

many incendiary public statements. And he clearly aimed his campaign activities toward mobilizing CPC supporters for the potential resort to violence.

106. Uncovering the precise details of, and specific membership in, the common plan to bring about such a CPC victory (as well as the other objective elements of indirect co-perpetration) should be one of the major goals of any OTP preliminary examination. What is crystal clear at this stage of the proceedings is that General Buhari's claim that the violence was merely 'a spontaneous reaction to perceived electoral shenanigans'²⁸³ is utterly self-serving and patently dubious. In the first case, the evidence suggests that any perceptions of 'shenanigans' were conjured by General Buhari's own public statements.²⁸⁴ Moreover, attempting to attach the word 'spontaneous' to what in reality amounted to three days of sustained violence over twelve Nigerian states in which hundreds of people were brutally murdered, raped, and injured and tens of thousands displaced from their homes is nothing more than facile evasion.

107. Accordingly, for purposes of this filing, the acts and conduct described above are indicative of criminal liability of the type contemplated by Article 25(3)(a) of the Statute, namely: indirect co-perpetration.

VI. JURISDICTION

108. 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.²⁸⁵

These requirements will be taken in turn.

A. Jurisdiction *Ratione Materiae*

²⁸³ Michelle Faul, 'ICC Lawyer, Activists Accuse Nigeria's Buhari of Violence', *Associated Press*, 22 January 2015.

²⁸⁴ See para 24, *supra*.

²⁸⁵ Kenya PTC Decision, para 39; see also OTP Kenya Request, paras 45 *et seq.*

109. According to Article 5 of the Statute, the ICC has subject-matter jurisdiction over the commission of crimes against humanity.²⁸⁶ As set out above, there is reason to believe that a variety of such crimes have been committed in Nigeria following the presidential elections of 2011. This much has been previously acknowledged by the OTP.²⁸⁷ The Court's jurisdiction *ratione materiae* is therefore triggered.

B. Jurisdiction *Ratione Temporis*

110. According to Article 11 of the Statute, the ICC has temporal jurisdiction 'only with respect to crimes committed after the entry into force of the Statute'.²⁸⁸ Regarding states that have become party to the Statute following its entry into force, 'the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State'.²⁸⁹ As indicated by the OTP: 'Nigeria deposited its instrument of ratification of the Rome Statute on 27 September 2001. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Nigeria or by its nationals from 1 July 2002 onwards.'²⁹⁰

C. Jurisdiction *Ratione Loci* and *Ratione Personae*

111. According to Article 12 of the 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'.²⁹¹ 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'²⁹² or '[t]he State of which the person accused of the crime is a national'.²⁹³ 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'.²⁹⁴ As set out

²⁸⁶ See Rome Statute, Article 5(1)(b) ('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: [...] (b) Crimes against humanity [...]'). Crimes against humanity are defined by Article 7 of the Statute.

²⁸⁷ See para 35, *supra*.

²⁸⁸ Rome Statute, Article 11(1).

²⁸⁹ Rome Statute, Article 11(2) (*N.b.* Unless that state has made a declaration under Article 12(3)).

²⁹⁰ Nigeria Article 5 Report, para 12.

²⁹¹ Rome Statute, Article 12(1).

²⁹² Rome Statute, Article 12(2)(a).

²⁹³ Rome Statute, Article 12(2)(b).

²⁹⁴ Kenya PTC Decision, para 175.

above, the crimes in question have taken place on Nigerian territory; moreover, it is alleged that one of the individuals responsible for such crimes—namely, General Buhari—is a Nigerian national. Accordingly, the Court has *both* territorial and personal jurisdiction.

VII. ADMISSIBILITY

112. According to Article 17 of the Statute, the admissibility assessment includes two components, namely: complementarity and gravity.²⁹⁵ 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”.’²⁹⁶ 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).’²⁹⁷ 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.’²⁹⁸

A. Complementarity

113. Firstly, 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.’²⁹⁹ In its judgment of 25 September 2009, the ICC Appeals Chamber stated:

²⁹⁵ See Article 17(1)(a)–(c) as to complementarity and Article 17(1)(d) as to gravity; see also OTP Kenya Request, paras 51 *et seq.*

²⁹⁶ Kenya PTC Decision, para 182. *N.b.* ‘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).’ *Ibid.*

²⁹⁷ Kenya PTC Decision, para 182.

²⁹⁸ Kenya PTC Decision, para 182.

²⁹⁹ Kenya PTC Decision, para 52.

[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 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.³⁰⁰

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 the second step.³⁰¹

114. In the Kenya Case, 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’.³⁰² Domestically, it was found that ‘inadequacies or reluctance from the national authorities to generally address the election violence’ was the prevailing climate.³⁰³ Notably, there had been no effort to investigate ‘senior business and political leaders’ or to prosecute ‘serious criminal incidents’.³⁰⁴
115. In Nigeria, regarding the 2011 post-election violence, there is clearly ‘a lack of national proceedings [...] with respect to the main elements which may shape the Court’s potential case(s)’.³⁰⁵ Despite the recommendation of the Lemu Panel to initiate criminal investigations—and President Jonathan’s public indication that he might comply—nothing has been done in this regard: no investigations, no arrests, no charges, no trials, and, obviously, no convictions. Unfortunately, all that exists are the (seemingly) ignored reports of two commissions-of-inquiry and a trail of so-called white papers. In the face of such blatant inaction, the question of Nigeria’s of unwillingness or inability simply does not arise.

³⁰⁰ ICC, Appeals Chamber, ‘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’, para 78.

³⁰¹ Kenya PTC Decision, para 54.

³⁰² Kenya PTC Decision, para 185.

³⁰³ Kenya PTC Decision, para 186.

³⁰⁴ Kenya PTC Decision, para 187.

³⁰⁵ Kenya PTC Decision, para 185.

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

B. Gravity

117. 'Although 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 [...]". Accordingly, the gravity assessment is a mandatory component for the determination of the question of admissibility.'³⁰⁶

118. 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'.³⁰⁷ This is because 'it is not feasible that at the stage of the preliminary examination it be done with regard to a concrete "case"'.³⁰⁸ Therefore, 'the gravity of the crimes will be assessed in the context of their modus operandi'.³⁰⁹ 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).³¹⁰

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'.³¹¹

³⁰⁶ Kenya PTC Decision, para 57.

³⁰⁷ Kenya PTC Decision, para 58.

³⁰⁸ Kenya PTC Decision, para 58.

³⁰⁹ Kenya PTC Decision, para 61.

³¹⁰ Kenya PTC Decision, para 188; *see also ibid*, para 62 (factors 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 behavior 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')

³¹¹ Kenya PTC Decision, para 62.

119. In the Kenya Case, 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’;³¹² the ‘brutality [...] [of] the means used to execute the violence’;³¹³ and the impact on the victims.³¹⁴ 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.³¹⁵ 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’³¹⁶ were sufficient.³¹⁷
120. The OTP has made a portion of the gravity determination already, noting the massive scale of the 2011 post-election violence.³¹⁸ Additionally, with respect to the first prong of the contextual analysis, the facts outlined above suggest that General Buhari may indeed bear a great level of responsibility for the crimes against humanity that have been committed.³¹⁹ Moreover, the violent nature of the murders and rapes, the brutal manner in which they were 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.³²⁰

VIII. THE INTERESTS OF JUSTICE

³¹² Kenya PTC Decision, para 191.

³¹³ Kenya PTC Decision, para 193.

³¹⁴ See Kenya PTC Decision, para 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 inability to re-establish their business, the contraction of sexually transmitted diseases after rape, abandonment after rape, and the separation of families.’)

³¹⁵ Kenya PTC Decision, para 198.

³¹⁶ Kenya PTC Decision, para 199.

³¹⁷ Kenya PTC Decision, para 200.

³¹⁸ See para 35, *supra*.

³¹⁹ See paras 24–27, *supra*.

³²⁰ See paras 16–22, *supra*.

121. The final aspect of the 53(1)(c) analysis involves the following determination: 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'.³²¹ 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'.³²² Put another way:

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.³²³

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'.³²⁴

122. In the Kenya Case, the OTP found 'no reason to believe that the opening of an investigation into the situation would not be in the interests of justice'.³²⁵ Regarding the case at hand, the Petitioners can think of 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.

123. First of all, the electoral violence that has plagued Nigeria since its transition to democracy threatens to 'destroy the foundational elements of democracy—choice and consent, civic participation, accountability, rule of law, and trust in state officials and institutions'.³²⁶ Bringing those responsible for electoral violence to account would go a long way towards ameliorating such threats and restoring faith and confidence in a highly defective political system. The recent withdrawal of charges against Kenyan President Uhuru Kenyatta has shone a cold light on the difficulties encountered by the ICC in bringing to justice the high-ranking officials it has accused of atrocities. In this

³²¹ Rome Statute, Article 53(1)(c); *see also* Kenya PTC Decision, para 63.

³²² Kenya PTC Decision, para 63.

³²³ OTP Kenya Request, para 60.

³²⁴ *See* OTP Website.

³²⁵ OTP Kenya Request, para 61.

³²⁶ CLEEN Report, p 3.

regard, the NCDJ represents the aspirations of all Nigerians who look forward to a day when their country's politicians—regardless of their party, faith, ethnicity, or geographic affiliation—can and will refrain from the kind of hateful and sectarian rhetoric that inevitably leads to death, destruction, and displacement.

124. Moreover, General Buhari has been acting with impunity since his days as head-of-state in the mid-1980s.³²⁷ And while the country has, at least nominally, made significant democratic strides over the last thirty years, Nigeria's political landscape is still in many ways akin to a battlefield on which scorched-earth practices are met, at most, with toothless commissions-of-inquiry and presidential white papers.
125. Finally, by publicly accepting the Petitioners' request to look deeper into the claims set out herein, the OTP could very well prevent the commission of further violence—undoubtedly one of the aims of any system of criminal justice.

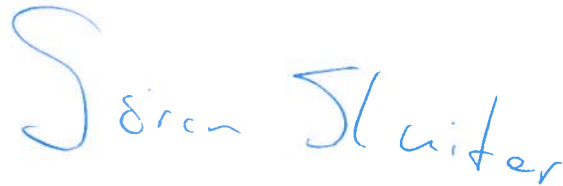
IX. CONCLUSION

126. For all of the reasons set out above, the Petitioners hereby urge the OTP to conduct a preliminary examination and subsequently initiate an investigation into the 2011 post-election violence and—in particular—General Buhari's involvement in the many crimes against humanity committed that were committed in northern Nigeria from 16–18 April 2011.
127. Additionally, the Petitioners request the OTP to inform them, through their lawyer, of any further steps and/or decisions to be taken in respect of the 'Nigeria Situation'.
128. Finally, the Petitioners express their availability, through their lawyer, to assist the ICC OTP in any further investigations, subject to reasonable conditions concerning confidentiality and security.

Respectfully submitted:

³²⁷ See para 5, *supra*.

Prof. dr. Göran SLUITER

A handwritten signature in blue ink that reads "Göran Sluiter". The signature is written in a cursive style with a large initial 'G'.

The Hague, 5 February 2015

Annexes:

3 documents

1 DVD

ANNEX I

Factual Findings of Human Rights Watch

The following is a sampling of detailed witness accounts compiled by Human Rights Watch in the aftermath of the 2011 post-election violence:

1. 'A lecturer at the Nuhu Bamalli Polytechnic, a college on the outskirts of the city of Zaria in northern Kaduna State, described to Human Rights Watch how a mob of Muslim youth attacked and killed four Christian students and a Christian lecturer on April 17':

Between 10 a.m. and 12 p.m. they entered the school chanting slogans and shouting: 'Where are the Christians that supported the ruling party?' When you see the mob, they were not in their senses. They had painted their faces black and were shouting that they needed "change" [the Congress for Progressive Change campaign slogan]. The mob had all sorts of weapons—machetes, sticks, and clubs. They started breaking the glass [windows] on the buildings. The students ran away but the mob pursued them into the staff quarters and they had nowhere to go. The mob beat them to death and hit them with machetes. Four Christian students and a Christian lecturer were killed. The lecturer was Yoruba. Three of the students and the lecturer died on the spot; the other student died at St Luke's Anglican Hospital. About 200 students—both Christians and Muslims—were injured; eight students are still in the hospital. I helped take the dead and injured to the hospital. The mobs also burned four of the staff houses. They said the lecturers had given money to the ruling party. Between 12 and 1 p.m. the military arrived and started shooting in the air and the mob scattered. They arrested one person. The military gathered the students to the main football field and kept guard. There were several thousand students. They all slept that night on the football field.

HRW Report, pp 8–9.

2. 'In the small town of Matsirga in southern Kaduna State, Muslim leaders told Human Rights Watch that 39 Muslims were killed. A middle-aged man who lives in the town described to Human Rights Watch what he saw on the night of April 18':

Around 8 p.m. after Isha'a prayers we were sitting around our mosque eating with our neighbors. One of my sons told me that people had made a roadblock on the road entering our town. I called one of the Bajju [ethnic group] leaders [name withheld] and he told me this trouble is from Kaduna and he can't do anything. He said I should pack my family and go hide. But they had blocked the road so we couldn't leave. I stood by the gate with my family. Around 10 p.m. I was told that the Bajju youth had set fire to one of the houses. I saw the fire in the distance. Some time past 10 p.m., a group of Bajju youth came and set fire to my neighbor's house. They were large in number. Some had sticks, machetes, and catapults. I recognized one of them. I called out to him, 'What is going on?' He said, 'Today you will face the music.' Another Bajju youth had a double barrel gun. My neighbor Yahaya pleaded with him saying, 'Why are you doing this?' But he shot Yahaya at close range. He was gasping for breath and died. I ran to my house and told my family to run. I climbed a mango tree by my house. I saw

the Bajju come and set fire to my house. I saw them burn my house, my car, my neighbor's house, and the neighborhood mosque. Around 3 a.m., after all the houses were burned, I climbed down from the tree and crawled on the ground until our burial ground. I then ran to the river about two kilometers away. I hid in the water for about an hour. When it started getting light, I crawled out of the river and climbed a nearby mountain and hid. I saw the Bajju people looking for us. I saw them kill three people by the river with machetes and an axe. I could see them but they couldn't see me . . . I later went back to my house with the police and army. One of my sons was killed, but my wives and other children survived. One of his [my son's] friends told me he saw the Bajju youth cutting him with machetes. They didn't kill women; they only killed men and boys. Some of the corpses we saw were burned. We couldn't identify them. Everything was burned to ashes, all of my documents, everything was burned to ashes. We have no other place than here. I was born in Matsirga.

HRW Report, pp 9–10.

3. 'Human Rights Watch interviewed two witnesses who described how a police officer shot and killed Suliman Adamu inside a house in the Tudun Wada neighborhood of Kaduna city on the morning of April 18. A construction worker described what he saw':

Around 8:30 p.m. on Sunday night [April 17], the day after the elections, people started burning tires [in the streets]. The police came and started shooting and we ran away. On Monday morning, around 8:30 to 9 a.m., some people started coming out and burning tires again. The police returned and pursued one of the people into Suli's [Suliman's] compound. Two policemen entered the compound. One was in mufti [civilian dress], he had a red Manchester jersey, and was wearing a helmet. The other police officer was wearing a black police uniform with a helmet. I saw one shoot his gun through the window. I heard Suliman yell. The policeman then shot again through the door. I heard the other policeman ask him why he shot him inside his house. He answered, 'If I shoot him, I can't miss; I can't waste my ammunition for nothing'. The policemen then left. Before we could take him to the hospital he was dead.

HRW Report, p 10.

ANNEX II

Factual Findings of the Nigerian Coalition for Democracy and Justice

The following are the names and descriptions of certain youth corpsers who were killed in Giade, Bauchi State in the 2011 post-election violence:

1. *Agnes Anyanwu* of Imo State origin; in spite of being pregnant, Ms Anyanwu was gang-raped to death;
2. *Michael Obinna Okpokiri* (NYSC No BA/10C/0950) of Abia State origin;
3. *Elliot Adowei* (NYSC No BA/11A/0274) of Delta State origin;
4. *Paul Seun Adewunmi* (NYSC No BA/10B/1301) of Ekiti State origin;
5. *Ikechukwu Chibuzor Ukeoma* (NYSC No BA/11A/1354) of Imo State origin;
6. *Anslem Nkwazema* (NYSC No BA/10B/1160) of Imo State origin;
7. *Olawale Tosin Teidi* (NYSC No BA/10C/1220) of Kogi State origin;
8. *Sule Ibrahim Akonji* (NYSC No BA/11A/1009) of Kogi State origin;
9. *Ayotunde Ebenezer Gbenjo* (NYSC No BA/10B/0463) of Osun State origin;
10. *Jehleel Kehinde Adeniyi* (NYSC No BA/10B/0197) of Osun State origin.

This is merely a sampling of those who lost their lives in the violence.

ANNEX III

Factual Findings of the Lemu Commission

The following table summarizes the number of casualties of the 2011 post-election violence as set out in the report of the Lemu Commission:

STATE	KILLED	INJURED
Kaduna	827	71
Bauchi	36	200
Adamawa	26	158
Gombe	20	147
Niger	9	27
Kano	8	22
Katsina	7	59
Borno	3	10
Jigawa	1	38
Yobe	1	3
TOTAL	938	735