings (2275 destroyed and 125 severely damaged), claimed to be identified in the study by HRW."³³

In its own report, the Police determined that at least five wards, namely, Bulabulin, Bayan Tasha, Panpan Gajagaja, Adam Kolo and Bagadaza, were "completely razed down by the soldiers";³⁴ and properties worth millions of Naira were lost "through fire which burnt over thirty (30) vehicles, fifty-seven (57) motorcycles, one hundred bags of beans/maize."³⁵ The National Emergency Management Agency, NEMA, in its initial assessment reported that it had recorded at least 642 internally displaced persons in its facilities.

The competing claims about the incident in Baga have focused on the casualty count. A dispositive determination of the truth from among the competing claims is impossible without a field mission into the affected community including an on-the-ground assessment of damage, and interviews. The Commission is determined to undertake this as soon as the conditions permit.

³¹ *Vanguard* on Sunday, 28 April 2013, available at <http://www.vanguardngr.com/2013/baga-mayhem-we-are-still-picking-corpses-of-women>

³² Human Rights Watch, "Satellite-Based Damage Assessment for Town of Baga, Borno State, Nigeria", page 1 (30 April 2013).

³³ National Space Research and Development Agency (NASRDA), "Satellite Imagery Analysis of Baga and Environs, Borno State, Nigeria", p.3 (June 2013)

³⁴ Police Incident Report, paragraph 15.

³⁵ *Ibid.*,

Pending this mission, it is notable that the focus has been on the numbers reported killed rather than on whether the nature of force that resulted in the killing was proportionate or disproportionate taking account of all the circumstances of the case, and, therefore, whether the force was ultimately lawful or unlawful.³⁶ The impression has been created in the controversy that has followed this incident that certain thresholds of killing may be permissible as long as they are made to appear low enough. Tragically, Government has not done enough to discourage this impression. While casualty count is important to our investigation, it is necessary to underline the fact that the focus of the Commission is firmly on the lawfulness of the force applied, taking account of all the circumstances of the case. This determination will be governed by the applicable rules of law and by evidence.

6 THE SITUATION IN THE NORTH-EAST OF NIGERIA

The Baga incident was one in a series of rapid evidence of escalation of the situation in north-east Nigeria at the beginning of the second quarter of 2013. The Commission has monitored the human rights and humanitarian situation in the north-eastern corridor of Nigeria through various sources, including de-briefs with travelers and witnesses from the region. A pattern emerges from the reports deserving of urgent attention.

6.1 ALLEGATIONS AGAINST JALISWAJ - ESCALATION IN ATTACKS ON COMMUNITIES AND SECURITY SERVICES

By some measures, the situation in Yobe State appeared to be de-escalating while JALISWAJ attacks in the border areas of Adamawa appear to have been on the increase. The escalation of internal security assets, mostly drawn from the Armed Forces and the Special SoFs has enhanced the footprint of the JTF beyond these areas into more remote parts of the region where they were hitherto absent.

Borno State, in particular, appeared to be the epicenter of JALISWAJ. In Borno, the JTF deployments were mostly in and around Maiduguri, comprising Maiduguri Municipal Council (MMC) and Jere LGA in the State capital. The MNJTF was mostly stationed in the border settlements to the north of Borno State. Borno State comprises 27 Local Government areas. These are: Abadam, Askira/Uba, Bama, Bayo, Biu, Chibok, Damboa, Dikwa, Gubio, Guzamala, Gwoza, Hawul, Jere, Kaga, Kala/Balge, Konduga, Kukawa, Kwaya Kusar, Mafa, Magumeri, Maiduguri, Marte, Mubbar, Monguno, Ngala, Nganzai, and Shani.

A notable escalation of JALISWAJ attacks appears to have begun in 2012 and deepened in 2013. There are allegations that both the calibre and quantity of ordnance at the disposal of

³⁶ See “Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions”, Philip Alston, UN Doc. A/HRC/14/24/Add.6 at 9 of 8 May 2010, saying that “whether or not a specific targeted killing is legal depends on the context in which it is conducted...”

the JALISWAJ elements was considerably increased. These attacks, especially in Borno State, were multi-faceted. Attacks against law enforcement agents appeared to have increased, resulting in increased casualties of service personnel in many communities outside Maiduguri Municipal and Jere LGAs. In particular, these attacks also uprooted or drove away law enforcement and security assets, including officials and outposts of the Police, Customs and Immigration from many of the LGAs in northern Borno. The Commission seeks fuller disclosure from the security agencies with respect to the exact numbers, identities and locations of law enforcement and security assets affected by these attacks. By the date of the announcement of the SoE on 14 May 2013, it was reported that JALISWAJ had active or dominant presence in as many of 12 LGAs in the State, especially in the ten LGAs in Borno North.³⁷

In addition to systematic attacks on law enforcement and internal security assets, JALISWAJ is also credibly alleged to have attacked communities, churches and places of worship. Victims reported the shooting of family members by young men who spoke the local Kanuri language. In many communities, women were reportedly prevented from going to the farms or undertaking planting. Some who ventured were attacked or abducted. The Commission spoke with witnesses from whose family's elements or operatives from JALISWAJ had abducted and forcibly "married" young women. These incidents of forced marriage took place against the will of both the women involved and their families. The Commission equally seeks fuller co-operation from the public with a view to developing a comprehensive record of victimization arising from or connected with the situation in north-east Nigeria. Public health programmes, including vaccination, could not be undertaken and, in some places, teachers were targeted leading to disruption in learning for basic education pupils.

6.2 ALLEGATIONS AGAINST JTF – VIOLATIONS AGAINST COMMUNITIES AND BREACHES OF PRINCIPLE OF LEGALITY

The Commission equally received several credibly attested allegations of gross violations by officials of the JTF, including allegations of summary executions, torture, arbitrary detention amounting to internment and outrages against the dignity of civilians, as well as rape. In particular, we have received persistent and credibly attested allegations of indiscriminate disposal of dead human remains by personnel of both the JTF and the Borno State Environmental Protection Agency, BOSEPA.

The allegations about detention practice are extensive. Detainees are allegedly held in un-gazetted places of detention, with no or inadequate documentation and outside the safeguards provided for under applicable laws, including the Constitution of Nigeria and the

³⁷ The LGAs in Borno North include: Dikwa, Gubio, Kukawa, Mafa, Magumeri, Marte, Monguno, Mubbar, Ngala, Nganzai.

African Charter on Human and Peoples' Rights. They are not allowed access to family, counsel or medical personnel. Under Nigeria's 1999 Constitution and consistent with the African Charter on Human and Peoples' Rights, detention is an exception to a guarantee of the right to personal liberty and can only take place "in accordance with procedure permitted by law."³⁸ The rules applicable to such detentions are unknown.

These conditions, if established, amount to internment which is not regulated by any law in force in Nigeria. The Commission is equally concerned that detention practice characterized by these features could provide a cover for torture and enforced disappearance and appeals to Nigeria's security forces to explicitly renounce both torture and enforced disappearance. Under the International Convention for the Protection of All Persons from Enforced Disappearance, "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance."³⁹ At the end of May 2013, the Federal Government released a set of alleged JALISWAJ operatives, some of whom appeared to be infants and children.⁴⁰

³⁸ Section 35(1) of the Nigeria's Constitution provides as follows:

Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with procedure permitted by law –

- (a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;
- (b) by reason of his failure to comply with the order of a court or in order to secure the fulfillment of any obligation imposed upon him by law;
- (c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;
- (d) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;
- (e) in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or
- (f) for the purpose of preventing unlawful entry of any person into Nigeria or effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto;

Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.

³⁹ International Convention for the Protection of All Persons from Enforced Disappearance, Article 1(2) (2006). The Convention defines "enforced disappearance" as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

⁴⁰ "Nigeria releases 58 Boko Haram Detainees", available at <http://www.africanspotlight.com/2013/05/31/nigeria-releases-58-boko-haram-detainees/> visited 3 June 2013

Prior to the announcement of a State of Emergency (SoE) in three States of north-east Nigeria, the personnel of the JTF were mostly deployed around the metropolitan areas of the affected States. The Commission received some complaints about absence or neglect of periodic troop rotation of JTF personnel but has so far been impossible to verify the regularity of troop rotation in the JTF deployments. Troop rotation facilitates rest and recuperation on the part of active service personnel, helping them to minimise risks of post-traumatic stress disorders (PTSD), among other consequences, which may predispose them to violations of host communities. Following the announcement of the SoE, however, Special Operations Forces (SOFs) were reportedly deployed as part of the JTF operations.

In the period immediately following the SoE, tele-communications contact with the affected States were (and have remained) disrupted, dis-abling communications between the affected States and the rest of Nigeria. Most recently the security agencies have also banned the use of satellite phones in the region.⁴¹ In Borno State, in particular, an initial 24-hour curfew was imposed in the first 48 hours of the SoE. The curfew has since been relaxed to a 10-hour duration lasting from 21:00 hours to 07:00 hours. The communication disruption has also made it impossible to adequately or at all monitor the consequences of the deployment.

The Commission has, however, received several allegations of unlawful killings against the JTF, especially in the initial insertion period of the emergency deployment. The intensity of BOSEPA's involvement in the disposal of human remains rose rapidly in the weeks immediately following the announcement of the SoE. Equally, there have been testimonies indicating that the Special Operations Forces (SOF) inserted with the Emergency deployment appear to have enhanced the professionalism of JTF personnel in many Sectors.

6.3 AVERTING A HUMANITARIAN CRISIS AND BUILDING COMMUNITY PARTICIPATION AND RESILIENCE

As a result, caught between JALISWAJ and the JTF, many communities reportedly lived in desperate fear and destitution which affected their enjoyment of constitutionally guaranteed rights as well as access to their livelihoods. Significantly, public health programmes, including immunization have been severely set back. Equally, some medical experts from the region report a notable upsurge in what appear to be evidence of post-traumatic stress dis-orders, including a rise in sudden death, cardiac seizures, and aneurysms. Fuller epidemiological investigations will be required into these claims.

⁴¹ Ola'Audu, "JTF bans Thuraya phones in Borno, others, says Boko Haram use them for attacks", *Premium Times*, 19 June, 2013, available at <http://premiumtimesng.com/news/139116-jtf-bans-thuraya-phones-in-borno-others-says-boko-haram-use-them-for-attacks.html>, visited on 19 June 2013.

Even before now, North-East Nigeria presented with the worst statistics of human development in Nigeria generally, especially in the area of maternal mortality where the rate is about three times the national average. While the national average in 2012 was 545 deaths per 100,000 live births, the maternal mortality rate in north-east Nigeria was reported during the same period to be about 1,549 per 100,000 live births.⁴² Anecdotal reports reaching the Commission suggest the maternal mortality situation in the region during this period is likely to have worsened. It is not immediately evident whether any mechanisms have been deployed to address this.

Compounding these issues, the farming communities of Borno State in particular have lost the 2013 planting season, mostly attributable to fear of JALISWAJ. The consequences of this are far reaching. The immediate result is the likelihood of a food security and nutritional crises in Borno and surrounding States that are dependent on the agricultural output from its Lake Chad Basin. Mitigation mechanisms adaptation must be deployed urgently in order to avert a food security and nutritional crisis in this region.

The prices of food stuff and staples have clearly spiked in much of north-east Nigeria. Around Maiduguri, the price of a 50 Kilogramme bag of rice now sells for between N15,000 to N18,000, up from N7,000 to N8,000, an increase of over 100%. In Maiduguri, as well as Yola, the cost of like-for-like transportation on a tricycle has risen from N50 to N100 for a shared ride, an increase of 100% and up from N200 to N300 for a charter, an increase of 50%. In more remote areas, however, such as Bama, some of whose food supplies used to come routinely from across the Border in Cameroon, the spike in prices is reported to be much higher. Usually, in north-east Nigeria, food prices and transportation do rise around the approach to the Holy Month of Ramadan, which, this year, is likely to begin in the second week of July. However, the scope and extent of these price rises suggest that they are more likely to be linked to the on-going security situation in the region.

Denial of or interference with humanitarian access could constitute an international crime. To respond to the humanitarian situation in the region, it is essential for the Government and security forces to ensure the existence of guaranteed humanitarian corridor in the zone of operations with assurances of protection to workers undertaking humanitarian deliveries and monitoring. The Commission wishes to underscore the legal obligation of Government and its security agencies to guarantee adequate humanitarian access to the zones of operation under their control.

Since the declaration of the SoE, it is reported that there has been a notable de-escalation in JALISWAJ activities in the affected states. In Borno State, in particular, JTF is

⁴² British Council/DfID, *Gender In Nigeria Report*, vi (2012)

reported to have recovered full control of most of the LGAs reported to have been previously dominated by JALISWAJ elements. The enhanced security presence could, depending on how it is managed, reassure communities enough to enable them organize to take a stake in enhancing security measures in their respective areas. However, community participation and ownership will be enhanced by affording remedies to communities living with this security situation, addressing the pattern of complaints against internal security forces in a credible manner, and ensuring that such complaints will not be taken lightly.

6.4 ADDRESSING USE OF FORCE

Most of the allegations against the JTF clearly appear to raise questions of proportionality of the use of force and standards applicable to the conduct of the armed forces in internal security operations. This report sketches an outline of the applicable standards. It is proposed to make this the subject of fuller examination by the Commission.

The situation in north-east Nigeria is not outside the contemplation of Nigeria's Constitution and the laws established under it. Under Section 14(2)(b) of the Constitution, "the security and welfare of the people shall be the primary purpose of government." The same Constitution also guarantees the right to life and prohibits torture.⁴³ With respect to the right to life, the Nigerian Constitution provides as follows in Section 33(2):

A person shall not be regarded as having been deprived of his life in contravention of this section, if he died as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary –

- (a) For the defence of any person from unlawful violence or for the defence of property;
- (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- (c) For the purpose of suppressing a riot, insurrection or mutiny.

The pre-condition that any denial of the life through the use of force under this provision must be "to such extent and in such circumstances as a permitted by law" and "reasonably necessary" clearly import the requirement of proportionality in the use of force by internal security forces. Legal standards exist to govern the determination of proportionality. Naturally, any such determination must be governed by evidence.

Given the provisions of Nigeria's constitution, attention deserves to be paid to the norms that can, should or ought to govern the operations in north-east Nigeria both prior to

⁴³ Constitution of the Federal Republic of Nigeria, 1999, sections 33(1) & 34(1)

and since the SoE. In particular, the attention of the Commission has been drawn to the Code of Conduct for Nigerian Armed Forces Personnel on Internal Security and Aid to Civil Power Operations, enacted by the then Chief of Defence Staff, Marshall Paul Dike, in February 2010. Paragraph 6 of this Code provides with respect to Rules of Engagement as follows:

In enforcing domestic law and order, members of the Nigerian Armed Forces shall use firearms as a last resort with maximum restraint, and respect for the principle of minimum force even in situations of self-defense. Force may only be used when absolutely necessary and to the extent required to perform their duty. To this end, all operations must be guided by appropriate Rules of Engagement (ROE) to direct personnel on the use of force.

The Commission is examining as part of its continuing monitoring of the situation in the States affected by the Emergency the extent to which there has been compliance with the provisions of this Code of Conduct. For ease of reference, this Code is reproduced as Appendix 2 to this interim report.

With reference to the Emergency, the Emergency Powers (General) Regulations of 2013 contain some broad provisions with respect to detention of persons within the emergency area, requisitioning of property, as well as search and seizure, and apprehension trial and punishment of persons offending against the Emergency Order.⁴⁴ The Emergency Regulations do not in any way claim to derogate from the constitutional protections of the rights to life and the absolute prohibition of torture, cruel, inhuman or degrading treatment or punishment. The tenor of the Emergency Regulations indicates that the Government of the Federal Republic of Nigeria desires to deal with the situation in north-east Nigeria as a law enforcement measure subject to regular internal laws. It is essential, however, to ensure adequate training for all forces deployed in the affected areas with respect to the rules or norms governing their operations.

6.5 FORCED DISPLACEMENT

Forced displacement has been a significant consequence of the on-going security situation and operation north-east of Nigeria. The Commission saw and spoke to some affected persons displaced into neighboring States in the north-east of Nigeria. Many of them are not encamped, some of them fear that registering with the camps maintained by the NEMA could expose them to the attentions of the security agencies or of JTF. They are also reported to be in

⁴⁴ Federal Republic of Nigeria, Emergency Powers (General) Regulations, Government Legal Notice, No. 85, Official Gazette, No. 28, Vol. 100, Regulation 3.

fear for safety of camps from possible JALISWAJ attacks. We have been unable to verify these fears but call attention to the fact that they exist.

As a result, credible demographics of the displaced in the affected regions may be difficult to gather. This should not, however, preclude an effort by the responsible agencies to do so. Under the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Nigeria, as a party to the Convention, voluntarily undertakes to “respect and ensure respect for the principles of humanity and human dignity of internally displaced persons”⁴⁵; and to “ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel.”⁴⁶ The government of Nigeria has a legal duty to respect and fulfill these obligations under both its constitution and international law. To begin with the government should acknowledge that forced displacement is a consequence of its on-going security operations in north-east Nigeria. It should also undertake enumeration of those affected and arrange adequate assistance and protection for them.

It is relevant that the States of north-east Nigeria most affected by the on-going situation are all along Nigeria’s international borders and that many of the affected communities have trans boundary affinity with communities in neighbouring countries. Unsurprisingly, therefore, there are also people from these communities displaced outside Nigeria. Where forced displacement crosses international borders, those affected are treated in law as refugees or asylum seekers. The United Nations High Commissioner for Refugees (UNHCR) has reported significant refugee flows into Cameroon and Niger. On 18 June, the UNHCR “reported the presence of over 3,000 Nigerians” in the Far North of Cameroon.⁴⁷ On the same day, the UNHCR also reported that “over 6,000 persons have arrived from northern Nigeria in the past weeks. That includes 2,692 Nigerian nationals as well as 3,544 returning Niger nationals and others, mainly Chadians.”⁴⁸ This was up from an earlier figure of “at least 2,400 people” reported by the same agency on 29 May.⁴⁹ On the same day, the UNHCR’s regional Director for Africa, George Okoth-Obbo, was quoted as saying that “UNHCR remains

⁴⁵ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Article 3(c) (2009). Nigeria ratified this Convention on 17 April 2012 and it entered into force on 6 December 2012. Ratification information available from the African Union at

<http://www.au.int/en/sites/default/files/Convention%20on%20IDPs%20-%20displaced....pdf>

⁴⁶ *Ibid.*, Article 3(j)

⁴⁷ “NE Nigeria Insecurity sees refugee outflows spreading to Cameroon”, available at

<http://www.unhcr.org/51c05dd76.html>

⁴⁸ *Ibid.*

⁴⁹ “UNHCR Concerned about Displaced Nigerian, Calls on Neighbouring Countries to Keep Borders Open”, UNHCR Press Release, 29 May 2013, available at <http://www.unhcr.org/51a602776.html>

concerned for the safety of the civilian population, especially those who may be forced to flee from their homes in search of safety."⁵⁰

The right to refugee protection is recognised as such under Article 12(3) of the African Charter on Human and Peoples' Rights, which is domestic law in Nigeria. Nigeria is also party to the AU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 and the United Nations Convention of 1951 on the same subject as supplemented by the Protocol of 1967. These Conventions are also part of Nigeria's national law under the National Commission for Refugees, Etc., Act.⁵¹ As such, they are binding on Nigeria. It is important here to call attention to the provisions of the AU Refugee Convention with respect to the exclusion of persons from refugee protection. In particular, Article 1(5) of the Convention provides:

The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity;
- (d) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Most of these refugees will be innocent civilians caught in the on-going operations. It is equally possible that some of those displaced could be JALISWAJ operatives. Nigeria's President had described JALISWAJ as "terrorists and insurgents", while the ICC-OTP has suggested that the organization could be implicated in crimes against humanity. The Algiers Convention on the Prevention and Combating of Terrorism of 1999 adopted under the auspices of the African Union (AU) clearly affirms that terrorism is a crime contrary to the purposes and principles of the AU and crimes against humanity are equally contrary to the purposes of the AU under the Constitutive Act of the African Union. As a result, Nigeria together with the host countries and the UNHCR have responsibilities to co-operate in status determination in a manner that ensures that refugee status is not extended to persons who would otherwise be liable to be excluded under applicable standards binding on Nigeria.

⁵⁰ *Ibid.*

⁵¹ Chapter N-21, Laws of the Federation, 2004.

APPENDIX 1

NATIONAL HUMAN RIGHTS COMMISSION

TERMS OF REFERENCE FOR INVESTIGATION INTO BAGA INCIDENT

AND ASSESSMENT OF HUMANITARIAN SITUATION IN N.E NIGERIA

1 BACKGROUND

Since 2009, there has been a deepening crisis of safety, security and governance in parts of north-east Nigeria, especially in Borno and Yobe States.

In 1998, Chad, Niger, and Nigeria established a Multi-national (military) Joint Task Force (MJTF) in the region primarily to address transboundary crime and secure border communities in the Lake Chad Basin. The MJTF comprises approximately troops contributed by Nigeria Chad and Niger. In April 2012, the troop contributing countries reportedly extended the mandate of the MJTF to include counter-insurgency operations in their sectors.

In 2009, in response to the rise in violence in the region, Nigeria deployed a military-led, Joint Task Force (JTF) also parts of north-east Nigeria. The JTF is different from the MNJTF. The JTF – like the MJTF - however, also undertakes counter-insurgency operations. Both the MNJTF and the JTF operate in parts of Borno State.

2 THE BAGA INCIDENT

Sometime between 15 and 21 April 2013, an encounter reportedly took place between uniformed personnel and alleged insurgents in Baga, Borno State, near Nigeria's north-eastern border with Lake Chad. At the end of this encounter, many people were reported killed, houses were burnt, and many more people were reportedly displaced.

3 TERMS OF REFERENCE

In exercise of its responsibilities and powers under Sections 5 and 6 of the National Human Rights Commission Act (as amended) [hereafter referred to as "The Act"], the National Human Rights Commission proposes to independently investigate the Baga incident and assess the wider humanitarian situation in parts of north-eastern Nigeria, especially in Borno and Yobe States and, for that purpose, establishes the following terms of reference.. In particular, the investigation will seek to:

- (i) Establish the specific and general circumstances, actors, and sequence of events that triggered the encounter allegedly between elements of the insurgency and personnel of the uniformed services;

- (ii) Establish the pattern and number of human casualties, the types or calibre of ordnance deployed (if any), and the scope of damage to human settlements and livelihoods;
- (iii) Establish whether the circumstances of the incident or its aftermath indicate or show evidence of the commission of serious human rights violations or other crimes and compliance with the applicable rules of engagement by all actors;
- (iv) In particular, establish whether the circumstances of the incident or its aftermath indicate or show any specific violations against women, children or civil population in the affected communities;
- (v) Assess the state of humanitarian provisioning for communities affected by the on-going security situation in Baga and in north-east Nigeria;
- (vi) Identify measures that may be taken to prevent a repeat of such incident and improve relations between the host communities and security agencies;
- (vii) Address its findings and recommendations to the relevant institutions, organs, agencies or departments of government, including, but not limited to the President and Commander-in-Chief of the Armed Forces; the National Assembly; and the Government of the relevant States; and
- (viii) Undertake any other tasks that may be necessarily incidental to the foregoing.

4 METHODOLOGY & POWERS

In undertaking this investigation, the Commission shall deploy such methods as may be appropriate for the attainment of the objectives defined by these terms of reference. In particular, the Commission shall:

- (i) secure and review other relevant pronouncements, reports, documents, or releases;
- (ii) seek and secure the co-operation of the Armed and uniformed services, relevant agencies at the Federal, including the NEMA, State and Local Government levels as well as elected representatives of the people and the affected communities;
- (iii) where necessary, offer suitable confidentiality to witnesses, intermediaries or other persons willing to assist it in this process;
- (iv) seek or co-opt as appropriate, such expertise as may be necessary or assist it in a fair and effective conduct of the investigations; and
- (v) utilize as necessary, the full range of the statutory powers of the available to it under the Act;

5 DELIVERABLES

In accordance with the Act, the investigation shall formulate a report of its findings and recommendations for adoption by the Commission and submission to the President and Commander-in-Chief of the Armed Forces, the National Assembly, the Government of the relevant States of Nigeria and release in such other form as the Commission may determine before the end of June 2013.

APPENDIX 2

RESTRICTED



CODE OF CONDUCT FOR NIGERIAN ARMED FORCES PERSONNEL

ON

INTERNAL SECURITY & AID TO CIVIL POWER OPERATIONS

Prepared Under the Direction of

Air Chief Marshal Paul Dike CFR Chief of Defence Staff

February 2010

RESTRICTED

RESTRICTED



I am a Patriotic Nigerian;

*I must discharge my Constitutional
responsibilities with diligence, professional
competence, and respect
for the Rule of Law.*

RESTRICTED



The information given in this document is not to be communicated, either directly or indirectly to the Press or to any person not authorised to receive it.

CODE OF CONDUCT FOR NIGERIAN ARMED FORCES PERSONNEL ON INTERNAL SECURITY AND AID TO CIVIL POWER OPERATIONS

RESTRICTED

RESTRICTED

GENERAL

1. As members of the Nigerian Armed Forces, you would usually be called upon in times of civil disturbance to provide aid to civil authority in restoring law and order in accordance with Section 217 of the 1999 Constitution of the Federal Republic of Nigeria. Your primary duties in such roles are the preservation of public peace, protection of lives and property and preventing crime. To achieve these duties, you would be acting outside your regular regimental duties and directly with Nigerian Citizens, therefore the highest standard of conduct would be expected of you.
2. This code sets out principles which will guide your actions while engaged in operations in aid of civil authority and is drawn based on the principles of international human rights and humanitarian laws. You therefore have a particular responsibility to treat citizens fairly, impartially and with respect, while avoiding all forms of partisanship, discrimination, and victimisation.

APPLICATION

3. This code applies to personnel of all ranks and shall apply in conjunction with existing regulations, standard operating procedures, and orders applicable to Nigerian Armed Forces personnel. The code is applicable in, but not limited to, domestic operations relating to the following:
 - a) Violent crimes.
 - b) Labour unrest.
 - c) Subversion.
 - d) Sabotage.
 - e) Religious Crisis.
 - f) Community clashes.
 - g) Restiveness.
 - h) Micro-nationalism.
 - i) Insurgency.
 - j) Election support
 - k) Disaster relief.

PART 1

RESPONSIBILITIES OF COMMANDERS

4. The success of any internal security operation regardless of its elaborate planning and prompt action depends on proper administration of the personnel deployed to crisis areas. During the period, considerations should be given to the following essential aspects of administration:
5. **Operational Guidelines.** Higher authority will provide direction to participating units and personnel on the nature of any military operation to be undertaken and the goals to be achieved when undertaking such missions. This may include direction on the scope of action a commander may take to accomplish the mission. Guidelines must define sufficiently the role of the military in the operation so as to enable personnel respond appropriately as situations develop and prevent them from taking actions that may breach any law.
6. **Rules of Engagement.** In enforcing domestic law and order, members of the Nigerian Armed Forces shall use firearms as a last resort with maximum restraint, and respect for the principle of minimum force even in situations of self-defence. Force may only be used when absolutely necessary and to the extent required to perform their duty. To this end, all operations must be guided by appropriate Rules of Engagement (ROE) to direct personnel on the use of force.
7. **Equipment.** Cleaning, inspection and checking of all arms and ammunition, radio and personnel equipment should be carried out at regular intervals.
8. **Stores.** Provision should be made for the replenishment and exchange of technical, clothing and other stores, especially where personnel are likely to stay longer in the crises area.
9. **Transportation.** Adequate and suitable vehicles should be provided for the Unit deployed to a crisis area. Arrangement for repairs and supply of POL should be made without disrupting the momentum of the operation.

10. **Food.** Regular provision of meals and drinking water must be made for the personnel. If by the nature of a crisis cooked meals cannot be served, troops must be supplied with adequate dry ration before leaving the unit, with provision for replenishment regularly in the field.
11. **Medical.** The Presence of the medical team and prompt evacuation of injured personnel will reassure and improve the morale of the men in the crisis area.
12. **Personal Hygiene.** Adequate arrangements must be made for the personnel to have baths, laundry, change of clothing, medical inspection and use of latrine in order to maintain a high level of personal hygiene.
13. **Rest.** Adequate arrangement must be made to ensure that personnel relieved from a crisis area have enough rest before being re launched to new trouble spots.

PART 2

RESPONSIBILITIES OF INDIVIDUALS

14. You must remember at all times that you are an ambassador of Nigerian Armed Forces and that your conduct could reflect on your Service and have consequences for you. You are therefore to maintain strict Service discipline and comply with the instructions of the operations headquarters as directed by appropriate superior authority bearing in mind the supremacy of the rule of law.
15. You are to respect the rights of individuals, treat all persons including foreigners with dignity, fairness and impartially.
16. You are to protect the dignity of all persons within area of IS Operations and provide them safety from the dangers of the crisis.
17. It is prohibited to commit acts of murder, or carry out summary execution without due process of law.

18. You must not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment. Superior orders or exceptional circumstances such as threat to national security, or public emergency are not a justification for torture or other cruel, inhuman or degrading treatment.
19. It is prohibited to attack civilians and civilian objects which are not being used by the opposing forces/groups.
20. Actions that you take against opposing forces shall be such that will not cause more damage or injury than your mission requires.
21. After the use of firearms and in the event of injuries, you will assist the wounded without discrimination.
22. All arms and ammunition or other offensive materials captured in the course of the operation are to be deposited with the police or unit armouries
23. You shall not convert opposing forces or abandoned property into your private use. The pillage or looting of civilian property is also prohibited.
24. You will not fraternise unduly with the inhabitants of the area of operations except where such is necessary for achieving military tasks.
25. You will not engage in Private activities, legal or illegal, such as trading and boot-legging, which may compromise effective performance of your duties.
26. Relief actions covering food, medical supplies, clothing etc must be permitted.
27. It is prohibited to commit any acts of sexual exploitation and sexual abuse; you are to extend particular duty of care towards women and children. They shall be the object of special respect and shall be protected in particular against rape, prostitution and any other form of indecent assault.
28. Pregnant women and mothers having dependant infants who are arrested, detained or interned for reasons related to the crisis, shall have their case considered with utmost priority.

29. If in exceptional cases, children who have attained the age of 15 years act in support of the opposing forces and are eventually arrested they shall continue to be treated as children.
30. You are not to issue or exit illegal orders.
31. As a member of the Nigerian Armed Forces, always bear in mind that you are responsible for your individual actions and are subject to Nigerian Military Laws as well as National Laws.

PART 3

CONDUCT ON SPECIAL ELECTORAL DUTIES

32. Escort duties and physical security at the returning/collation centres may form part of the special electoral duties to which you may be assigned. When so assigned your conduct must always be in conformity with the following instructions:

a. Escort Duties. When on escort duties you must be guided by the following precepts:

- (1) You must not handle electoral materials.
- (2) You must not convey electoral materials in military vehicles.
- (3) You must not engage in educating the public on procedures for voting.
- (4) You must not be identified with any political party
- (5) You must withdraw to a predetermined location away from the polling/returning centres on completion of escort duties.
- (6) You must ensure that electoral materials are escorted to officially designated centres.
- (7) You must take instructions only from your escort commander.
- (8) In the event of threat to life or lives and electoral materials in conjunction with the police when necessary.

b. Physical Security at the Returning/Collation Centres. When tasked to provide physical security at the returning/collation centres you must adhere strictly to the following guidelines:

- (1) You must not be involved in collation of votes.

- (2) You must remain at a designated place within the collation centre.
- (3) You must ensure security of electoral officials and materials in conjunction with the police when necessary.

RESTRICTED

Reporting Breaches

33. Every event and action that takes place during and IS operation must be recorded in details in log sheets or diaries. A collation of all the events will give a clearer picture of activities that took place. In particular, every individual member of the Armed Forces has a responsibility to report through established reporting mechanisms any suspicion that a violation of the present code has occurred or is about to occur. Failure to report such violations shall constitute grounds for disciplinary measures.