



**Global
Justice Center**

Human Rights Through the Rule of Law

April 14, 2015

**SUBJECT: ARTICLE 15 COMMUNICATION TO THE ICC OFFICE OF
THE PROSECUTOR REGARDING BOKO HARAM'S TARGETED
ABDUCTION OF WOMEN AND CHILDREN AS GENOCIDE**

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I. INTRODUCTION

1. The Global Justice Center (GJC), a New York-based human rights organization, focused on using international law for strategic change, files this communication to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC), pursuant to Article 15 of the Rome Statute.
2. GJC submits that, based on the information set out herein, there is a reasonable basis to believe that Boko Haram is perpetrating genocide against the Christian community in northeastern Nigeria,¹ including by forcibly transferring or abducting children, with the intent to destroy the group, as such, at least, “in part.” Due to the absence of national laws implementing the Rome Statute or the Genocide Convention, the absence of domestic criminal proceedings with respect to those bearing the greatest responsibility for these crimes, and in the light of the gravity of the acts committed, GJC further submits that the case would be admissible under Article 17 of the Rome Statute. Moreover, based on the available information, there is no reason to believe that the opening of a preliminary examination by the OTP at this time would in any way contravene the interests of justice. Accordingly, there is a reasonable basis to proceed pursuant to Article 15.
3. In support of this communication, GJC has relied upon a selected number of publicly available reports documenting the targeted abduction of Christian women and children by Boko Haram, the Nigerian government’s limited and ineffectual responses thereto, and the OTP’s preliminary findings with respect to its ongoing investigation into the

¹ *N.b.* Nigeria deposited its instrument of ratification to the Rome Statute on Sept. 27 2001. *See* International Criminal Court, *Nigeria*, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/nigeria/Pages/nigeria.aspx (last visited, Apr. 12, 2015).

situation in Nigeria.² The relevant excerpts of these reports are attached hereto as Annexes 1, 2 and 3.

II. RELEVANT FACTS

4. Nigeria, a federation comprised of 36 States and 774 local government areas, has a population of over 168 million people and more than 250 ethnic groups, of which the three main ones are: the Hausa-Fulani Muslims living predominantly in the north; the Yoruba, followers of both Christian and Islamic faiths, residing mainly in the southwest; and the Igbo, most of whom are Christians, and can be found primarily in the southeast.³
5. The types and causes of violence in Nigeria are multiple and differ from state to state.⁴ In central Nigeria's Middle-Belt states, inter-communal, political and sectarian violence is rooted in a struggle for political power and disputes between indigenous groups and "settlers."⁵ In the Niger Delta, ethnic gangs, military groups and federal forces fight over control of the oil production in the region and access to resources.⁶ Finally, the Northern states, particularly Borno, Kano, and Kaduna States, have been affected by communal or electoral violence, as well as attacks attributed to Boko Haram.⁷
6. Boko Haram is a Salafi-jihadi Muslim group, operating mainly in northeastern Nigeria (Borno, Yobe, Katsina, Kaduna, Bauchi, Gombe and Kano States), with origins dating back to 2002 when it was founded as a predominantly radical religious movement by

² *N.b.* The OTP opened a preliminary examination with respect to the situation in Nigeria on or before 18 November 2010. See ICC, Office of the Prosecutor, *Situation in Nigeria: Article 5 Report*, ¶ 21 (Aug. 5, 2013) [hereinafter, Nigeria Article 5 Report], available at <http://www.icc-cpi.int/iccdocs/PIDS/docs/SAS%20-%20NGA%20-%20Public%20version%20Article%205%20Report%20-%2005%20August%202013.PDF>.

³ *Id.* at ¶ 24.

⁴ *Id.* at ¶¶ 25-32.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Mohammed Yusuf in Maiduguri, in Borno State. The group's declared objective was to replace the Nigerian State with a Shariah-based Islamic system.⁸

7. Boko Haram's new declared leader, Abubakar Shekau, seems to be pursuing a more radical, violent and global jihadist agenda going beyond the establishment of an Islamic system in Nigeria,⁹ as demonstrated by Boko Haram's recent pledge of allegiance to the Islamic State in Iraq and the Levant (ISIL).¹⁰
8. From mid-2013, there has been a dramatic increase in the pace and intensity of Boko Haram attacks against civilian targets, with Human Rights Watch (HRW) reporting that at least 2,053 civilians were killed by Boko Haram in the first half of 2014.¹¹ The intensity of the violence has led the OTP to determine that "since at least May 2013, the situation in Nigeria relating to the activities of Boko Haram and the counter-insurgency response by the Nigerian authorities constitutes a non-international armed conflict."¹²
9. The OTP has also concluded that, since July 2009, there is a reasonable basis to believe that Boko Haram has committed crimes against humanity, namely acts of murder and persecution, and that the acts of murder, since at least May 2013, may also qualify as war crimes,¹³ advancing the preliminary examination of the situation in Nigeria to phase 3 (admissibility), with a view to assessing whether the national authorities are conducting

⁸ *Id.* at ¶ 30; *see also* Children and armed conflict: Report of the Secretary-General, May 15, 2014, U.N. Doc. A/68/878-S/2014/339; GAOR, 68th Sess., ¶ 177, [hereinafter SG Report on Children and Armed Conflict] available at http://www.un.org/ga/search/view_doc.asp?symbol=A/68/878&Lang=E&Area=UNDOC.

⁹ Nigeria Article 5 Report, at ¶ 31; Jacob Zenn and Elizabeth Pearson, *Women, Gender and the evolving tactics of Boko Haram*, JOURNAL OF TERRORISM RESEARCH, vol. 5(1) (SPECIAL ISSUE), Feb. 2014, at 46-47 [hereinafter, Zenn, *Women, Gender and the evolving tactics of Boko Haram*], available at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=177299>.

¹⁰ *See* Associated Press (AP), *Islamic State Accepts Boko Haram Pledge of Allegiance*, WALL STREET JOURNAL, Mar. 13, 2015, <http://www.wsj.com/articles/is-accepts-boko-haram-pledge-of-allegiance-1426237308>.

¹¹ HRW, *Those Terrible Weeks in their Camp: Boko Haram Violence against Women and Girls in Northeast Nigeria 13-16* (Oct. 2014) [hereinafter HRW, *Those Terrible Weeks*], available at <http://www.hrw.org/reports/2014/10/27/those-terrible-weeks-their-camp-0>.

¹² ICC, Office of the Prosecutor, *Report on Preliminary Examination Activities 2014* (Dec. 2, 2014), ¶¶ 178-179, available at <http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>.

¹³ *Id.*

genuine proceedings in relation to those who appear to bear the greatest responsibility for such crimes, and the gravity of such crimes.¹⁴

10. Consistent with the worsening level of violence and scale of grave violations committed by Boko Haram, the United Nations Security Council (UNSC) has repeatedly condemned the continued escalation of attacks perpetrated by Boko Haram; most recently on April 7, 2015.¹⁵
11. In addition, the Human Rights Council (HRC) held a Special Session on April 1, 2015 in light of the terrorist attacks and human rights abuses and violations committed by Boko Haram.¹⁶ At the Special Session, the U.N. High Commissioner for Human Rights, Zeid Raad al-Hussein, expressed his concern over the “high risk of escalating ethnic and religious violence,” stating that his Office had received reports that Boko Haram fighters retreating from advancing military forces in Nigeria had murdered women and girls that they had taken as “wives.”¹⁷
12. The HRC concluded its Special Session by calling for the investigation of the atrocities committed by Boko Haram, with a view towards accountability.¹⁸
13. As detailed in the attached Annexes, since 2013, Boko Haram’s tactics have evolved to targeting Christian women and children, including for abductions.¹⁹ A study by Nigeria’s

¹⁴ Nigeria Article 5 Report, at ¶¶ 15, 17, 79-100.

¹⁵ Security Council Press Statement on Boko Haram Attacks against Civilians in North-East Nigeria and Chad, (Apr. 7, 2015), available at <http://www.un.org/press/en/2015/sc11852.doc.htm>.

¹⁶ Press Release, Human Rights Council opens Special Session in light of terrorist attacks and human rights abuses by Boko Haram (Apr. 1, 2015), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15786&LangID=E>.

¹⁷ Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights, Opening Statement at the 23rd Special Session of the Human Rights Council (Apr. 1, 2015), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15782&LangID=E>; Associated Press, *Boko Haram Fighters Murdered Captive Women: UN Human Rights Chief*, THE WORLD POST, Apr. 4, 2015, http://www.huffingtonpost.com/2015/04/01/boko-haram-murdered-women_n_6983928.html.

¹⁸ Press Release, Human Rights Council calls for the investigation of the atrocities committed by Boko Haram, <http://www.ohchr.org/EN/NewsEvents/Pages/AtrocitiesCommittedByBokoHaram.aspx> (Apr. 8, 2015).

¹⁹ HRW, *Those Terrible Weeks*, at 27-31; Watchlist on Children and Armed Conflict, “*Who Will Care For Us?*”: *Grave Violations against Children in Northeastern Nigeria*, at 22-25 (Sept. 2014) [hereinafter, Watchlist Report], available at http://watchlist.org/wordpress/wp-content/uploads/2111-Watchlist-Nigeria_LR.pdf; Zenn, *Women, Gender and the evolving tactics of Boko Haram*; Atta Barkindo, Benjamin Tyavkase Gudaku, and Caroline Katgurum Wesley, *Boko Haram and Gender Based Violence Against Christian Women and Children in North-Eastern Nigeria Since 1999*, 16-32

Political Violence Research Network (NPVRN) suggests that over 45% of those killed by Boko Haram are Christian women and children.²⁰ In describing the violence afflicting Bauchi State, NPVRN concluded that,

[f]irst and foremost, the continued attacks on these areas, believed to be Christian enclaves only, reveal among many other things that the dangerous ideology of Boko Haram is essentially driven by Islamic religious fundamentalism and fanaticism, sustained by crass impunity. In addition, reliable sources seem to suggest that Boko Haram attackers believe Christian women are responsible for making their children hold Islam in disdain, as a religion that perpetrates terror. This has angered Boko Haram sect members; **who in turn have made Christian women and their children *the most hunted targets.***²¹

14. The Christian Association of Nigeria has been reporting the abduction of Christian teenagers since July 2013²² and researchers speaking to women in the northeastern regions of Nigeria have uncovered a picture of violence and intimidation, with Christian women and children increasingly targeted with abduction, forced marriage and compulsory conversion to Islam.²³
15. Perhaps the most grave example of abduction by Boko Haram, to-date, is the abduction of 276 schoolgirls from the Government Secondary School, in Chibok, Borno State, on the night of April 14, 2014.²⁴ Over 200 schoolgirls are still unaccounted for.²⁵
16. Boko Haram was listed as a new party in Annex II of the Secretary-General's 13th Annual Report on Children and Armed Conflict, for killing and maiming and attacks on

(Nigeria's Political Violence Research Network Working Paper No. 1, Nov. 2013), *available at* <https://www.worldwatchmonitor.org/research/3117403> [hereinafter, NPVRN Report].

²⁰ Zenn, *Women, Gender and the evolving tactics of Boko Haram*, at 49 (citing NPVRN Report, at 17-22).

²¹ *Id.* at 21.

²² *Boko Haram: Christian girls kidnapped and Islamized, schools targeted*, AGENCIA FIDES, Jul. 23, 2013,

<http://www.fides.org/en/news/34019->

[AFRICA NIGERIA Boko Haram Christian girls kidnapped and Islamized schools targeted#.VSvnGvnF-VM.](http://www.fides.org/en/news/34019-)

²³ NPVRN Report, at 16-32.

²⁴ HRW, *Those Terrible Weeks*, at 13-16.

²⁵ *Nigeria president-elect: 'I cannot promise' to find Chibok girls*, ALJAZEERA AMERICA, Apr. 14, 2015,

<http://america.aljazeera.com/articles/2015/4/14/nigeria-president-elect-cant-promise-to-find-chibok-girls.html> (citing 219 as still missing).

schools and hospitals, which triggered the establishment of the Monitoring and Reporting Mechanism (MRM) in Nigeria.²⁶

17. And, on March 25, 2015, for the first time, the UNSC held an Open Debate on the topic of grave violations committed against children by armed non-State actors, during which Boko Haram and its tactics of gender-based abductions figured prominently. At least twenty-five UN Member States and UNICEF joined the call for the expansion of the triggers for inclusion of parties into the annexes of the Secretary-General's annual report to include abductions.²⁷ Addressing the UNSC, the Special Representative of the Secretary-General for Children and Armed Conflict, Leila Zerrougui, stated that “[m]ass abductions of women and children are becoming a tactic of war used systematically to terrorize, suppress and humiliate entire communities.”²⁸

18. Boko Haram was further named in the Secretary-General's Annex to his 2015 report to the Security Council on conflict-related sexual violence as a party credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence during armed conflict.²⁹

III. THE STANDARD HAS BEEN MET FOR INITIATING A PRELIMINARY EXAMINATION OF WHETHER GENOCIDE HAS OR IS BEING COMMITTED

19. A “preliminary examination” is the procedural mechanism, found in Article 15 of the Rome Statute, by which the OTP determines whether there is a reasonable basis to proceed with an investigation, subject to authorization (at a later stage) by the ICC's Pre-

²⁶ See SG Report on Children and Armed Conflict (listing Boko Haram as a party that kills and maims children and that engages in attacks on schools and hospitals).

²⁷ Press Release, Office of the Special Representative of the Secretary General for Children and Armed Conflict, *Amid growing crises, UN officials urge protection for war's youngest victims*, (Mar. 25, 2015), available at <https://childrenandarmedconflict.un.org/amid-growing-crises-un-officials-urge-protection-for-wars-youngest-victims/>; Press Release, Watchlist on Children and Armed Conflict, *UN Security Council debate a unique opportunity to address violations of children's rights by armed groups*, (Mar. 24, 2015), available at http://watchlist.org/wordpress/wp-content/uploads/Watchlist-statement-March2015OpenDebate_Final.pdf; Press Release, Security Council, *Former Child Soldier Describes Forced Recruitment during Security Council Debate, Urges International Community to Aid Other Children Released by Armed Groups* (March 25, 2015), available at <http://www.un.org/press/en/2015/sc11832.doc.htm>.

²⁸ UN worried by rise in mass abductions of children, YAHOO NEWS (Mar. 25, 2015, 5:29 PM), <http://news.yahoo.com/un-worried-rise-mass-abductions-children-212927177.html>.

²⁹ U.N. Secretary General, *Report of the Secretary General on Conflict Related Sexual Violence*, Annex, U.N. Doc. S/2015/203 (Mar. 23, 2015).

Trial Chamber (PTC).³⁰ The filing of a “communication” to the OTP by an individual, group, State, or organization, is one of the means of triggering a preliminary examination.³¹

20. Article 53(1)(a)-(c) of the Rome Statute governs the legal framework of a preliminary examination,³² which requires the OTP to consider: (i) jurisdiction (temporal, material, and either territorial or personal); (ii) admissibility (complementarity and gravity); and (iii) the interests of justice.³³ In so doing, the OTP employs a four-phase filtering process.³⁴

³⁰ See Rome Statute of the International Criminal Court, A/Conf.183/9, Art. 15(1) (Jul. 17, 1998) [hereinafter Rome Statute] (“The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.”); Article 15(2) (“The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.”); Article 15(3) (“If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. [...]”); and Article 15(6) (“If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.”).

³¹ See ICC, Office of the Prosecutor, *Preliminary Examinations*, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx (last visited, Apr. 12, 2015).

³² Rome Statute, at Art. 53(1) (“The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) The case is or would be admissible under article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.”).

³³ See Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 20 (Mar. 31, 2010) [hereinafter, Kenya PTC Decision], (“In reaching this conclusion, rule 48 [...] dictates that the Prosecutor ‘shall consider the factors set out in article 53, paragraph 1(a) to (c)’. On the basis of a finding by the Prosecutor that there is ‘a reasonable basis to proceed with an investigation’, the Prosecutor ‘shall submit’ to the Chamber a request for authorization of the investigation.”).

³⁴ See ICC, Office of the Prosecutor, *Preliminary Examinations*, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx (last visited, Apr. 12, 2015) (“In phase 1, the Office conducts an initial assessment of all information on alleged crimes received under article 15 (‘article 15 communications’), to filter out information on crimes that are outside the jurisdiction of the Court. In phase 2, it analyzes all information on alleged crimes received or collected to determine whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall under the subject matter jurisdiction of the Court. In phase 3, it analyzes admissibility in terms of complementarity and gravity. In phase 4, having concluded from its preliminary examination that the case is admissible, it will examine the interests of justice. A recommendation that an investigation would not serve the interests of justice will be made only under highly exceptional circumstances.”).

Depending on the facts and circumstances of each situation, the Office may either decide: to decline to initiate an investigation where the information manifestly fails to satisfy the factors set out in article 53(1) (a)-(c); to continue to assess relevant national proceedings; to continue to collect information in order to establish sufficient factual and legal basis to render a determination; or to initiate the investigation, subject to judicial review as appropriate.³⁵

A reasoned response is to be issued at the conclusion of the process.³⁶

21. According to the OTP:

The Statute does not specify what the communication should contain. The Office analyses all communications received and the extent of the analysis is affected by the detail and substantive nature of the information available. If the available information does not provide sufficient guidance for analysis that could lead to a determination that there is a reasonable basis to proceed, the analysis is concluded and the sender informed. *This decision is provisional and may be revised in the event that new information is forthcoming.*³⁷

As part of its review, the OTP “may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations and other reliable sources that are deemed appropriate. The Office may also receive oral testimony at the seat of the Court.”³⁸

22. The test applicable at this preliminary stage of proceedings—namely, “a reasonable basis to believe”—is the lowest evidentiary standard provided for in the Rome Statute.³⁹

This is logical given that the nature of this early stage of the proceedings is confined to a preliminary examination. Thus, the information available to the Prosecutor is neither expected to be “comprehensive” nor “conclusive”, if compared to evidence gathered during the investigation.⁴⁰

Therefore, an ICC PTC, “in evaluating the available information provided by the Prosecutor, [...] must be satisfied that there exists a sensible or reasonable justification

³⁵ *Id.*

³⁶ *See Id.* (“In order to promote transparency of the preliminary examination process the Office issues regular reports on its activities and provides reasoned responses for its decisions to either proceed or not proceed with investigations.”).

³⁷ *See* ICC, Office of the Prosecutor, *What should be included in a Communication sent to the Office?*, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/siac/Pages/default.aspx (last visited, Apr. 12, 2015) (emphasis added).

³⁸ Rome Statute, art. 15.

³⁹ Kenya PTC Decision, at ¶ 27.

⁴⁰ *Id.*

for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’.”⁴¹

23. Accordingly, given the fact that permission to undertake an *initial investigation* shall be sought by the Prosecutor on satisfaction of the “lowest evidentiary standard provided for in the Statute,” it follows that the test for initiating a *preliminary examination*—the antecedent to an initial investigation and the relief sought by a communication to the OTP—is lower still.

24. Here, in addition to the OTP’s new jurisdictional assessment to determine whether, subsequent to 2013, acts committed by Boko Haram constituting crimes of humanity may also qualify as war crimes, GJC is respectfully requesting that the OTP further expand its preliminary examination to assess whether Boko Haram’s targeted abductions of Christian women and children may also qualify as genocide. The evidence provided herein meets the “lowest evidentiary standard” provided for in the Rome Statute to undertake an initial investigation, i.e. “reasonable basis to believe,” and, therefore, meets the “lower still” test for initiating a preliminary examination.

IV. THERE IS A REASONABLE BASIS TO BELIEVE BOKO HARAM’S TARGETED ABDUCTIONS OF CHRISTIAN WOMEN AND CHILDREN CONSTITUTE GENOCIDE

A. Boko Haram’s Abduction of Chibok Schoolgirls Meets All the Elements Constituting Genocide.

25. According to Article 6 of the Rome Statute, the crime of genocide is defined as “any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or

⁴¹ *Id.* at ¶ 35.

in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”⁴²

26. Article 6(e), genocide by forcibly transferring children, is further developed by seven contextual elements: (i) The perpetrator forcibly transferred one or more persons; (ii) Such person or persons belonged to a particular national, ethnical, racial or religious group; (iii) The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious groups, as such; (iv) The transfer was from that group to another group; (v) The person or persons were under the age of 18 years; (vi) The perpetrator knew, or should have known, that the person or persons were under the age of 18 years; (vii) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.⁴³

27. As an initial matter, the following evidence is not required, in order to conclude that the forcible transfer or abductions committed by Boko Haram amount to genocide:

- that the *only* reasonable conclusion that can be drawn from the information, is that the Boko Haram acted with *dolus specialis*/specific intent to destroy in whole or in part Christians;⁴⁴
- the absence of a personal motive;⁴⁵
- a numeric threshold for the victims, or, finally;⁴⁶
- evidence of the actual destruction of Christians in their entirety, or that a substantial part of Christians was actually destroyed, or evidence of genocidal acts against multiple victims.⁴⁷

i. Boko Haram Forcibly Transferred the Chibok Schoolgirls.

⁴² Rome Statute, art. 6.

⁴³ ICC, *Elements of Crimes*, at 3-4 available at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

⁴⁴ See *Prosecutor v. Omar Hassan Abman Al Bashir*, Case No. ICC-02/05-01/09-94, ¶¶ 4-5 (July 12, 2010).

⁴⁵ See *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeals Judgment, ¶ 49 (ICTY July, 5 2001) (wherein the *Jelisić* Appeals Chamber held, “[t]he Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. *The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.*” (emphasis added)).

⁴⁶ See *Prosecutor v. Gatete*, Case No. ICTR-2000-61-T, Judgment, ¶ 582 (Mar. 31, 2011); *Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T, Judgment, ¶ 2072 (May 17, 2011).

⁴⁷ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 497 (Sept. 2, 1998).

28. The abductions suffered by the Chibok schoolgirls constitute forcible transfer through the most direct means envisioned by Article 6(e): physical force and the threat of imminent violence or death.⁴⁸ At the school, Boko Haram fighters reportedly shot into the air, threatened to kill all of the students, forced some of the girls into a truck, and forced others to walk at gunpoint for miles until reaching the group's camp in the forest.⁴⁹ By abducting the Chibok schoolgirls by way of physical violence and threat of injury or death, Boko Haram is forcibly transferring them away from their Christian community.

ii. Nearly All Abducted Chibok Schoolgirls Were Christian.

29. According to HRW, the Chibok students they interviewed, who had escaped from Boko Haram custody after the school attack, reported that nearly all of those abducted from their school (located in a predominantly Christian area of Borno State) were Christian. This assertion is supported by Christian leaders who reported that 90% of the abducted girls were Christian.⁵⁰

iii. Boko Haram Intends or Intended to Destroy, in Whole or in Part, Christians, As Such.

30. According to the Elements of Crimes, which are the primary source of law for the Court,⁵¹ the element of *dolus specialis* or specific intent to destroy may be inferred from circumstantial evidence.⁵² In this case, adequate *mens rea* can be inferred from evidence

⁴⁸ See ICC, *Elements of Crimes*, at 3 (noting that “the term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.”).

⁴⁹ HRW, *Those Terrible Weeks*, at 23.

⁵⁰ *Id.* at 22, 27-28.

⁵¹ See Rome Statute, art. 21(1)(a).

⁵² See ICC, *Case Matrix: Art. 6 Genocide – Common Elements*, <https://www.cmn.cx/cms/index.php?folder=45&id=5697> (last visited, Apr. 12, 2015); *Prosecutor v. Nizeyimana*, Case No. ICTR-2000-55C-T, Judgment and Sentence, ¶ 1512 (Jun. 19, 2012); *Prosecutor v. Karemera and Ngirumpatse*, Case No. ICTR-98-44-T, Judgment, ¶¶ 1626-1627 (Feb. 2, 2012); *Prosecutor v. Gatete*, Case No. ICTR-2000-61-T, Judgment, ¶ 583 (Mar. 31, 2011); *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, ¶¶ 46-61 (ICTY Sept. 3, 2001); *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 590 (ICTY Aug. 2, 2001); *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeals Judgment, ¶ 47 (ICTY, July 5, 2001).

contained in the OTP's Article 5 Report,⁵³ as well as in reports by HUMAN RIGHTS WATCH,⁵⁴ the WATCHLIST ON CHILDREN AND ARMED CONFLICT,⁵⁵ and in other reliable sources.⁵⁶ These reports detail evidence of Boko Haram's: 1) statements about their intent to destroy Christians as well as statements inciting, ordering, encouraging others to destroy Christians; 2) expressions of satisfaction after the commission of genocidal acts;⁵⁷ 3) use of pejorative terms against Christians; 4) forcible relocation and transfer of Christians; 5) use of roadblocks; 6) selection and separation of victims, based upon their membership as Christians and exclusion from genocidal acts of persons not members of that group, and, finally; 7) use of rape to destroy Christians.

iv. Boko Haram Transferred the Chibok Schoolgirls to Another Group.

31. Boko Haram's declared leader, Abubakar Shekau, has bragged that "the over 200 Chibok schoolgirls have converted to Islam[.] They have now memorized two chapters of the Koran [...] We have married them off. They are in their marital homes."⁵⁸ By doing so, Boko Haram has allegedly integrated the Chibok schoolgirls into its own group by forcing the girls to live as members of Boko Haram camps, to disavow their Christian identity, beliefs, to convert to Islam, and to marry Muslim men.⁵⁹

⁵³ Nigeria Article 5 Report.

⁵⁴ HRW, *Those Terrible Weeks*.

⁵⁵ Watchlist Report.

⁵⁶ Zenn, *Women, Gender and the evolving tactics of Boko Haram*; NPVRN Report; *Nigeria: Boko Haram Abducts Women, Recruits Children*, HUMAN RIGHTS WATCH (Nov. 29, 2013), <http://www.hrw.org/news/2013/11/29/nigeria-boko-haram-abducts-women-recruits-children>; *Boko Haram: Christian girls kidnapped and Islamized, schools targeted*, AGENZIA FIDES, July 23, 2013, <http://www.fides.org/en/news/34019->[AFRICA NIGERIA Boko Haram Christian girls kidnapped and Islamized schools targeted#.UuOvF7TLdLN](http://www.fides.org/en/news/34019-); Jude Owuamanam, *We're behind plateau mass killings – Boko Haram*, PUNCH NEWS, July 11, 2012, <http://www.punchng.com/news/were-behind-plateau-mass-killings-boko-haram-%E2%80%A2-says-christians-should-accept-islam-if-they-want-peace/>; "Security Officials and Christians Are Enemies of Islam and Muslims, We Will Target and Kill Them – Says Spokesman of Jama'atu Ansarul Muslimina fi Biladi Sudan, Abu Ja'afar," DESERT HERALD, Jun. 5, 2012, <http://desertherald.com/jamaatu-ansarul-muslimina-fi-biladi-sudan-threatens-southern-kaduna-militant-group-akhwat-akwop/>; see also Annexes 1, 2 and 3 attached hereto.

⁵⁷ Jude Owuamanam, *We're Behind Mass Killings, Boko Haram Says Christians Should Accept Islam if They Want Peace*, PUNCH, Jul. 11, 2012, available at <http://www.punchng.com/news/were-behind-plateau-mass-killings-boko-haram-%E2%80%A2-says-christians-should-accept-islam-if-they-want-peace/>.

⁵⁸ Al Jazeera America, *Boko Haram leader says kidnapped schoolgirls were 'married off'*, AL JAZEERA AMERICA, Nov. 1, 2014, available at <http://america.aljazeera.com/articles/2014/11/1/nigeria-kidnappedgirls.html>.

⁵⁹ See, e.g. HRW, *Those Terrible Weeks*, at 25 (describing how abducted women and girls recounted being subjected to forced conversion, forced marriage, forced labor, and even forced participation in military operations to support their captors).

v. The Abducted Chibok Schoolgirls Were Under 18 Years of Age.

32. News reports indicate that most of the girls kidnapped from the Chibok Government Girls Secondary School were between the ages of 16 and 18.⁶⁰ This is the typical age range for students attending “senior secondary school” in Nigeria.⁶¹

vi. Boko Haram Knew or Should Have Known the Chibok Schoolgirls Were Under 18 Years Old.

33. Because the Chibok school girls were taken directly from their dormitory at the Government Secondary School, the perpetrators must have been aware that they were abducting girls, many of whom would be under 18 years old.⁶² A 16-year-old girl told the Associated Press that when “[s]he pleaded that she was too young” to be married to a Boko Haram fighter, he responded, “[d]o you think you are better than those Chibok girls that we kidnapped?” and told her those girls were “enjoying their matrimonial homes.”⁶³ Further, many of the girls were likely young enough that their appearance should have put the perpetrators on notice that they were 18 years or younger.

vii. Boko Haram’s Abduction of the Chibok Schoolgirls is Part of a Manifest Pattern of Similar Conduct Directed against Christians.

34. The abduction of Christian girls and women, followed by forced conversion, forced marriage, and sexual abuse has emerged as a systematic *modus operandi* for Boko Haram.⁶⁴ The abduction of the Chibok girls is amongst numerous instances of such abductions

⁶⁰ B.B.C. News, *Boko Haram 'to sell' Nigeria girls abducted from Chibok*, BBC NEWS, Apr. 24, 2014 (indicating the age of the girls), available at <http://www.bbc.com/news/world-africa-27283383>; Ola’ Audu, *Nigerian government confirms abduction of scores of female students by Boko Haram*, PREMIUM TIMES, Apr. 15, 2014, available at <http://www.premiumtimesng.com/news/158785-nigerian-government-confirms-abduction-scores-female-students-boko-haram.html>.

⁶¹ See Jennifer Onyukwu, *The Education System in Nigeria*, WORLD EDUCATION NEWS REPORT (Aug. 1, 2011), <http://wenr.wes.org/2011/08/wenr-julyaugust-2011-practical-information/>; Watchlist Report, at 23; NPVRN Report, at 30 (documenting witness accounts of school attacks in other areas).

⁶² See Jennifer Onyukwu, *The Education System in Nigeria*, WORLD EDUCATION NEWS REPORT (Aug. 1, 2011), <http://wenr.wes.org/2011/08/wenr-julyaugust-2011-practical-information/>.

⁶³ Associated Press, *Boko Haram Kidnaps Hundreds, Tells Captives Stories of Chibok Girls*, THE HUFFINGTON POST, Feb. 11, 2015, available at http://www.huffingtonpost.com/2015/02/11/boko-haram-girls_n_6660078.html.

⁶⁴ U.N. Secretary General, *Report of the Secretary General on Conflict Related Sexual Violence*, ¶ 85, U.N. Doc S/2015/203 (Mar. 23, 2015); see, e.g., Zenn, *Women, Gender, and the Evolving Tactics of Boko Haram*.

over the past several years.⁶⁵ Human Rights Watch documented 18 other reports of abductions of women and girls between April 2013 and July 2014, nearly all in Borno State alone.⁶⁶ Other similar abductions have been reported across northeastern Nigeria.⁶⁷ Amnesty International estimates that over 2,000 women and girls have been abducted since the beginning of 2014 alone.⁶⁸ The majority of these victims are Christian girls targeted for their religious affiliation.⁶⁹

35. Thus, Boko Haram's abduction of the Chibok schoolgirls falls within the larger context of the group's "war with Christians," characterized by more widespread murder and persecution of Christians.⁷⁰

B. General Summary of Why Boko Haram's Abduction of Chibok Schoolgirls Constitutes Genocide.

36. On the information presented—bearing in mind the nature of the instant filing, the low threshold applicable to initiating a preliminary examinations, as well as the object and purpose of the OTP's mandate—there is a reasonable basis to believe that Boko Haram has committed and is committing genocide because, as a part of broader systemic practice, it used physical force to transfer Christian schoolgirls to another group with the "specific intent" to destroy Christians.

37. Further, under the 2014 Framework of Analysis for Atrocity Crimes: A tool for prevention, developed by the United Nations Secretary-General's Special Advisers on the Prevention of Genocide and on the Responsibility to Protect, *all* eight of the common risk factors conducive to the commission of atrocity crimes are present in

⁶⁵ See, e.g., HRW, *Those Terrible Weeks*, at 62; NPVRN Report (documenting the prevalence of abduction and other crimes in each Nigerian state.)

⁶⁶ HRW, *Those Terrible Weeks*, at 62.

⁶⁷ See generally, NPVRN Report (documenting the prevalence of abduction and other crimes by state throughout the region).

⁶⁸ Alex Whiting, *Boko Haram abducted 2,000 women and girls, forced to fight: Amnesty*, REUTERS, Apr. 13, 2015, <http://www.reuters.com/article/2015/04/13/us-nigeria-girls-warcrimes-idUSKBN0N42DD20150413>.

⁶⁹ See, e.g., HRW, *Those Terrible Weeks*, at 27, 28; NPVRN Report at 21 ("[T]he continued attacks on these areas, believed to be Christian enclaves only, reveal [...] [that] Boko Haram is essentially driven by Islamic religious fundamentalism and fanaticism, sustained by crass impunity [...] Boko Haram sect members... have made Christian women and their children the most hunted targets.").

⁷⁰ See Article 5 Report, at ¶¶ 87-88.

Nigeria, as well as the two risk factors specific to genocide, including under risk factor 10, the “Development of policies or measures that seriously affect the reproductive rights of women, *or that contemplate the separation or forcible transfer of children belonging to protected groups.*”⁷¹

V. THE COURT HAS JURISDICTION OVER BOKO HARAM’S TARGETED ABDUCTIONS OF CHRISTIAN WOMEN AND CHILDREN

38. For a crime to fall within the jurisdiction of the Court, it must satisfy the following conditions:

- (i) it must fall within the category of crimes referred to in article 5 and defined in articles 6, 7, and 8 of the Statute (jurisdiction *ratione materiae*);
- (ii) it must fulfill the temporal requirements specified under article 11 of the Statute (jurisdiction *ratione temporis*); and
- (iii) it must meet one of the two alternative requirements embodied in article 12 of the Statute (jurisdiction *ratione loci* or *ratione personae*). The latter entails either that the crime occurs on the territory of a State Party to the Statute [...] or be committed by a national of any such State.⁷²

These requirements will be taken in turn.

A. The Court has Jurisdiction *Ratione Materiae* Because Boko Haram’s Abductions are a Form of Genocide.

39. Under Articles 5 and 6 of the Rome Statute, the ICC has subject-matter jurisdiction over the commission of the crime of genocide.⁷³ As set out above, there is reason to believe that genocide has been or is being committed in Nigeria. Therefore, the Court’s jurisdiction *ratione materiae* is triggered.

B. The Court has Jurisdiction *Ratione Temporis* Because Boko Haram’s Abductions Took Place After Nigeria Ratified and Became a Party to the Rome Statute.

⁷¹ U.N. Advisors to the Secretary General on the Prevention of Homicide, *Framework of Analysis for Atrocity Crimes: A tool for prevention*, at 19 (July 2014) (emphasis added).

⁷² Rome Statute, arts. 5-8, 11-12; Kenya PTC Decision, ¶ 39. See also ICC Office of the Prosecutor, No.: ICC-01/09, Request for authorization of an investigation pursuant to Article 15, Situation in the Republic of Kenya, (OTP Kenya Request), ¶¶ 45 *et seq.* (Nov. 26, 2009).

⁷³ See Rome Statute, art. 5(a) (“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: [...] (a) The crime of genocide.”). The crime of genocide is defined in Article 6 of the Rome Statute.

40. According to Article 11 of the Rome Statute, the ICC has temporal jurisdiction “only with respect to crimes committed after the entry into force of the Statute.”⁷⁴ Nigeria ratified the Rome State on September 27, 2001, before the Statute went into force, and therefore, the ICC “has jurisdiction over Rome Statute crimes committed on the territory of Nigeria or by its nationals from July 1, 2002 onwards.”⁷⁵ Specifically, this communication addresses acts committed by Boko Haram from 2013 onwards, and, therefore, the Court has jurisdiction *ratione temporis*.

C. The Court has Jurisdiction *Ratione Loci* and *Ratione Personae* Over Boko Haram’s Abductions Which Took Place in Nigeria as well as Those Committed by Nigerian Nationals.

41. According to Article 12 of the Rome Statute, a “State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.”⁷⁶ In this respect, the ICC may then exercise its jurisdiction territorially or personally, the basis being either: “[t]he State on the territory of which the conduct in question occurred”⁷⁷ or “[t]he State of which the person accused of the crime is a national.”⁷⁸ In other words, “[t]he crime must either occur on the territory of a State Party to the Statute [...] or be committed by a national of any such State.”⁷⁹ As set out above, certain of the crimes in question have taken place on Nigerian territory; moreover, it is alleged that one or more of the individuals responsible for such crimes are Nigerian nationals. Accordingly, the Court has *both* territorial and personal jurisdiction.

VI. BOKO HARAM’S TARGETED ABDUCTION OF CHRISTIAN WOMEN AND CHILDREN IS ADMISSIBLE UNDER ARTICLE 17

⁷⁴ Rome Statute, art. 11(1).

⁷⁵ Nigeria Article 5 Report, ¶ 12.

⁷⁶ Rome Statute, art. 12(1).

⁷⁷ Rome Statute, art. 12(2)(a).

⁷⁸ Rome Statute, art. 12(2)(b).

⁷⁹ Kenya PTC Decision, ¶ 175.

42. According to Article 17 of the Rome Statute, the admissibility assessment includes two components, namely: complementarity and gravity.⁸⁰ At the initial stages of the proceedings, such assessment is limited to “the admissibility of one or more *potential* cases within the context of a ‘situation’.”⁸¹ For purposes of the instant filing, it will be sufficient to determine “whether the information provided [...] reveals that the [Federal] Republic of [Nigeria] or any third State is conducting or has conducted national proceedings in relation to these elements which are likely to constitute the Court’s future case(s).”⁸² If the finding in this regard “is in the negative, then the case would be admissible, provided that the gravity threshold under article 17(1)(d) of the Statute is met.”⁸³

A. Complementarity

43. First, an examination is required as to whether the relevant State is conducting or has conducted “national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court’s investigations. If the answer is in the negative, the ‘case would be admissible’, provided that the gravity threshold is also met.”⁸⁴ In its judgment of September 25, 2009, the ICC Appeals Chamber stated:

[I]n considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of subparagraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart

⁸⁰ See Rome Statute, art. 17(1)(a)-(c) as to complementarity and art. 17(1)(d) as to gravity; *see also* OTP Kenya Request, paras 51 *et seq.*

⁸¹ Kenya PTC Decision, ¶ 182 (“The parameters of a potential case have been defined by the [ICC Pre-Trial] Chamber as comprising two main elements: (i) the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).”)

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Kenya PTC Decision, ¶ 52.

before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute.⁸⁵

Thus, where “the available information indicates that there is a situation of inactivity with respect to the elements that are likely to shape the potential case(s),” it is not necessary to proceed to inquiries of unwillingness or inability.⁸⁶

44. In the Kenya situation, the PTC determined that, despite “references to a number of domestic investigations and prosecutions concerning the post-election period,” these were “only in relation to minor offences.”⁸⁷ Domestically, it was found that “inadequacies or reluctance from the national authorities to generally address the election violence” was the prevailing climate.⁸⁸ Notably, there had been no effort to investigate “senior business and political leaders” or to prosecute “serious criminal incidents.”⁸⁹
45. In the instant matter, at a minimum, Nigeria has, to-date, failed to make either the Rome Statute or the Genocide Convention part of its domestic law, which means that crimes against humanity, war crimes, and genocide are not crimes in Nigerian law.⁹⁰ Further, the OTP’s *Report on Preliminary Examination Activities 2014*, found that “information gaps remain with respect to national proceedings, in particular regarding the high discrepancy between the reported number of arrests of persons associated with Boko Haram and information on relevant legal proceedings.”⁹¹ And, Amnesty International has recently

⁸⁵ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No.: ICC-01/04-01/07 OA 8, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2009).

⁸⁶ Kenya PTC Decision, ¶ 54.

⁸⁷ Kenya PTC Decision, ¶ 185.

⁸⁸ Kenya PTC Decision, ¶ 186.

⁸⁹ Kenya PTC Decision, ¶ 187.

⁹⁰ HRW, *Those Terrible Weeks*, at 51; Amnesty International, *Amnesty International Report 2014/15: The State of the World’s Human Rights*, at 274, available at <https://www.amnesty.org/en/documents/pol10/0001/2015/en/> (“The [Nigerian] authorities [have] failed to adequately investigate killings and abductions, bring suspected perpetrators to justice or prevent further attacks.”).

⁹¹ ICC, Office of the Prosecutor, *Report on Preliminary Examination Activities 2014*, ¶ 188 (Dec. 2, 2014).

reported that “The [Nigerian] authorities [have] failed to adequately investigate killings and abductions, bring suspected perpetrators to justice or prevent further attacks.”⁹²

46. On a basic level, Nigeria lacks the capacity to prosecute the crime of genocide, due to the absence of national laws implementing the Rome Statute or the Genocide Convention. Further, the OTP opened a preliminary examination of the situation in Nigeria in November 2010 and the ICC’s Prosecutor has twice visited Nigeria, in July 2012 and most recently in February 2014, during which visits she urged Nigeria to investigate and prosecute crimes committed by Boko Haram. By the end of 2014, the OTP reported that it will request further information from Nigeria on the relevance and genuineness of national proceedings by competent national authorities. Given the considerable amount of time allowed Nigeria to meet its primary responsibility of investigating and prosecuting these crimes, in the face of such blatant inaction, the question of Nigeria’s unwillingness or inability simply does not arise. There is clearly “a lack of national proceedings [...] with respect to the main elements which may shape the Court’s potential case(s).”⁹³

47. Accordingly, for purposes of this filing, the complementarity question must be answered in the negative.

B. Gravity

48. “[A]lthough a State with jurisdiction over a case may have remained entirely inactive with respect to domestic investigations, the Court should still determine the case as inadmissible if it ‘is not of sufficient gravity to justify further action [...]’.”⁹⁴ Accordingly, the gravity assessment is a mandatory component for the determination of the question of admissibility.

⁹² Amnesty International, *Amnesty International Report 2014/15: The State of the World’s Human Rights*, at 274, available at <https://www.amnesty.org/en/documents/pol10/0001/2015/en/>.

⁹³ Kenya PTC Decision, ¶ 185.

⁹⁴ Kenya PTC Decision, ¶ 57.

49. Notably, with regard to preliminary examinations, “gravity should be examined against the backdrop of the likely set of cases or ‘potential case(s)’ that would arise from investigating the situation.”⁹⁵ This is because “it is not feasible that at the stage of the preliminary examination it be done with regard to a concrete ‘case’.”⁹⁶ Therefore, “the gravity of the crimes will be assessed in the context of their *modus operandi*.”⁹⁷ This preliminary contextual assessment:

involves a generic examination of: (i) whether the persons or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed within the incidents, which are likely to be the object of an investigation. In relation to the latter, the Chamber stated earlier that it is guided by factors such as the scale, nature, manner of commission, impact of crimes committed on victims, and the existence of aggravating circumstances (*i.e.*, qualitative dimension).⁹⁸

While gravity may be examined following a quantitative as well as a qualitative approach, ultimately “it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave.”⁹⁹

50. In the Kenya situation, the gravity requirement was met on the basis of “the alleged number of deaths, documented rapes, displaced persons, and acts of injury, as well as the geographical location of these crimes, which appear[ed] widespread;”¹⁰⁰ the “brutality [...] [of] the means used to execute the violence;”¹⁰¹ and the impact on the victims.¹⁰²

⁹⁵ *Id.* at ¶ 58.

⁹⁶ *Id.* at ¶ 58.

⁹⁷ *Id.* at ¶ 61.

⁹⁸ *Id.* at ¶ 188; *see also id.* at ¶ 62 ([F]actors relevant to the qualitative assessment include: “(i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (*i.e.*, the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families.”).

⁹⁹ *Id.* at ¶ 62.

¹⁰⁰ *Id.* at ¶ 191.

¹⁰¹ *Id.* at ¶ 193.

¹⁰² *See id.* at ¶ 196 (“The Chamber observes that the victims’ representations also corroborate the Prosecutor’s submission concerning the individual impact of the violence on the victims. Complaints of harm suffered concern the inability of victims’ children to continue their education, poor living conditions and health concerns in IDP camps, psychological damage such as trauma, stress, and depression, loss of income due to loss of jobs or an

Furthermore, as to the contextual dimension, the PTC found that the “high-ranking positions, and [...] alleged role in the violence” of those “likely to be the focus of the Prosecutor’s future investigations,” satisfied the first constituent element of gravity.¹⁰³ As to the second constituent element, the “number of burned houses, deaths, and displaced people, which resulted from the violence” and certain “elements of brutality, for example burning victims alive, attacking places [of shelter] [...], and using [...] machetes to hack people to death” with respect to “the incidents that are likely to be the object of the Prosecutor’s investigations”¹⁰⁴ were sufficient.¹⁰⁵

51. The OTP has made a portion of the gravity determination already, noting in its Article 5 Report that Boko Haram’s attacks against the civilian population have been widespread “in terms of the high number of victims as well as the geographical spread.”¹⁰⁶ Furthermore, on the issue of gender-based abductions, OTP has recognized in its *Policy Paper on Sexual and Gender-Based Crimes* that sexual and gender-based crimes are amongst the gravest under the Rome Statute.¹⁰⁷ Moreover, the violent nature of the abductions, murders and rapes, the brutal manner in which they were and are being carried out, and the devastating impact on the victims and their families—as evidenced by, among other things, the large-scale displacement of people and its attendant devastation on home and business life—all amount to aggravating circumstances indicating a very grave situation indeed.¹⁰⁸
52. Further, the gravity of Boko Haram’s abduction of women and girls must be viewed against the backdrop of increasing violent extremism. According to the Secretary General of the United Nations, the increase of violent extremism in modern conflict has revealed

inability to re-establish their business, the contraction of sexually transmitted diseases after rape, abandonment after rape, and the separation of families.”).

¹⁰³ *Id.* at ¶ 198.

¹⁰⁴ *Id.* at ¶ 199.

¹⁰⁵ *Id.* at ¶ 200.

¹⁰⁶ Article 5 Report, at ¶ 80.

¹⁰⁷ ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, ¶¶ 3, 45 (Jun. 2014), available at <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

¹⁰⁸ See HRW, *Those Terrible Weeks*; see also Annexes 1, 2 and 3 attached hereto.

a shocking trend of gender-based violence employed as a tactic of terror by radical groups.¹⁰⁹ Violence against women and girls by extremists is “not incidental, but integrally within the strategic objectives, ideology and founding of extremist groups.”¹¹⁰ In fact, the Secretary General has found that forced marriage, enslavement and the “sale” of kidnapped women and girls are central to Boko Haram’s *modus operandi* and ideology.¹¹¹ This violence arises from discrimination and dehumanization based on, among other things, gender, political and religious identity.¹¹² “Indeed the same ideology and objectives that motivate Boko Haram to abduct women and girls in Nigeria, also spur ISIL to enslave women and girls in Iraq.”¹¹³ The rise of violent extremists’ targeting of women and girls raises the urgency and gravity of the situation in Nigeria and of Boko Haram’s heinous crimes. In the words of the U.N. Secretary General, “[c]onflict environments that are conducive to extremism [...] require close attention.”¹¹⁴

**VII. THERE IS NO REASON WHY AN INVESTIGATION WOULD BE
CONTRARY TO THE INTERESTS OF JUSTICE AND THERE ARE
COMPELLING REASONS FOR THE OTP TO ACT**

53. The final aspect of a preliminary examination involves an analysis under 53(1)(c) of the Rome Statute as to whether, “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”¹¹⁵ However, “[u]nlike sub-paragraphs (a) and (b), which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice.”¹¹⁶ Put another way:

¹⁰⁹ U.N. Secretary General, *Report of the Secretary General on Conflict Related Sexual Violence*, ¶ 83, U.N. Doc. S/2015/203 (Mar. 23, 2015).

¹¹⁰ *Id.* at ¶ 84.

¹¹¹ *Id.* at ¶ 85.

¹¹² *See id.*

¹¹³ *Id.* at ¶ 81.

¹¹⁴ *Id.* at ¶ 83.

¹¹⁵ Rome Statute, art. 53(1)(c); *see also* Kenya PTC Decision, ¶ 63.

¹¹⁶ Kenya PTC Decision, ¶ 63.

Under Article 53(1), while the jurisdiction and admissibility are positive requirements that must be satisfied, the interests of justice is a potential countervailing consideration that may produce a reason not to proceed. As such, the Prosecutor is not required to establish that an investigation is in the interests of justice, but rather, whether there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time.¹¹⁷

According to the OTP's stated practice, "[a] recommendation that an investigation would not serve the interests of justice will be made only under highly exceptional circumstances."¹¹⁸

54. In the Kenya situation, the OTP found "no reason to believe that the opening of an investigation into the situation would not be in the interests of justice."¹¹⁹ Regarding the case at hand, there is no reason why an investigation would be in any way contrary to the interests of justice. And while this point need not be demonstrated in the affirmative, there are nevertheless very compelling reasons for the OTP to act.

55. First, it would put all States *unequivocally* on notice that genocide may be occurring in northeastern Nigeria, and, therefore, trigger their positive obligations to prevent and punish genocide under the Genocide Convention, as made clear by the International Court of Justice (ICJ).¹²⁰

56. By publically accepting GJC's request to look deeper into the claims set out herein, the OTP could very well prevent the commission of further abductions in Nigeria, and elsewhere—undoubtedly one of the aims of any system of criminal justice—by signaling that those targeting women and children for acts of genocide, will be held accountable.

According to a recent U.N. Human Rights Report, ISIL is currently using similar tactics

¹¹⁷ OTP Kenya Request, ¶ 60.

¹¹⁸ ICC, Office of the Prosecutor, *Preliminary Examinations*, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx (last visited Apr. 14, 2015).

¹¹⁹ OTP Kenya Request, ¶ 61.

¹²⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment of Feb. 26, 2007, ¶ 430, available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

of gender-based abductions, forced marriages and conversions, in its attempts to destroy the Yezidi minority population in Iraq and Syria.¹²¹

57. The Rome Statute imposes a duty on the OTP to “take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children,”¹²² in order to take appropriate measures to ensure the effective investigation and prosecution of crimes within the Court’s jurisdiction.

58. The OTP’s policy on sexual and gender-based crimes also calls for the integration of a gender perspective into every stage of the prosecutorial process, including from the earliest stages of the preliminary examination, and for the Prosecutor to “charge acts of sexual and gender-based crimes as different categories of crimes within the Court’s jurisdiction (war crimes, crimes against humanity, and genocide), in order to properly describe, *inter alia*, the nature, manner of commission, intent, impact, and context.”¹²³ The OTP is also in the process of preparing a comprehensive policy on children and has further pledged that “[c]rimes against children must be investigated and prosecuted to the full extent of the law.”¹²⁴

59. The government of Nigeria is struggling to uphold its Responsibility to Protect (R2P) and has requested external help in order to better protect its population, an act which, consistent with Pillar Two of R2P, calls on the international community, including the ICC, as the legal arm of R2P, to provide assistance with prosecutions.¹²⁵

¹²¹ Rep. of the U.N. High Commissioner for Human Rights on the human rights situation in Iraq in light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, U.N. Doc. A/HRC/28/18, ¶¶ 35-46, 76, 78 (Mar. 13, 2015) available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_18_AUV.doc.

¹²² Rome Statute, art. 54(1)(b).

¹²³ ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, ¶¶ 1, 8, 25, 72-73 (Jun. 2014), available at <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

¹²⁴ International Criminal Court, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the occasion of the 25th Anniversary of the Convention on the Rights of the Child: End the scourge of violence against children* (Nov. 20, 2014), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-20-11-2014.aspx (last visited Apr. 14, 2015).

¹²⁵ Global Centre for the Responsibility to Protect, R2P MONITOR, Issue 20, Mar. 15, 2015, at 7-8, <http://www.globalr2p.org/publications/362> (concluding that “[t]he government of Nigeria is struggling to uphold its Responsibility to Protect and needs ongoing support from the international community.”); Global Centre for the Responsibility to Protect, *Nigeria: The extremist Islamist group Boko Haram continues to perpetrate mass atrocity crimes*.

VIII. CONCLUSION

60. For all of the reasons set out above, GJC respectfully urges the OTP to conduct a new jurisdictional assessment as part of its ongoing preliminary examination of the situation in Nigeria to determine whether forcible transfer or abductions that particularly target Christian women and children, constitutes genocide.
61. Additionally, GJC requests to be informed by the OTP, of any further steps and/or decisions to be taken in respect of the “Situation in Nigeria.”
62. Finally, GJC expresses its availability to assist the ICC OTP in any further investigations.

Respectfully submitted:



Janet Benshoof, Esq.

New York, New York April 14, 2015

Annexes:

3 Documents (1. Selected Factual Findings of Human Rights Watch; 2. Selected Factual Findings of Watchlist on Children and Armed Conflict; 3. Selected Factual Findings of Nigeria’s Political Violence Research Network.)

Excessive use of force by the security forces also contributes to the threat of further atrocities (Mar. 15, 2015), <http://www.globalr2p.org/regions/nigeria>; International Coalition for the Responsibility to Protect, *The Crisis in Nigeria*, <http://responsibilitytoprotect.org/index.php/crises/crisis-in-nigeria> (last visited Apr. 12, 2015); International Coalition for the Responsibility to Protect, *Q&A: The Responsibility to Protect (RtoP) and Nigeria*, [http://responsibilitytoprotect.org/Nigeria%20Q%20A%20FINAL\(2\).pdf](http://responsibilitytoprotect.org/Nigeria%20Q%20A%20FINAL(2).pdf) (last visited Apr. 12, 2015) (“Nigeria has requested external help in order to better protect its people, an act which is consistent with pillar II of RtoP and calls on the international community to provide assistance and capacity-building to states that are under stress and unable to protect their civilian population from mass atrocity crimes.”).