

April 14, 2015

The Honourable Fatou Bensouda, Chief Prosecutor
INTERNATIONAL CRIMINAL COURT
Office of the Prosecutor
Information & Evidence Unit
Post Office Box 19519
2500 CM, The Hague
The Netherlands

Re: The Imperative to Prosecute the Abduction of the Schoolgirls in Nigeria as Genocide

Dear Prosecutor Bensouda:

As President of the Global Justice Center (GJC), I am writing you on a matter of global concern and singular importance: the duty of your office to prosecute Boko Haram's gender-based abductions, forced marriages, and conversions of Christian schoolgirls as "the crime of crimes"¹—genocide.

Today marks the one-year anniversary of Boko Haram's abduction of nearly 300 schoolgirls in Chibok, Nigeria, the majority of whom remain in captivity. According to HUMAN RIGHTS WATCH (HRW), nearly all those abducted were Christian.² HRW has also reported a series of abductions, subsequent to Chibok, noting that Boko Haram have been "emboldened" by "[t]he relative ease with which it carried out the Chibok abductions."³ The impunity thus far afforded Boko Haram has fueled the continuing and systematic crime of targeted abduction of Christian women and girls.

The abduction of the Chibok schoolgirls is forcible transfer of children, one of the five enumerated acts which constitute genocide under Article 2(e) of the Genocide Convention and Article 6(e) of the Rome Statute.⁴ April 7, 2015 marked 21 years since the "transgenerational"⁵ genocide against the Tutsi in Rwanda—an "unmistakable disgrace for the world, including the United Nations,"⁶ which included the targeting of children.⁷ April 24, 2015 will mark 100 years since the Armenian genocide, which also included the forcible transfer of children⁸—one of the "outstanding examples of the crimes of genocide," according to the U.S. government.⁹ The first international convictions for genocide at the Nuremberg Military Tribunals in 1948, *United States v. Greifelt*, included acts of forcible child transfer,¹⁰ and in his opening statement, the *Greifelt* Prosecutor underscored the heinous nature of "the crime of kidnaping [sic] children."¹¹

As the attached "Article 15 Communication" sets out in further detail, there is a reasonable basis to believe that Boko Haram is perpetrating genocide against the Christian community in northeastern Nigeria, including by forcibly transferring children, with the intent to destroy the group, as such, at least "in part." In fact, the determination by the OFFICE OF THE PROSECUTOR (OTP) that Boko Haram has committed crimes against humanity, namely persecution, is based, in main part, on evidence of a specific intent to destroy Christians.¹²

More specifically, according to the OTP, Boko Haram's declared leader, Abubakar Shekau, stated in video messages posted on YouTube, that Boko Haram is "at war with Christians," issued an "ultimatum" of three days for Christians to leave northern Nigeria and that Boko Haram, "must destroy Christians and Christianity in Nigeria" ¹³ Similarly, HRW reported that Shekau stated in another video, "This is a war against Christians and democracy and their constitution, Allah says we should finish them when we get them." ¹⁴

On April 1, 2015, at a Special Session of the Human Rights Council on Boko Haram, 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." ¹⁵ The former HIGH COMMISSIONER, Navi Pillay, has also publicly expressed concern over Boko Haram's targeting of Christians. ¹⁶

Witness accounts make clear the genocidal intent of these crimes, detailing, consistent with the Elements of Crime of the International Criminal Court (ICC), evidence of: 1) the use of roadblocks; 2) the selection and separation of victims, based upon their membership, as Christians; 3) the exclusion of non-Christians, from genocidal acts; 4) the forcible relocation and transferring of Christians; 5) the use of rape as a means of destroying Christians, and; 6) killing civilians. ¹⁷

For example, WATCHLIST ON CHILDREN AND ARMED CONFLICT has reported that a young woman told them:

When we were going we saw people in military uniform. They stopped us. But [Boko Haram] were dressed like the military ... They held many buses. They checked if you were Christian, in which case they would kill you. If you were Muslim you were allowed to pass. They identified ... [Christians/Muslims] by their mode of dress. After searching and killing, and because it was getting dark, they assembled us to go to a camp. Many people were taken captive. ¹⁸

The young woman, who finally escaped, also reported seeing many abducted girls at the Boko Haram camp. ¹⁹

In addition, according to a recent study for NIGERIA'S POLITICAL VIOLENCE RESEARCH NETWORK (NPVRN), a young Christian woman reported "an attack by Boko Haram on her university accommodation: the men were murdered, the women segregated into Muslim and non-Muslims, and the Christian women systematically raped" ²⁰ —she became pregnant as a result of the rape. ²¹

The NPVRN Study further explained that:

First 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*** [emphasis added].²²

Therefore, based upon the information set forth in the attached Article 15 Communication, we, respectfully, urge the OTP to conduct a new jurisdictional assessment as part of its ongoing preliminary examination of the situation in Nigeria to determine whether these new crimes that particularly target Christian women and children, constitute genocide.²³

It is *critical* that the OTP consider whether Boko Haram's gender-based abductions amount to genocide, for the following reasons:

- (1) 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);²⁴
- (2) Nigeria appears **unable to meet its own obligations** to prevent or to punish genocide under the Genocide Convention.²⁵ 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;²⁶
- (3) It would act as a **deterrent for other perpetrators**, including in Syria and Iraq, by signaling that those targeting women and girls, including through abductions, for acts of genocide, will be held accountable. According to a recent U.N. Human Rights Report, the Islamic State in Iraq and the Levant (ISIL), now formally affiliated with the Boko Haram, is currently using similar tactics of gender-based abductions, forced marriages and conversions, in its attempts to destroy the Yezidi minority population in Iraq and Syria;²⁷
- (4) 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,”²⁸ in order to take appropriate measures to ensure the effective investigation and prosecution of crimes within the Court's jurisdiction.
- (5) **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 on 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.”²⁹ 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;”³⁰

- (6) Finally, 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.³¹

In sum, the ICC’s enforcement of the specially protected rights of kidnapped girls under Article 2(e) of the Genocide Convention and Article 6(e) of the Rome Statute, will increase the global political will, moral suasion and legal gravitas necessary, once and for all, to stop the genocidal abductions of girls and women in Nigeria and elsewhere, including in Syria and Iraq. It is critical to stop crimes targeting girls and women and ensure justice for all gender crimes.

Madame Prosecutor, we thank you, in advance, for your attention to these pressing matters, and are available to discuss these concerns further with you.

The ICC has admirably taken historic steps to put justice for women and girls at the forefront of its agenda. And in this case, there is a way to ensure justice for (and, more importantly, to rescue!) the abducted girls of Nigeria as well as to establish a precedent of intolerance for crimes of this nature. It has never been more important to focus on these crimes considering the emerging pattern of the use of gender-based abductions by not only Boko Haram but ISIL and the OTP’s April 8, 2015 Statement that it lacks a jurisdictional basis, at this stage, to open a preliminary examination into the crimes committed in Syria and Iraq, by ISIL.³²

We implore the ICC to demonstrate its will.

Peux ce que veux: Allons-y (“Where there’s a will, there’s a way. Let’s go”).³³

Sincerely,

Janet Benshoof
President, Global Justice Center

¹ Term first used by the former Rwandan Ambassador to the United Nations (U.N.), His Excellency Manzi Bakuramutsa, in the Security Council debate on the establishment of the International Criminal Tribunal for Rwanda (“ICTR”). U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/PV.3453 (Nov. 8, 1994) at 15. *See also Prosecutor v. Kambanda* Case No. ICTR-97-23-S, Judgment and Sentence, ¶ 16 (September 4, 1998).

² Human Rights Watch (“HRW”), *Those Terrible Weeks in their Camp: Boko Haram Violence against Women and Girls in Northeast Nigeria 27-28* (October 2014) [hereinafter HRW, *Those Terrible Weeks*], available at <http://www.hrw.org/reports/2014/10/27/those-terrible-weeks-their-camp-0>; *see also* Annex 1, Article 15 Communication.

³ *Id.* at 23-24.

⁴ Convention on the Prevention of the Crime of Genocide, art. 2(e), G.A. Res. 260(A) (III) A, U.N.Doc A/Res/260(III), 102 Stat. 3045, 78 U.N.T.S. 277 (Dec. 9, 1948) [hereinafter *Genocide Convention*]; Rome

Statute of the International Criminal Court (“ICC”), A/Conf.183/9, Art. 6(e) (July 17, 1998) [hereinafter Rome Statute].

⁵ Andrea Dooley, *We Are All Rwandans: Repatriation, National Identity, and the Plight of Rwanda’s Transferred Children*, 12 (3) J. HUM. RTS. 309, 310 (2013).

⁶ U.N. Secretary-General Ban Ki-moon, Statement, Secretary-General Remarks at Commemoration of International Day of Reflection on the Genocide in Rwanda, (Apr. 7, 2015), www.un.org/sg/statements/index.asp?nid=8521 (last visited Apr. 9, 2015).

⁷ See, e.g., Dooley, *supra* note 5.

⁸ See generally, TANER AKÇAM, THE YOUNG TURKS’ CRIME AGAINST HUMANITY: THE ARMENIAN GENOCIDE AND ETHNIC CLEANSING IN THE OTTOMAN EMPIRE 287-339 (2012); Keith David Watenpugh, *Are There Any Children for Sale? Genocide and the Transfer of Armenian Children (1915-1922)*, 12(3) J. HUM. RTS. 283 (2013); Vahakn N. Dadrian, *Children as victims of genocide: the Armenian case*, 5(3) J. GENOCIDE RES. 421 (2003).

⁹ Written Statement of the United States of America, Reservations to the Convention on the Prevention of Genocide (Advisory Opinion), I.C.J. Pleadings, at 25 (May 8, 1951), available at http://www.armenian-genocide.org/Affirmation.388/current_category.6/affirmation_detail.html. Raphael Lemkin’s invention of the word “genocide” was spurred, in part, by the Armenian Genocide, and his disbelief that the perpetrators of the atrocities were not held accountable for their crimes. See, e.g., SAMANTHA POWER, *A PROBLEM FROM HELL* 17-20 (Basic Books) (2002).

¹⁰ See Indictment in United States v. Greifelt, in TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 610 (1950).

¹¹ *Id.* at 674; And, it was the United States who lobbied for including forcible child transfers among the prohibited acts of genocide, including the “forced transfer of children” as a final clause in the enumeration of the acts constituting physical and biological genocide, in its draft Genocide Convention. See U.N. Secretariat, Econ. & Soc. Council, Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat, at 35, U.N. Doc. E/623 (January 30, 1948).

¹² International Criminal Court (“ICC”), Office of the Prosecutor, *Situation in Nigeria: Article 5 Report*, ¶¶ 15, 87-90, 96-100 (Aug. 5, 2013) [hereinafter Article 5 Report], available at <http://www.icc-cpi.int/iccdocs/PIDS/docs/SAS%20-%20NGA%20-%20Public%20version%20Article%205%20Report%20-%202005%20August%202013.PDF>.

¹³ *Id.* at ¶¶ 87-88.

¹⁴ HRW, *Those Terrible Weeks*, *supra* note 2, at 17.

¹⁵ U.N. High Commissioner for Human Rights, Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, at the 23rd Special Session of the Human Rights Council (Apr. 1, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15782&LangID=E> (last visited Apr. 9, 2015); Associated Press (AP), *Boko Haram Fighters Murdered Captive Women: UN Human Rights Chief*, The World Post (Berlin) (Apr. 4, 2015, 8:16 AM), http://www.huffingtonpost.com/2015/04/01/boko-haram-murdered-women_n_6983928.html.

¹⁶ Article 5 Report, *supra* note 12, ¶ 87, n. 87.

¹⁷ See Rome Statute, *supra* note 4, at art. 21(1)(a); ICC, *ICC Case Matrix, Art. 6: Genocide – Common Elements*, <https://www.cmn.cx/cms/index.php?folder=45&id=5697> (last visited April 12, 2015); *Prosecutor v. Nizéyimana*, ICTR-2000-55C-T, Judgment and Sentence, ¶ 1512 (June 19, 2012); *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-T, Judgment, ¶¶ 1626-1627 (Feb. 2, 2012); *Prosecutor v. Gatete*, ICTR-2000-61-T, Judgment, ¶ 583 (March 31, 2011); *Prosecutor v. Sikirica et al.*, IT-95-8-T (ICTY), Judgment on Defense Motions to Acquit, ¶¶ 46-61 (Sept. 3, 2001); *Prosecutor v. Krstić*, IT-98-33-T (ICTY), Judgment, ¶ 590 (Aug. 2, 2001); *Prosecutor v. Jelisić*, IT-95-10-A (ICTY), Appeals Judgment, ¶ 47, (July 5, 2001).

¹⁸ Watchlist on Children and Armed Conflict, “*Who Will Care For Us? Grave Violations against Children in Northeastern Nigeria*,” at 23 (2014 September) available at http://watchlist.org/wordpress/wp-content/uploads/2111-Watchlist-Nigeria_LR.pdf; see also Annex 2, Article 15 Communication.

¹⁹ *Id.*

²⁰ 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 50, available at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=177299> (citing 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*, 23 (Nigeria’s Political Violence Research Network Working Paper No. 1, Nov. 2013), available at <https://www.worldwatchmonitor.org/research/3117403> [hereinafter, NPVRN Report]); see also Annex 3, Article 15 Communication.

²¹ NPVRN Report, *supra* note 20, at 25.

²² *Id.* at 21.

²³ See Fatou Bensouda, Prosecutor of the International Criminal Court, Speech at International Seminar on the Imperatives of the Observance of the Human Rights and International Humanitarian Law Norms in International Security Operations (Feb. 24, 2014), *available at* <http://www.icc-cpi.int/iccdocs/otp/SpeechProsecutor-AbujaNigeriaFra.pdf>.

²⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, I.C.J. Reports 2007, ¶ 430, (Feb. 26, 2007), *available at* <http://www.icj-cij.org/docket/files/91/13685.pdf>.

²⁵ See *Id.* at ¶ 427 (underscoring that the obligation to prevent and the obligation to punish genocide are separate legal obligations of a State).

²⁶ HRW, *Those Terrible Weeks*, *supra* note 2, at 51; Amnesty International Report, *The State of the World's Human Rights*, 274 (2014/2015), <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.”).

²⁷ 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, March 13, 2015, U.N. Doc. A/HRC/28/18; HRC 28th Sess., ¶¶ 35-46, 76, 78, *available at* http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_18_AUV.doc.

²⁸ Rome Statute, *supra* note 4, Article 54(1)(b).

²⁹ International Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, ¶¶ 1, 8, 25, 72-73 (June 2014), *available at* <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

³⁰ 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), *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-20-11-2014.aspx.

³¹ Global Centre for the Responsibility to Protect, *R2P Monitor*, March 15, 2015, at 7-8, *available at* <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. Excessive use of force by the security forces also contributes to the threat of further atrocities*, <http://www.globalr2p.org/regions/nigeria> (last updated March 15, 2015); See Brianna Burt, International Coalition for the Responsibility to Protect, *The Crisis in Nigeria*, 8-12, <http://responsibilitytoprotect.org/index.php/crises/crisis-in-nigeria> (last visited April 14, 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 April 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.”).

³² Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS (April 8, 2015), *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx.

³³ The final line in General Roméo Dallaire’s now infamous “Genocide Fax” to U.N. headquarters in New York, dated 11 January 1994, in which he quite presciently warned of the preparation for the “anti-Tutsi extermination.”